Vanderbilt Journal of Transnational Law

Volume 15
Issue 4 *Winter 1982*

Article 3

1982

Updating the Antitrust Guide on International Operations

Eleanor M. Fox

UPDATING THE ANTITRUST GUIDE ON INTERNATIONAL OPERATIONS—A GREENER LIGHT FOR EXPORT AND INVESTMENT ABROAD

*Eleanor M. Fox**

TABLE OF CONTENTS

I. INTRODUCTION

Since the enactment of the antitrust laws, policy makers, scholars, and business executives have debated whether the United States antitrust laws chill export and investment abroad.[1] The

* Professor of Law, New York University School of Law. This article was funded by a grant from the New York University Law Center Foundation.

1. The debate is reflected in, *e.g.*, NATIONAL ASSOCIATION OF MANUFACTURERS, 1974 REPORT OF THE NATIONAL ASSOCIATION OF MANUFACTURERS ON THE INTERNATIONAL IMPLICATIONS OF U.S. ANTITRUST LAWS (1974); UNITED STATES CHAMBER OF COMMERCE, FINAL REPORT OF THE ANTITRUST TASK FORCE ON INTERNATIONAL TRADE AND INVESTMENT OF THE UNITED STATES CHAMBER OF COMMERCE ON

terms of the debate have not changed significantly for more than a decade. The law and the government's enforcement policies, however, have changed. Since the United States Department of Justice issued its *Guide on Antitrust and International Operations* (Guide) on January 26, 1977,[2] law and enforcement policy have become more hospitable to private business decisions that would increase exports and foreign investment.

This Article attempts to update the Guide. It is confined largely to substantive analysis of transactions which may have the statutorily proscribed effect on competition. It does not address the defenses based upon foreign government action or involvement, or the limits of United States personal or subject matter jurisdiction over firms located abroad or acts committed abroad.

Since the issuance of the Guide in 1977, noteworthy change in the direction of a more favorable attitude toward private business

---

UNITED STATES ANTITRUST LAWS AND AMERICAN EXPORTS (1974); Schwechter & Schepard, *The Effects of United States Antitrust Laws on the International Operations of American Firms*, 1 NW. J. INT'L L. & BUS. 492 (1979).

A strong case can be made that if the United States antitrust laws have an impact in lessening exports and investment abroad, that impact is dwarfed by other government laws and action. *See, e.g.*, Dresser Indus., Inc. & Dresser (France) S.A. v. Baldrige, No. 82-2385 (D.D.C. Aug. 25, 1982) (denying plaintiffs' application for a temporary restraining order against the imposition of penalties or sanctions under export control regulations that prohibit the sale to the Soviet Union of oil and gas transmission equipment manufactured through use of technology licensed by United States firms). Assistant Attorney General William F. Baxter, testifying on a bill that would authorize formation of a commission to study the international applications of the United States antitrust laws, stated: "The antitrust laws, correctly interpreted, are generally acknowledged not to impose a significant impediment to United States business in its efforts to compete abroad." *Reagan Administration Seeks Broad Mandate for Special Commission on Export Problems*, ANTITRUST & TRADE REG. REP. (BNA) No. 1043, at A-3, A-4 (Dec. 10, 1981). The Assistant Attorney General testified that, if such a commission is formed, it should have a broad mandate to examine all statutory impediments to exports. *Id.* Laws that should be examined, he said, include the general export control provisions and antiboycott regulations of the Export Administration Act, the Ribicoff Tax Amendments of 1976, the Trading with the Enemy Act, Commodities Futures Trading Commission regulation of foreign brokers, and the Foreign Corrupt Practices Act. *Id.* Sherman Unger, General Counsel of the Commerce Department, identified the application of other sovereigns' laws to exports from the United States as another impediment to exports. *Id.*

2. UNITED STATES DEPARTMENT OF JUSTICE, ANTITRUST DIVISION, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS, Jan. 26, 1977, [Special Ed.] TRADE REG. REP. (CCH) (Feb. 1, 1977) [hereinafter cited as GUIDE].

decisions, and particularly international transactions, has been reflected by court decisions, government enforcement policies, and legislative action. This analysis begins with an outline of some of the important changes effected by law and enforcement policy, and then reviews the 1977 Guide, including relevant case illustrations, to demonstrate when and how current law and policy may indicate answers different from those given in the Guide.

Legislative change leads the list of developments producing a freer environment for foreign business transactions. On October 8, 1982, President Reagan signed into law Public Law 97-290.[3] The Foreign Trade Antitrust Improvements Act of 1982, title IV of the legislation, amends the Sherman Act by adding a new section, section 7.[4] Section 7 provides that the Sherman Act does not apply to exports or to foreign commerce other than import trade unless the conduct involved "has a direct, substantial, and reasonably foreseeable effect" on (1) import commerce; (2) commerce other than trade with foreign nations; or (3) export commerce of a person engaged in such commerce in the United States.[5] Thus, when no harm is threatened to a seller doing business in or from

---

3. Pub. L. No. 97-290. Relevant portions are reprinted at [4 Federal Laws] TRADE REG. REP. (CCH) ¶¶ 25,117, 25,245, 27,000-032.

4. Pub. L. No. 97-290, § 402, [4 Federal Laws] TRADE REG. REP. (CCH) ¶ 25,117.

5. Section 7 of the Sherman Act provides:

> This Act shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
>
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
>
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
>
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
>
> (2) such effect gives rise to a claim under the provisions of this Act, other than this section.
>
> If this Act applies to such conduct only because of the operations of paragraph (1)(B), then this Act shall apply to such conduct only for injury to export business in the United States.

Pub. L. No. 97-290, § 402, *amending* 15 U.S.C. § 1 (1976 & Supp. IV 1980). The Foreign Trade Antitrust Improvements Act likewise qualifies the scope of § 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a) (1976) (prohibiting unfair methods of competition), by adding parallel language to the end of § 5(a). Pub. L. No. 97-290, § 403, [4 Federal Laws] TRADE REG. REP. (CCH) ¶ 25,245.

the United States, the new law scales back the Sherman Act to effects within the United States. Business people doing business abroad are no longer at risk under the United States antitrust laws for possible harm to competition in foreign markets.[6] Title III of the new legislation provides a procedure whereby applicants wishing to engage in specific export trade activities may, under stated conditions, receive a certificate of review from the Secretary of Commerce and thereby obtain a qualified antitrust exemption.[7] Title II of the new legislation, the Bank Export Ser-

---

6. Congress failed to enact a provision in H.R. 5235, 97th Cong., 2d Sess. § 3 (1982), that specifically would have exempted from § 7 of the Clayton Act, 15 U.S.C. § 18 (1976 & Supp. IV 1980), the formation and operation of joint ventures limited to commerce with foreign nations other than import commerce. The failure of Congress to enact this provision would appear to be inconsequential, for no merger or joint venture violates the Clayton Act unless it may substantially lessen competition "in any section of the country." Clayton Act, § 7. Thus, the Clayton Act has never proscribed joint ventures when the only harmful impact would occur in foreign markets.

7. The Export Trade Certificates Review Act, Pub. L. No. 97-290, §§ 301-12, [4 Federal Laws] TRADE REG. REP. (CCH) ¶ 27,020-032 (Oct. 8, 1982) [hereinafter titles I and III will both be referred to as the Export Trading Company Act]. The Act provides that the Secretary of Commerce, with the concurrence of the Attorney General, shall issue an export trade certificate of review upon determining that the applicant's

> export trade, export trade activities, and methods of operation will—
> (1) result in neither a substantial lessening of competition or restraint of trade within the United States nor a substantial restraint of the export trade of any competitor of the applicant,
> (2) not unreasonably enhance, stabilize, or depress prices within the United States of the goods, wares, merchandise, or services of the class exported by the applicant,
> (3) not constitute unfair methods of competition against competitors engaged in the export of goods, wares, merchandise, or services of the class exported by the applicant, and
> (4) not include any act that may reasonably be expected to result in the sale for consumption or resale within the United States of the goods, wares, merchandise, or services exported by the applicant.

Id. § 303(a), *reprinted at* ¶ 27,023.

No criminal or civil antitrust action may be brought against a holder of a certificate of review for conduct specified in and complying with the terms of the certificate. Any injured person, however, may sue for an injunction, actual damages, and costs including a reasonable attorney's fee, for the certificate holder's failure to comply with the four standards quoted above. In such an action, there is a presumption that conduct specified in and complying with the certificate complies with the four standards. If the court finds that the conduct complies with the standards, the defendant is entitled to costs including a reasonable atvices Act, removes certain restrictions on the financing of export trading companies by banking institutions.[8]

Supreme Court case law is a second source of change. Two major Supreme Court cases decided after January 1977 have a particularly direct bearing on the analysis of the substantive issues with which this Article is concerned. *Continental T.V., Inc. v. GTE Sylvania Inc.*[9] and *Broadcast Music Inc. v. Columbia Broadcasting System*[10] (*BMI*) favor distributional restraints that facilitate interbrand competition and collaboration among competitors reasonably necessary to establish or penetrate a market. The Supreme Court's decision in *GTE Sylvania* is the most important recent legal development. It overrules *United States v. Arnold, Schwinn & Co.*,[11] which held that one who sells a product may not limit the customers to whom or territories in which the buyer may resell. The overruling of *Schwinn* marks the end of an era of rigid application of per se rules and indicates that no per se rule will survive when its application stands in the way of a more competitive marketplace.[12] *GTE Sylvania* supersedes the analysis, and in some cases changes the result, of hypothetical examples set forth in the Guide. The Court's decision in *BMI* is the second most important development in the case law. *BMI* reinforces the illustrative cases in the Guide indicating the permissibility of joint ventures when high costs and risks of independent action would make a project infeasible or unattractive.[13]

---

torney's fee. Also, the Attorney General may sue "to enjoin conduct threatening clear and irreparable harm to the national interest." *Id.* § 306, *reprinted at* ¶ 27,026.

8. Pub. L. No. 97-290, §§ 201-207.

9. 433 U.S. 36 (1977).

10. 441 U.S. 1 (1979).

11. 388 U.S. 365 (1967), *overruled,* Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

12. Application of the per se rule would have prohibited Sylvania from assigning its distributors to stated locations. The prohibition would have deprived Sylvania of an important tool by which to compete more effectively against stronger competitors. *GTE Sylvania,* 433 U.S. at 40-41.

13. Two other Supreme Court cases deserve comment. In Pfizer, Inc. v. Government of India, 434 U.S. 308, 313-15 (1978), the Supreme Court held that a foreign government, as purchaser of price-fixed products, has the right to sue for treble damages. The opinion in *Pfizer* states that antitrust remedies are not limited to the protection of United States citizens. *See id. Pfizer* left important questions unanswered, especially in view of the fact that the foreign government bought the price-fixed goods from United States producers engaged in a United

The third realm of change is Justice Department policy. In 1977, the Department was ready and willing to apply Supreme Court case law, whether or not based on efficiency principles; it sought to protect export opportunities, and it took a flexible approach to principles appropriate to facilitate the competitive process.[14] In contrast, the Reagan Administration Justice Department consolidates all antitrust theory into a single paradigm: antitrust law exists only to promote allocative efficiency. Anti-

---

States conspiracy. *Pfizer* did not address the case in which the only breakdown in competitive conditions occurs in foreign markets and in which only foreign consumers are injured. That question has now been addressed by the new § 7 of the Sherman Act, which provides that, in the latter case, the Sherman Act does not apply. *See supra* text accompanying note 5.

Legislation to overrule *Pfizer* is pending. The House of Representatives passed a bill that would limit recoveries by foreign governments to single damages. H.R. 5106, 97th Cong., 2d Sess. (1982). In 1981 the Senate passed a similar bill that would not only limit such recoveries to single damages but would also deny recovery to a foreign government unless its law granted reciprocal rights to the United States Government. *See* S. 816, 96th Cong., 2d Sess. (1981). Subsequently, the Senate passed H.R. 5106, but added a controversial unrelated amendment, the Tris bill. S. 823, 97th Cong., 2d Sess. (1982). The Senate apparently hopes to induce the House of Representatives to accept the Tris bill in return for the Senate's foregoing its attempt to condition the *Pfizer* bill on reciprocity. *See Senate Passes Pfizer Bill; Conference with House is Needed,* 43 ANTITRUST & TRADE REG. REP. (BNA) No. 1084, at 691 (1982).

National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978), may also affect analysis of international antitrust issues. *Professional Engineers* held, in a domestic context, that only procompetitive effects may be offered to justify an agreement that creates anticompetitive effects; therefore, societal goals other than competition may not be offered to justify an otherwise illegal restraint. *Professional Engineers,* if taken literally and applied to foreign commerce, suggests that the promotion of exports is no defense to an otherwise illegal restraint of trade.

14. There is no one correct answer to the question: What is economically sound antitrust policy? The GUIDE, *supra* note 2, modified to reflect the overruling of United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), is consistent with one view of an economically sound policy. This view protects an environment for dynamic competition and postulates that consumers will be better off if substantial parts of the markets are kept open and contestable. Thus, this view protects opportunities and rights not to be fenced out. *See* GUIDE, *supra* note 2, at 5; *see also* Fox, *The Modernization of Antitrust: A New Equilibrium,* 66 CORNELL L. REV. 1140, 1169 (1981).

The Reagan Administration focuses more narrowly on specific behavior producing inefficiency. Officials postulate that private action is usually efficiency-producing and that consumers are better off if government intervenes to prevent only identified, inefficient transactions. *See infra* note 15.

trust law should therefore reprehend only that which is inefficient.[15] Only cartels[16] and certain monopolization[17] are inefficient because they give a firm or firms power to raise prices and cut back output without producing offsetting increases in efficiency.

The economic evil of output limitation may be illustrated as follows. If the producers in market A limit their output, by definition they produce too little to satisfy all consumers who wish to purchase product A at a competitive price. Too few resources are devoted to market A in light of consumer demand. Consumers who would have bought product A substitute "inefficiently." Their demand is diverted to product B, which costs society more resources to make. Too many resources are devoted—or allocated—to market B.[18] Preventing the misallocation of resources is the sole goal of antitrust enforcement under the Reagan Administration.[19]

Cartels are the prime target of a policy focused on output limitation. Cartels may be created by an explicit agreement, an unspoken understanding, or the mere interdependence of very few firms in a high-barrier market in which buyers need the product and have no acceptable substitute.[20] Cartel results are achieved

15. *See generally* Attorney General William French Smith's Remarks to District of Columbia Bar, *reprinted in* ANTITRUST & TRADE REG. REP. (BNA) No. 1047, at H-1 (July 2, 1981) [hereinafter cited as Remarks of William French Smith]; Interview with William F. Baxter, Assistant Attorney General, Antitrust Division, Report from Official Washington, 51 A.B.A. ANTITRUST L.J. 23 (1982) [hereinafter cited as 1982 Interview with William F. Baxter]; Panel Discussion—Interview with William F. Baxter, Assistant Attorney General, Antitrust Division, 50 A.B.A. ANTITRUST L.J. 151 (1981) [hereinafter cited as 1981 Interview with William F. Baxter].

16. A cartel is an agreement among competitors to restrict production or to achieve that result by raising prices or by dividing customers or territories.

17. Monopoly achieved by superior performance may reflect efficiencies in the form of lower costs. The cost savings may offset the resource loss from output restriction. Monopoly achieved by merger is more likely to lead to output restriction without compensating cost savings.

18. For a discussion of allocative efficiency as a basis for antitrust enforcement, see Fox, *supra* note 14, at 1159-66.

19. *See generally* 1982 Interview with William F. Baxter, *supra* note 15; 1981 Interview with William F. Baxter, *supra* note 15. Resources may also be misallocated by buyer cartels. The Justice Department recently sued and settled with Japanese firms that allegedly agreed on prices to be paid for Alaskan tanner crabs. United States v. C. Itoh & Co., 1982-1983 Trade Cas. (CCH) ¶ 65,010 (W.D. Wash. 1982).

20. When buyers have no good substitutes, demand is inelastic. That is, de-

traditionally by agreement on price, which in turn limits output.[21] They also can be achieved by mergers that produce the conditions for interdependence[22] and by agreements among competitors to divide markets or to suppress competitive technology.[23]

Translated into an international context, the Department's principal concerns are eliminating cartels and blocking transactions that facilitate cartel-like behavior. Targets for enforcement include international cartels and technology sharing arrangements between actual or potential competitors who have power over output, transnational mergers that facilitate output restriction in the United States, and competitor collaboration that is unnecessary to increase sales abroad and that provides a forum for cartel agreements at home. On the other hand, United States competitors, who, in combination, do not have market power[24] at home or abroad could by agreement export at a common price[25] without

---

mand will not be affected significantly by a small but not insignificant rise in price. Elastic demand indicates that buyers will shift their demand in the face of a small but significant rise in price. Low entry barriers indicate that new suppliers will provide the product if the present producers raise their price. If either demand or supply by fringe firms is elastic, potential cartelists cannot maintain a cartel price because buyer or seller response will undermine their efforts. Therefore, they will be unable to reduce output and distort resource allocation.

21. *See* F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 169-71 (2d ed. 1980).

22. *See* Merger Guidelines promulgated by the Department of Justice in 1982, [Extra Ed.] TRADE REG. REP. (CCH) No. 546 (June 14, 1982) [hereinafter cited as 1982 Merger Guidelines].

23. The emergence of competitive technology could destabilize a cartel. Competitive technology can be suppressed through patent pooling and requirements by the patentee that the licensee grant back to the patentee the exclusive rights to all improvements invented by the licensee. Pooling (e.g., of blocking patents) and exclusive grantbacks, however, also can have benign or proefficiency effects. *See* A.B. Lipsky, Jr., Deputy Assistant Attorney General, Antitrust Division, Remarks before the American Bar Association, Antitrust Section, National Institute on Critical Issues in International Antitrust and Unfair Competition Law, *Patent Licensing Practices—Antitrust Division Reappraisal*, Nov. 5, 1981, *reprinted in* 5 TRADE REG. REP. (CCH) ¶ 50,434 [hereinafter cited as Remarks of A.B. Lipsky, Jr.].

24. Market power connotes power over output. Market power is the power to raise prices and to hold the price increases in the face of buyer and seller substitutability. If the price is raised artificially, output is restricted.

25. This is price-fixing if the purpose of the agreement is to set a common price rather than to organize a joint enterprise that integrates exporting functions and operates as a single entity. Such price-fixing is illegal per se if the sales are made domestically, even if the parties to the agreement have no market

threatening any distortion in the allocation of resources, and they were not likely to raise Justice Department concerns even before enactment of the Foreign Trade Antitrust Improvements Act.[26]

The Justice Department policy of challenging only output-limiting transactions would give businesses more freedom from Government action than does the law. The law continues to prohibit certain private restraints that impair competitive opportunities or reduce the likely development of competitive technologies but cannot be shown to restrict output.[27] Because the law provides a private right of action, businesses cannot, with complete security, rely on a government policy not to challenge certain activity. Nonetheless, a government policy of hospitality may be a persuasive consideration to a court considering the merits of a marginal private case. Moreover, to the extent that government policy reflects the law, as it largely does in the area of nonprice distributional restraints, it should control.

This Article applies the newly developed law and the newly articulated government policy to the analysis of the relevant illustrative cases in the 1977 Guide.

---

power. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224-26 & n.59 (1940). That is because the per se rule is a broad, prophylactic rule against price-fixing and is designed to establish pricing-independence as the ethic of business. *See* Fox, *supra* note 14, at 1184-85.

Until the enactment in 1982 of the Foreign Trade Antitrust Improvements Act, *see supra* note 5, the application of the Sherman Act to export price-fixing was in doubt. If competing producers of a product formed a Webb-Pomerene Association and registered their association with the Federal Trade Commission, the Sherman Act was and is suspended as long as the parties do not harm competition within the United States. Clayton Act, 15 U.S.C. §§ 61-66 (1976). The Webb-Pomerene Act applies only to products, not services. It remains law notwithstanding the 1982 legislaton. *See supra* notes 3-8. If, however, exporters did not register as a Webb-Pomerene Assocation and agreed to fix export prices, it was unclear whether their agreement was subject to the per se rule and unclear whether United States law was simply inapplicable if the only victims were foreign consumers. *See, e.g.*, Baker, *Antitrust and World Trade: Tempest in an International Teapot?*, 8 CORNELL INT'L L.J. 16, 27-28 (1974) (the antitrust laws do not protect foreign producers or foreign consumers injured by a breakdown of competition in foreign markets); Rahl, *American Antitrust and Foreign Operations: What is Covered?*, 8 CORNELL INT'L L.J. 1 (1974) (United States antitrust laws apply to export price-fixing because the restraint is in commerce).

Although United States law does not prohibit transactions that have a harmful impact only on foreign economies, the laws of a host country may do so.

26. *See supra* text accompanying note 4.

27. *Cf.* Blue Shield of Va. v. McCready, 102 S. Ct. 2540 (1982).

II. The Guide and the Current Enforcement Policy

A. The 1977 Guide

The Guide states that antitrust enforcement by the Government has two major purposes in connection with international commerce. First, the Justice Department will seek to protect United States consumers by insuring that they receive the benefit of the products and ideas produced by foreign domestic competitors.[28] Second, the Department will seek "to protect American export and investment opportunities against privately imposed restrictions."[29] Each firm "engaged in the export of goods, services, or capital should be allowed to compete on the merits and not be shut out by some restriction imposed by a bigger or less principled competitor."[30] The Guide states that a very large proportion of the international transactions entered into by United States firms will not violate either policy—protection of United States consumers or protection of export opportunities of United States competitors.[31] In the event that neither policy is violated, the transaction "will not involve violations of U.S. antitrust law . . . . This is especially true of those transactions involving the development or expansion of export markets, whether this be through the formation of foreign subsidiaries, joint ventures, licensing arrangements or distributorships."[32]

B. Current Enforcement Policy

Justice Department enforcement policy is formulated differently today. The purpose of antitrust enforcement with respect to international commerce is the same as the purpose of antitrust enforcement with respect to domestic commerce—to promote the efficient allocation of resources.[33] If resources are allocated efficiently within the United States—that is, allocated to their best use in light of consumer demand—all United States consumers presumably will benefit.

United States consumers also will benefit if United States law prevents distortion in the allocation of resources by United States

28. Guide, *supra* note 2, at 4-5.
29. *Id.* at 5.
30. *Id.*
31. *Id.*
32. *Id.* at 5-6.
33. *See supra* note 15.

competitors who produce for export a product that returns to the United States. The higher-than-competitive price charged by the United States exporters would cause inefficient substitution away from the exported product, increase the cost of products produced abroad, and raise the price of products United States consumers buy.[34]

Current Department of Justice officials would not include as an enforcement objective the protection of United States export and investment opportunities as such, or protection of the right to compete on the merits and the corollary right not to be shut out of markets by private restraints. The Department, however, does agree with the 1977 Guide that the law should protect United States consumers, and that most international transactions do not impair the interests of United States consumers and thus should be encouraged.[35]

III. ILLUSTRATIVE CASES

A. Case A: A Multinational Operation

Case A raises the question whether and when a multinational corporation legally may allocate territories between and among its various wholly or partly owned subsidaries. The answer given by the Justice Department in 1977 is that the multinational enterprise may allocate territories among its subsidaries and set the prices at which they sell, even when the enterprise has a dominant position in most markets.[36]

The 1977 Guide treats territorial allocation by a multinational enterprise as a unilateral act of one enterprise rather than as an agreement among competitors, as long as the parent corporation fully controls the subsidiaries.[37] Control generally is established, the Guide states, when the parent controls a majority of the voting stock of the subsidiary. Control may be established even when the parent has a minority position in the subsidiary, if it maintains effective working control.[38]

---

34. The above analysis assumes that each distortion in resource allocation impairs allocative efficiency. That is not necessarily the case. Distortions may negate one another. *See* Markovitz, *Monopolistic Competition, Second Best, and the Antitrust Paradox: A Review Article,* 77 MICH. L. REV. 567 (1979).

35. *See* Remarks of William French Smith, *supra* note 15.

36. GUIDE, *supra* note 2, at 12.

37. *Id.*

38. *Id.*

Case A raises the technical legal question of when an allocation of territories is a single-firm act. Substantively, it distinguishes between the effort of co-conspirators to use one competitor's minority stock interest in the other as a cover for an international cartel,[39] on the one hand, and the effort of a single enterprise to allocate its own resources internally so as to develop fully each territory in which it sells.[40]

Case A recites and applies principles of law that long have been accepted by the Department of Justice and can be expected to be applied today.[41] The importance of Case A lies not so much in its clarification of law as in its presentation of an appropriate international principle—the right of multinational corporations to allocate their resources within their own enterprises as they see fit. In the late 1970s, negotiations for an International Code on Restrictive Business Practices proceeded under the auspices of the United Nations Committee on Technology and Development. Developing countries contended that the multinationals' practice of contractually barring subsidiaries in developing countries from exporting to lucrative markets assigned to sister corporations was a means of allocating territories[42] and unreasonably restricted the trade of developing countries. The developing countries urged that each subsidiary of a multinational corporation should be treated as a separate entity capable of conspiring with its parent

39. *See* Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951).

40. Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) addresses the different situation in which the company does business through independent distributors. In that event more than one actor is involved. In certain cases of high market concentration, the producers can, by giving territorial protection to each of their distributors, aggrandize their market power and restrain interbrand competition.

If a single firm, even a monopolist, allocates resources within its corporate family by assignments of territory, it does not violate § 1 of the Sherman Act because the allocation is a single firm act. 15 U.S.C. § 1 (1976). Section 2 of the Sherman Act, 15 U.S.C. § 2 (1976), is not violated because, by the allocation, the firm is not aggrandizing or abusing the power that it already has. If, however, sister corporations that hold themselves out as competitors agree to divide territories or fix prices, the agreement is likely to be regarded as a horizontal agreement between two entities in violation of section 1. *See* Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951); Joseph Cicione & Sons v. Eastern Indus., Inc., 1982-2 Trade Cas. (CCH) ¶ 64,737 (E.D. Pa. 1982).

41. *See* Gill, *The UNCTAD Restrictive Business Practices Code: A Code for Competition?*, 13 INT'L LAW. 607, 612-13 (1979).

42. *See* Davidow, *The United States, Developing Countries and the Issue of Intra-enterprise Agreements*, 7 GA. J. INT'L & COMP. L. 507 (1977).

and affiliates.[43] The developing countries ultimately gave important concessions. The participating nations agreed to a voluntary code, which was approved by the United Nations General Assembly in December 1980.[44] The code provides that "enterprise" means, among other things, a corporation, and includes its "branches, subsidiaries, affiliates or other entities directly or indirectly controlled by [it]."[45]

Thus, the UNCTAD Code may be construed to recognize the right of a single enterprise to allocate its own resources and to incorporate the principle of Case A.[46]

B. Case B: A United States Firm's Foreign Acquisition

In Case B, Razors, Inc. (RI), a United States company, is the largest manufacturer of razor blades in the United States and in the world. It accounts for half of all United States and worldwide razor blade sales. RI wishes to buy Glint, a German manufacturer that has developed a cadmium steel razor blade arguably superior to the blades offered by RI and other major firms. Glint, which has begun selling these blades in Germany on a low advertising budget, accounts for less than one percent of all razor blade sales in Germany and makes insignificant export sales to the United States. RI has the technical capability to manufacture cadmium blades, but has decided not to do so either in the United States or abroad.

The Guide raises two problems, both relating to section 7 of the Clayton Act, which prohibits mergers or acquisitions of firms engaged in commerce or in any activity affecting commerce where the effect may be substantially to lessen competition in the United States or any section of the country.[47] First, does section 7 of the Clayton Act apply to the transaction, in view of Glint's limited involvement in United States commerce? Second, is the

43. *Id.* at 511-13.

44. The Code, entitled *The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices,* [hereinafter cited as UNCTAD Code] is United Nations General Assembly Resolution 35/63. The Code is reprinted in ANTITRUST & TRADE REG. REP., (BNA) No. 963, at G-1 (May 8, 1980).

45. *Id., reprinted at* G-2.

46. *Cf.* B. HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE 215-16 (1979) (noting ambiguities in the UNCTAD Code).

47. Clayton Act § 7, 15 U.S.C. § 18 (1976 & Supp. IV 1980).

acquisition one whose effect may be to lessen competition substantially within the United States within the meaning of section 7?[48]

Analysis of the commerce question under section 7 was important to the Guide's discussion of Case B. That analysis has been superseded by a 1980 amendment.[49] Before 1980, section 7 applied only if the parties were "engaged in [interstate or United States foreign] commerce."[50] Under the amendment, the law applies if the merging parties are engaged either "in commerce or in any activity affecting commerce."[51] Accordingly, if Glint is engaged either in commerce with the United States (which it apparently is not) or in any activity affecting commerce, section 7 of the Clayton Act now applies. If Glint were an important potential entrant into a highly concentrated United States razor blade market, and if its threat of entry kept United States prices lower than they otherwise would have been, Glint's business activity literally would affect United States commerce. This effect may be sufficient to invoke amended section 7.[52] Case B, however, does not suggest that Glint is an important potential entrant exerting a moderating effect. Therefore it is unlikely that section 7 applies, even in view of the 1980 amendment.[53]

---

48. GUIDE, *supra* note 2, at 15-16.

49. Pub. L. No. 96-349, § 6(a), 94 Stat. 1157 (1980), (amending Clayton Act § 7, 15 U.S.C. § 18 (1976)).

50. Clayton Act, ch. 323, § 7, 38 Stat. 731 (1914), *amended by* Clayton Act, ch. 1184, § 1, 64 Stat. 1125 (1950).

51. Pub. L. No. 96-349, § 6(a), 94 Stat. 1157 (1980).

52. The case is strongest if Glint's moderating effect stems from the fact that it is actually preparing to enter the United States market. It is weakest if the moderating effect should occur despite Glint's passive disinterest in entering the United States market. Moderating effects, however, are not likely to occur in the latter event. Moreover, under the facts postulated, interests of United States consumers are at stake, and one party to the transaction is a United States company and thus both legally and equitably subject to the substantive constraints of United States law. It would be sound policy, therefore, to recognize that a foreign firm whose perceived potential for entry moderates price in a concentrated United States market in which its prospective merger partner operates is, for that reason, engaged in an activity affecting commerce within the meaning of amended § 7 of the Clayton Act.

53. Current Justice Department officials might avoid analysis of whether Glint is engaged in an activity affecting United States commerce, for this is a test peculiar to § 7 of the Clayton Act. The Sherman Act prohibits mergers that unreasonably restrain trade, and the Justice Department currently takes the position that the standards for illegality under the Sherman Act and the Clayton

If the statute were applicable, we would reach the substantive question—does the acquisition lessen competition or threaten to do so as a matter of reasonable probabilities? The 1977 Guide and the 1982 Merger Guidelines begin analysis on common ground: If the acquisition of Glint lessens competition, it must do so because it eliminates one of few potential entrants into a highly concentrated United States market. A negative effect on competiton may be produced by either (1) elimination of a moderating influence on price by acquisition of a potential entrant that had such an effect, or (2) elimination of the probability that the acquired firm (the potential entrant) would have entered the market independently of the acquiring firm and would have added a major new competitive force to a noncompetitive market.[54]

The 1977 Guide, however, gives little insight into when a merger of potential competitors may produce these effects. The 1982 Merger Guidelines are explicit.[55] The 1982 Guidelines set forth certain conditions that must usually be present before a merger of firms that are not competitiors can be expected to produce an output restraint.[56] First, the market must be very highly concentrated. The 1982 Guidelines measure the level of market concentration by the Herfindahl-Hirschman Index (HHI), which is computed by summing the squares of the shares of all firms in the market.[57] Unless the HHI exceeds 1800, the Government is unlikely to sue.[58] Second, even if concentration surpasses 1800,

---

Act are identical. *See* 1982 Merger Guidelines, *supra* note 22, at 11; 1981 Interview with William F. Baxter, *supra* note 15, at 158-59. The Sherman Act requires only that the transaction substantially affect commerce. *See, e.g.*, Burke v. Ford, 389 U.S. 320, 321 (1967).

54. *See* 1982 Merger Guidelines, *supra* note 22, at 39-44; *see also* United States v. Marine Bancorporation, 418 U.S. 602 (1974). The Supreme Court has reserved the question whether elimination of more competitive entry ("entry effect") may, in itself, ever violate § 7 of the Clayton Act, since such an acquisition does not make market conditions worse but simply blocks a chance to make them better. *Marine Bancorporation*, 418 U.S. at 636-37.

55. 1982 Merger Guidelines, *supra* note 22, at 39-44.

56. Both of the identified effects on competition, *see supra* text accompanying note 54, may restrain output by eliminating a force that could increase obstacles to collusion by the incumbent firms.

57. For an explanation of how the Herfindahl-Hirschman Index works, see Fox, *The New Merger Guidelines—A Blueprint for Microeconomic Analysis*, 27 ANTITRUST BULL. (1982) (in publication).

58. 1982 Merger Guidelines, *supra* note 22, at 42. An HHI of 1800 roughly corresponds with a four-firm concentration ratio of 80% if the four firms have

the Justice Department is not likely to challenge a merger of potential competitors if there are more than two other firms that possess the same entry advantage as the acquired firm or if entry is easy.[59]

The 1977 Guide notes, and the 1982 Guidelines suggest, that the acquisition of Glint probably does not fulfill the conditions of an illegal potential-competition acquisition.[60] Glint is probably not a major potential entrant into the United States market. It is not an industry leader abroad, and it has small size and limited resources. It probably is not capable of entering the United States market. There is no indication that it has exerted a moderating effect on the price of razor blades in the United States.

The apparent agreement between the Guide and the Merger Guidelines on the appropriate outcome of Case B should not mislead the reader. The facts of Case B present an easy case because Glint was not a significant potential entrant into the United States market. The Guide suggests that acquisition of small, inventive Glint by the largest manufacturer of razor blades in the world would be anticompetitive if Glint were a significant potential entrant.[61] Even if Glint were a significant potential entrant, however, present Justice Department policy would require extensive further analysis. The Department would require answers to questions of the following sort: If a hypothetical single razor blade producer in the United States raised prices by a small but significant amount, such as five percent, would buyers shift to electric razors or other substitutes? Would foreign blade producers ship into the United States market? Would producers of similar products shift their facilities to the production of razor blades? All such responses by buyers and suppliers within six months to a year[62] would be relevant market data, and the market would be

relatively equal market shares, and a four-firm concentration ratio of 70% if the firms have unequal market shares.

59. *Id.* at 43.

60. *Compare* GUIDE, *supra* note 2, at 17 *with* 1982 Merger Guidelines, *supra* note 22, at 26-43.

61. *See* GUIDE, *supra* note 2, at 16-17.

62. The 1982 Merger Guidelines measure shifts within one year by (1) buyers who would turn to substitute products, (2) suppliers who have existing facilities but make a different product, and (3) suppliers who make and sell the same product in a different geographic area. 1982 Merger Guidelines, *supra* note 14, at 16, 23, 25. After defining the market, the Justice Department considers whether new entry within two years is likely. *Id.* at 32.

expanded to reflect the probable shifts. If the concentration in this expanded market fell short of 1800 on the HHI, or if entry was easy or other substantial potential competitors numbered more than three, the Department would be likely to conclude that the merger would not produce sufficient lasting market power to warrant suit.[63]

C. Case C: Joint Bidding

Case C recites that several United States electrical equipment manufacturers and engineering firms have formed a consortium for the purposes of submitting a bid on a very large hydroelectric project in a Latin American country. The consortium includes three United States equipment manufacturers who rank second, third, and sixth among United States manufacturers, and three engineering firms, who rank first, fifth, and eighth among United States engineering firms. The consortium will be competing against similar groups supported by the Japanese and British Governments. The project is too large for a smaller group to finance, and a smaller group would not have the necessary technical capabilities. The project will take nearly ten years to complete. The parties are concerned about political risks in the host country.[64]

The Guide analyzes the joint venture in three steps. First, does the joint venture, in essence, unreasonably restrain competition?[65] The reasons for the formation of the joint venture are relevant to this question (presumably because intent is some evidence of effect). In this case the goal of the joint venture was to be a better competitor against similar consortia from other countries which are supported by their governments, possibly through subsidization. Apparently, the United States participants fear that, without this coordination, their bid would not be competitive. The Guide says: "[T]here is no reason to suspect that the joint venture either would eliminate competition in the domestic

---

63. *Id.* at 42-43.

64. The fact pattern of Case C resembles a proposal made by General Electric, Allis Chalmers, Westinghouse Electric, and others to form a consortium to provide turbine generators for a major Latin American project. GUIDE, *supra* note 2, at 21; Department of Justice Press Release, May 10, 1976. The venture was cleared under the Business Review procedure by the Department of Justice. *Id.*

65. GUIDE, *supra* note 2, at 20.

U.S. market or foreclose export opportunities for U.S. firms."[66] The Guide concludes that the joint venture is, therefore, permissible. The second question posed by the Guide is: Does the joint venture have any unreasonable collateral restraints?[67] In this case there were no collateral restraints. The third question is: Is the joint venture a "bottleneck monopoly," and is access so important to United States competitors that exclusion results in a serious handicap making it necessary that the venture "be open to all on reasonable and nondiscriminatory terms?"[68] The Guide concludes that the consortium was not an essential facility; other engineers and equipment suppliers could form their own consortia to bid on the project.[69] Therefore, they would not be handicapped. The Guide cautions that a joint venture among competitors involves the risk that their cooperation may "spill over" into other areas, and suggests that in some circumstances it may be desirable for the joint venture to have separate personnel in order to reduce day to day contact among officials of the competitor members.

The conclusion of current Justice Department officials would be the same. The analysis, however, would be somewhat different. First, the Department would not ask whether this joint venture forecloses important export opportunities for United States firms or whether it imposes a serious handicap on them.[70] The Justice Department would not worry about any disadvantage to competitors unless the disadvantage is of a dimension that would cause output restriction and price increases, and that dimension is not present in this case.[71] A joint venture to export or to bid on a project abroad probably would never be such an essential facility.

More centrally, while the discussion in Case C is hospitable to joint bidding, the current Justice Department views joint bidding with an even more favorable attitude. One of the essential messages of the Reagan Administration's Justice Department is that joint ventures likely to increase business abroad will be encouraged. As Attorney General William French Smith promised in a speech to the District of Columbia Bar in June 1981:

66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.* at 21-22.
70. *See* 1981 Interview with William F. Baxter, *supra* note 15, at 153.
71. Case M, however, may be such a case. *See infra* text accompanying notes 146-59; *see also* United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912) (one railroad turntable controlling railroad traffic across the United States).

> We will . . . undertake a broad reassessment of our antitrust enforcement practices concerning international commerce—and especially joint ventures by American businesses that are not likely to have anticompetitive effects on domestic markets. The federal government should not—and rational antitrust enforcement need not—impede American firms' efforts to compete internationally.[72]

Finally, consistent with its view that businesses need clearer signals of right and wrong, the current Justice Department would be more specific about the type of harm it would seek to prevent. That harm, of course, is output restriction. There is a threat of output restriction when the joint venturers are competitors and the joint venture encompasses so many firms in a concentrated market, accounting for so much of that market that "the opportunity to get together and discuss the joint venture role is likely to facilitate collusion in the markets from which they came."[73]

The 1982 Merger Guidelines provide a relatively clear statement of the conditions under which the Department believes collusion is likely to be feasible and profitable. From the perspective of the 1982 Guidelines, the range at which dangers of collusion develop begins at about 1000 on the HHI. At 1800 and above, these dangers are likely to be serious.[74] Nevertheless, easy entry would negate the danger of collusion, and a variety of other market factors may indicate a greater or lesser danger.[75] If conditions in the market in which the joint venturers compete indicate the feasibility and profitability of collusion, then a joint venture that brings those firms closer together may dangerously enhance opportunities for collusion. If, on the other hand, the market factors indicate that collusion is neither feasible nor profitable, the current Justice Department is not likely to challenge the consortium for bidding on a project abroad. Even if the factors indicate that collusion is probable, current Justice Department officials might decide that the benefits of allowing the venturers to realize significant economies of scale outweigh the costs of an increased risk of collusion at home.[76]

---

72. Remarks of William French Smith, *supra* note 15, at H-3.
73. 1981 Interview with William F. Baxter, *supra* note 15, at 161.
74. 1982 Merger Guidelines, *supra* note 22, at 29-30.
75. *Id.* at 31-39.
76. For example, Assistant Attorney General Baxter stated:

> One can imagine circumstances where the case for aggregation in the joint venture activity is so powerful, because of extreme conditions of increasing returns to scale at the joint venture level, that one would simply have to

In sum, both the 1977 Guide and the policy of the 1980s indicate concern regarding collusion. Current government policy statements, however, raise this concern to center stage. They are explicit in identifying conditions under which collusion is believed to be a danger, and add that dangers of collusion may be outweighed by scale economies. Moreover, the 1977 Guide protects opportunities important to United States exporters, whereas policy of the 1980s would not.

Members of a consortium like the one described in Case C may apply for an export trade certificate of review, as authorized by the Export Trading Company Act of 1982. Issuance of the certificate would require a determination by the Secretary of Commerce, with the concurrence of the Attorney General, that the specified export activities and methods of operation will not harm competition within the United States or the export trade of any competitor, constitute an unfair method of competition against competitors engaged in the export of like services, or be reasonably expected to result in the sale or resale of the goods or services in the United States.[77] Even after issuance of such a certificate, the holder is protected from antitrust actions only if its conduct is specified in and complies with the terms of the certificate, and even then the protection is only partial.[78] In view of the facts that certificate holders receive only qualified protection from antitrust litigation and that the holder subjects itself to a new, single-damage cause of action for unfair methods of competition, it is not obvious that the new certification procedure will be used widely.

D. Case D: Joint Research

Case D advances the analysis of problems that may flow from competitor collaboration. It poses the first of several problems on technology transfers. RXI is the second largest of five producers of X-metal in the United States. British Metals is one of the larg-

---

get a firm grip on his stomach and say, "Sure there are dangers flowing back. Let us see if they cannot do this through some independently established company that can attain the scale economies rather than doing it in the joint venture form." I just don't want all those vice presidents in charge of sales meeting as a board of directors in New York once a month.
1981 Interview with William F. Baxter, *supra* note 14, at 161.

77. Pub. L. No. 97-290, § 303, [4 Federal Laws] TRADE REG. REP. (CCH) ¶ 27,023.

78. *See supra* note 7.

est X-metal producers in the Common Market. X-metal is currently produced from X-ore, but the process is costly. Several producers, including RXI and British Metals, have been trying to develop a substitute process, but thus far no one has been successful. RXI and British Metals wish to enter into a joint venture, in the form of a new British company equally owned by each parent, to develop a process for producing X-metal from materials other than X-ore. The joint company will seek to obtain patents covering its processes. It will give RXI an exclusive license to all patent rights and use of know-how in North America, and will give British Metals all such rights in Great Britain and the Common Market.

The Guide asks the three questions identified in Case C as applicable to joint ventures.[79] It observes that no essential-facility problem is raised by the facts,[80] and it proceeds to ask whether the joint venture is appropriate in essence, and whether it involves any unreasonable collateral restraints.[81]

The basic antitrust problem posed by Case D is the possible lessening of competitive incentives to develop new technology when the firms whose technological competition is eliminated are two of the few major producers of the product in question. There is no suggestion in the 1977 Guide that the collaborative activity itself (as opposed to possible spill-over effects) will lead to an increase in price over current price. Indeed, the suggestion is that if the collaboration is successful, and thus a cheaper process is available, price will decline.[82] The harm apparently envisioned by the Guide stems from elimination of the possibility that, proceeding independently, each company would have provided a spur to the other to invent a cheaper way to make X-metal, and both might have developed separate low-cost alternatives, thereby benefiting consumers.[83]

The Guide declares that the joint venture is likely to be unobjectionable. While observing that the joint venture would eliminate competition between the two venturers in the development

79. GUIDE, *supra* note 2, at 23.

80. *Id.*

81. *Id.* at 25.

82. *See id.* at 23-24.

83. This latter inquiry—whether the market would become more competitive if the joint venture were barred than if it were permitted—was the inquiry framed by the Supreme Court in United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964).

of an alternative process for producing X-metal, it states that there is no antitrust objection if the cost and risk of the research are so great that the parties would not undertake it on their own. It notes further that, because other leading firms will continue to parallel the research efforts of the joint venture, a competitive spur to the joint venture's research efforts seems assured.[84] The Guide cautions that, because the joint venturers are two of a small group of X-metal producers, spill-over effect (collusion by the parents) should be guarded against, and the joint venture should not be unnecessarily broad in duration or scope.[85]

Current Justice Department officials probably also would conclude that the joint venture is in essence reasonable, but spill-over effect (collusion) would be its central, rather than ancillary, concern. To determine the feasibility of collusion, the present enforcers would begin their analysis by defining the market. They would ask: Does X-metal have any good substitutes? Are barriers to production of it (and its good substitutes) high? Is the market highly concentrated? Only if elasticity of demand and of fringe supply are low, and competitors are few, could attempts by the joint venturer's parents to raise price and restrict output be successful.

If output restriction is not feasible, the Department would be unlikely to have any further concern. If it is feasible, and if movement in that direction may be facilitated by collaboration between these two major producers (who presumably are either competitors or potential competitors), the Department would ask whether the costs and risks of the research are so high, compared with probable return on investment, that the parties probably would not undertake or continue the research unilaterally, and whether the combination of the knowledge and skills of the two partners is likely to reduce the costs and risks, compared with probable return, to attractive proportions. If the answers are affirmative, the Department would probably approve the joint venture but would require that precautions be taken to assure corporate separation and to prevent the new company from becoming a forum for conversations among its parents' salespeople. The Department, like the 1977 Guide, would be likely to require that the joint venture be reasonably limited in scope and duration.[86]

84. GUIDE, *supra* note 2, at 24-25.

85. *Id.* at 25.

86. *See supra* discussion of Case C. The GUIDE suggests that the antitrust

The second inquiry in Case D is: Are there any unreasonable collateral restraints? Is it unreasonably restrictive for the joint venturers to agree that the United States partner would get exclusive rights to the patents and know-how in North America, that the British partner would get exclusive rights to the patents and know-how in Great Britain and the Common Market,[87] and that the joint venturers would conduct all of their research operations through the joint company? The 1977 Guide equivocates on the question of division of territory. It states that the lawfulness of the division would be determined by the rule of reason[88] but

---

laws may appropriately bar transactions merely because they lessen competitive incentives of major producers to develop new technology under circumstances in which there is little technological competition from others. *See* GUIDE, *supra* note 2, at 23. In the 1982 Merger Guidelines, the Justice Department identified as its only merger enforcement objective preventing mergers that increase power over price. 1982 Merger Guidelines, *supra* note 22, at 11-13. The GUIDE's concerns harmonize with the concern of the Merger Guidelines where the producers have power over price.

87. The parties in this case contemplate that the joint venture will obtain patents on a process rather than on a product. The United States Patent Code gives the patentee the right to convey the exclusive right to practice the patent in the United States or any specified part of it. 35 U.S.C. § 261 (1976). Section 261 arguably overrides the antitrust laws and allows the patentee to confine sales of a patented product to a stated territory regardless of the competitive consequences. *But see* L. SULLIVAN, ANTITRUST § 184 (1977).

Unlike the owner of a product patent, the owner of a process patent does not gain rights to apportion territories from the Patent Code; a process patent conveys merely the right to use the process and does not convey the right to sell the unpatented product made therefrom. This distinction was commonly invoked by product patentees when United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), was law, because territorial restraints were illegal per se unless authorized by the Patent Code. Since *GTE Sylvania* overruled *Schwinn*, *see supra* text accompanying note 11, § 261 of the Patent Code has receded in importance. Vertical territorial restraints are no longer illegal per se under the antitrust laws; they are usually reasonable, and therefore the proponent of the restraint usually does not need to rely upon the Patent Code to validate the restraint.

Vertical territorial restraints may offend the antitrust laws if they facilitate collusion among few sellers in a well defined market. Thus, if three patentees share a market and all license third parties to make and sell, they might increase their power by imposing tight territorial restraints on their licensees. If the patentee is the only seller in the market, however, collusion would not be the problem. The patentee could not increase its power by imposing territorial or other restraints. *See* United States v. Studiengesellschaft Kohle, 670 F.2d 1122 (D.C. Cir. 1981).

88. At the time of the issuance of the GUIDE, territorial divisions, whether vertical or horizontal, were illegal per se. *E.g.*, *Schwinn*, 388 U.S. at 376. Prior to

does not state how it would apply the rule. It fails to address the second question; namely, the lawfulness of the agreement not to engage in competitive research.

At present, Justice Department officials would analyze the collateral restraints in terms of output restriction. If the United States market for X-metal is not susceptible to collusion or monopolization, the analysis would not proceed further. There are two cases in which collateral restraints might lead to lower output than that which would be optimal after the new technology is introduced.[89] In one scenario, the parties would proceed with the joint venture even if both venturers received licenses under all patents and even if each retained the right to perform independent research. Nonetheless, they agree to the two collateral restraints. The joint venture is formed and proceeds to produce a new, much lower-cost technology that no other competitor is able to duplicate. British Metals cannot compete in the United States for the life of the basic patent (and longer if the joint venture obtains improvement patents) because it has agreed to give RXI exclusive rights in the United States, and its own higher-cost technology has become noncompetitive. British Metals cannot invent around the patent because it has foregone the freedom to do its own research, and any additional joint research will inure to the benefit of RXI in the United States. RXI monopolizes the United States market and British Metals monopolizes sales in the Common Market.

In the second scenario, the joint venture and other United States competitors develop alternative low-cost technologies. Concentration is so high, however, that the elimination of British

---

the issuance of the GUIDE, Justice Department officials had stated publicly that territorial divisions were illegal even when affected by patent licensing. The GUIDE took a contrary position and stated that territorial division created by reason of patent rights is "not now regarded by the Department as being illegal *in itself* under the antitrust laws." GUIDE, *supra* note 2, at 25.

The GUIDE states that "there may be some circumstances when an exclusive license barring United States sales by the non-United States party would raise antitrust problems. The larger the period of exclusivity, the more serious these problems would become." *Id.* at 26 (footnote omitted).

89. The Justice Department currently looks at mergers, and presumably it would look at joint ventures, using current price and output as a benchmark. *See* 1982 Merger Guidelines, *supra* note 22, at 25. Because this joint venture is likely to decrease cost and increase output, it would not be objectionable from that perspective.

Metals' competition in the United States or the elimination of its moderating effect as the most substantial potential entrant facilitates collusion, higher prices, and lower output.

These scenarios may be mere possibilities. The current Justice Department would be reluctant to second-guess the parties' determination (if one was made) that the two restrictive covenants were necessary to induce them to invest in the joint venture. If, however, there is a United States market that is susceptible to collusion, the Department may be concerned that the two covenants were devices to keep British Metals, an apparently important potential entrant, out of the United States and to divide world markets. If this were found to be a likely purpose or effect and the Department believed that the covenants ostensibly were dispensable or overbroad, it probably would challenge them.[90]

E. Case E: Manufacturing Joint Venture and Know-How License

Hot Chip, the third largest United States manufacturer of key transistor parts with about twenty-two percent of domestic sales, wishes to enter the important Japanese market and has been unsuccessful in its attempt to do so. In order to enter the Japanese market, it has formed a joint venture with Japan Manufacturing (JM). JM is one of Japan's largest industrial entities; it manufactures electronic equipment but does not manufacture the transistor parts. The joint venture, JZC, will operate in Japan and will use Hot Chip's know-how to produce transistors. Hot Chip is concerned that JZC will have lower costs than Hot Chip has in the United States, and might out-compete it. Accordingly, Hot Chip has obtained a covenant providing that neither JZC nor JM will export the transistors to the United States or other designated markets.

Is the joint venture permissible in essence? The Guide says that it is,[91] and this is the response expected from the current

90. *See* Yamaha Motor Co. v. FTC, 657 F.2d 971 (8th Cir. 1981), *cert. denied,* 102 S. Ct. 1768 (1982); *see also* Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951) (agreements to supress competition between separate legal entities cannot be justified by calling the arrangement a "joint venture"); United States v. National Lead Co., 63 F. Supp. 513 (S.D.N.Y. 1945), *aff'd,* 332 U.S. 319 (1947) (combination of competitors who by agreement split the world market violates the Sherman Antitrust Act).

91. *See* GUIDE, *supra* note 2, at 28-29.

Justice Department. At worst, the joint venture would eliminate possible competition from JM in the United States transistor part market. It does not appear, however, that, absent the joint venture, JM would have developed transistor parts and entered the United States market. Moreover, because JM was, at most, a potential producer of the product, it seems unlikely that JM would be one of a small group of likely potential entrants into the United States.

Is the collateral territorial restraint reasonably ancillary to the main purpose of the contract? The Guide says that it probably is not. The agreement permanently precludes JZC and JM from exporting the transistors to the United States. Hot Chip is concerned about a cost-cutting entrant, and, says the Guide, antitrust law is designed to preserve potential disruption from cost-cutting entrants.[92] The Guide would place on "Hot Chip and JM the burden to prove that the know-how being transferred is of substantial value, and that the territorial restraint is no greater in scope or duration than is necessary to prevent frustration of the underlying contract."[93] It suggests that the appropriate duration would be limited to the time it would take JM to develop equivalent know-how by reverse engineering, and that a restraint beyond this period would be virtually impossible to justify.[94]

Current Justice Department officials would view the collateral restraint more flexibly.[95] They would be particularly sympathetic to credible claims by Hot Chip that Hot Chip would not have entered into the joint venture agreement unless it could protect its trade secrets by the covenant for which it bargained. Moreover, although this is a highly concentrated market, the facts do not indicate that JM was a significant potential entrant. JZC and JM would become potential entrants only by reason of Hot Chip's initiation of the joint venture and sharing of its own technology. Furthermore, there may be other more likely potential entrants. Because a plaintiff could not establish that the joint venture would lead to increased price and lessened output, it seems likely that the Justice Department would not challenge the transaction.

---

92. *Id.*

93. *Id.* at 31 (footnote omitted). Hot Chip holds 49% of the stock of JZC. If it had a majority interest, "there might be different considerations." *Id.* at 32.

94. *Id.* The "period of reverse engineering" is illusory. One cannot know how long it will take a competitor to copy an invention.

95. *See* 1981 Interview with William F. Baxter, *supra* note 15, at 162-63.

If, however, but for the joint venture, JM was one of few significant potential entrants into the United States market and the market was susceptible to collusion, current Department officials would be concerned about JM's permanent covenant not to compete. The Department would try to facilitate the transaction and to protect domestic competition at the same time, and it would probably, under these changed facts, impose on Hot Chip and JM a burden of the sort that the Guide imposed.[96] At a minimum it probably would disallow the restraint for a period longer than the life of the know-how and longer than a period reasonably necessary to recoup the initial investment.

The essential difference between the Guide and the policy of the early 1980s is that the Guide would approach the restrictive covenant with skepticism because the market was highly concentrated and because JM could become an important potential entrant, whereas current policy would approach the whole transaction with favor and probably would not place burdens of justification on the proponents of the joint venture unless the transaction threatened a near-term rise in price.

F. Case F: Know-How License

Fast Technology, Inc. (FTI) is a small Massachusetts corporation that possesses valuable unpatented technology. It licenses this technology for twenty years in return for a royalty to Badische Maschinenwerke A.G. (BMW), a major manufacturer located in Germany. FTI is a small, growing factor in the United States market. It has not been successful in its export trade. By granting BMW a license and selling domestically produced components and equipment to it, FTI hopes that it will be able to export economically. BMW is a large, well-financed international company, capable of invading the United States market through use of FTI's technology. Fearing this result, FTI requires BMW to agree that for twenty years it will not compete with FTI in the United States in any product for which its licensed technology is used. Also, FTI requires BMW to purchase and use only FTI components in executing the licensed process.

---

96. If, but for the joint venture, JM would have entered the United States market for the sale of transistor parts or transistors, and if its covenant not to compete in the United States covered all transistors and parts, whether or not made with Hot Chip's know-how, the covenant probably would have been illegal. *See Yamaha Motor Co.*, 657 F.2d at 981.

1. *The Territorial Restraint*

Can FTI, as a condition of its know-how license, lawfully require licensee BMW to agree not to compete with FTI in the United States for a term of years? Can that term be as long as twenty years? The Guide states that FTI can exact an agreement from BMW not to compete, presumably because FTI would not have the incentive to license BMW if BMW could immediately use the know-how in competition with FTI.[97] The time period of the restraint, however, must be reasonable. The Guide views twenty years as unreasonable if twenty years is longer than necessary for reverse engineering "unless the parties could justify [the twenty-year period] as necessary to the technology sharing agreement."[98]

Current Justice Department officials would start the analysis from a different reference point. They would start with a strong presumption that the owner of technology should have the freedom to exploit it unilaterally in whatever way the owner sees fit and by the most convenient means.[99] The Department regards all exploitation of technology as permissible under the antitrust laws unless it aggrandizes the owner's monopoly or produces cartel control beyond lawful ownership rights.[100]

Applying these principles, one could not condemn the twenty-year covenant not to compete on the basis of the stated facts. There is one way in which a long-term export ban could produce cartel control over the market for the product manufactured with the United States licensor's technology, but Case F does not seem

---

97. *See* GUIDE, *supra* note 2, at 34.

98. *Id.* at 33.

99. *See* Remarks of A.B. Lipsky, Jr., *supra* note 23, at 14; *see also* Brief for the United States as Amicus Curiae, on petition for a writ of certiorari, SCM Corp. v. Xerox Corp., No. 80-2092 (U.S. Mar. 22, 1982) [hereinafter cited as Brief]. The above references apply specifically to patents but seem applicable also to know-how.

In its amicus brief, the Justice Department wrote:

> When the parties to an agreement are without market power, the purpose and, more importantly, the economic effect, if any, of their agreement can be presumed to be to increase efficiency—thereby promoting consumer welfare—where they cannot eliminate competition between themselves, unduly enhance the value of one of their technologies, or restrict output in any way.

Brief, *supra*, at 10 (footnote omitted).

100. Brief, *supra* note 99, at 10.

to be that case. In order for FTI's export ban to facilitate cartel control, the following would be necessary: the United States market would have to be highly concentrated with inelastic demand, high barriers, and low supply substitutability; FTI's technology would have to be a necessary ingredient of the end product; and FTI itself would have to be a much larger factor than it is in the United States market. Finally, it would be necessary to show that, but for the licensing agreement, BMW probably would have derived the technology or a good substitute for it on its own within a period less than the term of the restraint, that it would have entered the United States market on its own or by licensing its technology to a non-leading United States firm, and that it was one of few potential entrants capable of so doing.

The difference between the 1977 Guide and enforcement policy of the 1980s is the following: The Guide would regard the twenty-year ban as unreasonable if it unnecessarily excluded the independent competition of a major foreign manufacturer of related products during a time period when the foreign manufacturer, if it tried, could probably have derived the technology on its own.[101] Current policy would not condemn such a restraint unless the market was susceptible to collusion and the barred entry of the licensee removed a force that would destabilize a cartel.[102]

---

101. *See* GUIDE, *supra* note 2, at 33.

102. Because the covenant by definition restrains trade into the United States of a major foreign manufacturer of related products capable of competing with FTI in the United States, the GUIDE would give strict scrutiny to the restraint. Since the covenant on its face does not threaten output limitation in the United States (indeed, it was exacted by a United States firm to exploit its technology abroad), current Justice Department officials would approach the transaction hospitably.

Moreover, unlike the GUIDE, the present Justice Department would not ask whether the purposes of the transaction could be accomplished by a less restrictive alternative. In its brief in SCM Corporation v. Xerox Corporation, regarding acquisition by Xerox of a patent, the Justice Department said:

> The fact that a transfer of assets has taken place does not justify an attempt by a court to impose a "least restrictive alternative" test on an otherwise legal *use* of assets, where the transfer itself has anticompetitive effects and the subsequently attained monopoly power is not attributable to any unlawful practice.
>
> The inherent uncertainties of a "least restrictive alternative" make it an inappropriate standard under the antitrust laws . . . .

Brief, *supra* note 99, at 13. By "anticompetitive," the Justice Department means "that the decrease in consumer welfare resulting from restriction of output by the parties is likely to exceed any increase in consumer welfare resulting from

2. *The Tie-In*

The Guide states that if the know-how "is sufficiently valuable to confer monopoly power, [the license] is a tie-in and would be illegal per se . . . if practiced in the domestic market."[103] As for the international context, the Guide states vaguely, "the presumption against the legality of a tie-in may not necessarily be absolute."[104] The tie-in would be of concern, the Guide continues, only if it foreclosed other sellers engaged in United States commerce[105] from sales of the tied product in the overseas market.[106]

As for domestic markets, the Guide reflects the latest Supreme Court case law. If an owner of intellectual property has market power in the market for its know-how, that owner may not legally tie any substantial dollar amount of goods to the licensing of the know-how.[107] The Supreme Court has never weakened this rule.

---

increased efficiency." *Id.* at 11.

103. GUIDE, *supra* note 2, at 35 (footnote omitted).

104. *Id.*

105. The GUIDE states that the exclusion of overseas suppliers from overseas markets does not constitute United States foreign commerce, and hence United States law does not apply. *Id.* at 34. This conclusion is not obvious because the tie-in is in United States foreign commerce. *See* Rahl, *American Antitrust and Foreign Operations: What is Covered?*, 8 CORNELL INT'L L.J. 1 (1974). Before the enactment of the Foreign Trade Antitrust Improvements Act, *supra* note 5, arguably the only appropriate questions were whether the tie-in violated standards of illegality, and if so whether the overseas supplier suffered an antitrust injury. It was not apparent why an excluded foreign supplier had not been injured, while a similarly situated United States supplier clearly suffered antitrust injury under the law. *See* Waldbaum v. Worldvision Entr's, 1978-2 Trade Cas. (CCH) ¶ 62,378 (S.D.N.Y. 1978); Industria Siciliana Asfalti Bitumi, S.p.A. v. Exxon Research & Eng'g Co., 1977-2 Trade Cas. (CCH) ¶ 61,636 (S.D.N.Y. 1977). The Foreign Trade Antitrust Improvements Act preempts *Waldbaum* and *Industria.*

106. As the GUIDE notes, a tie-in is justified if it is necessary to protect the quality of the tying product. This may be the case when certain qualities of the tied product are essential to the effective functioning of the tying product and those qualities cannot be specified. GUIDE, *supra* note 2, at 34. The GUIDE suggests that even a goodwill justification is unreasonable beyond the period of "reverse-engineering." *Id.*

107. *See* United States v. Loew's, Inc., 371 U.S. 38 (1962) (a copyright on a motion picture film is sufficient to confer the necessary power in the market for the tying product); International Salt Co. v. United States, 332 U.S. 392 (1947) (plaintiff need not prove lessened competition in the market for the tied product; it is enough that a not insubstantial dollar amount of commerce (*e.g.*, $500,000) in the tied product is restrained); *see also* United States Steel Corp. v. Fortner Entr's, Inc., 429 U.S. 610 (1977) [hereinafter cited as *Fortner II*]; Fort-

The Court decided its last tie-in case in the early 1970s,[108] however, and some lower courts, refusing to apply a per se rule, are requiring the plaintiff to prove that competition in the market for the tied product is lessened.[109]

The traditional per se rule is based on the fact that tie-ins have, by definition, the effect of depriving the customer of freedom of choice in selecting among competing sellers and depriving competing sellers of the chance to supply those customers, and on the perception that "tying arrangements generally served no legitimate business purpose that cannot be achieved in some less restrictive way . . . ."[110] The Guide reflects this perspective. Indeed, the concept of protecting export opportunities is based on the value of open markets and freedom of access, and not in concerns regarding output limitation.[111]

In contrast, current Justice Department officials do not approve of the per se rule against tie-ins even in the domestic market.[112]

---

ner Entr's, Inc. v. United States Steel Corp., 394 U.S. 495 (1969) [hereinafter cited as *Fortner I*].

108. *Fortner II,* 429 U.S. 610 (1977).

109. *See, e.g.,* Kingsport Motors, Inc. v. Chrysler Motor Corp., 1981-1 Trade Cas. (CCH) ¶ 63,888 (6th Cir. 1981); *In re* Data Gen. Corp. Antitrust Litig., 529 F. Supp. 801, 818 (N.D. Cal. 1981), *app. pending. But see* Betaseed, Inc. v. U and I, Inc., 1982-2 Trade Cas. (CCH) ¶ 64,878 at 72,710, 72,414-15 (9th Cir. 1982).

110. *Fortner I,* 394 U.S. at 503.

111. The GUIDE's implicit recommendation, however, would lead to strange results. It suggests that if FTI wishes to tie its components to its technology, it should require the licensee to purchase components of United States suppliers, rather than components of FTI. *See* GUIDE, *supra* note 2, at 35. In the example, however, FTI decided to license its know-how, which it might otherwise have kept secret from its potential competitors, in order to gain access to an export market for its components. If FTI cannot assure sales of its components in Germany, its reason for the transaction will fail. It seems unlikely that FTI would be willing to use the entree derived from its know-how to provide itself with the mere opportunity, shared with its United States competitors, to try to win the business of BMW.

In the example, the tie-in makes possible export trade that would not otherwise exist. Therefore, competitors would be no better off without the licensing agreement than they would be with it. Moreover, no United States consumers are injured. Arguably, it is unreasonable for United States law to condemn the tie.

112. Vertical Restraints and Tying—Justice Department Views, 5 TRADE REG. REP. (CCH) ¶ 50,433 (1981) (remarks of Ronald G. Carr, Deputy Assistant Attorney General, Antitrust Division).

The Department believes tie-ins are likely to be efficient.[113] Government enforcers would worry about FTI's tie-in in the *domestic* market only if the tie-in could feasibly be used "to achieve an independently based monopoly position" in the market for components,[114] or to facilitate collusion.[115] In the international context, it is even more difficult to imagine a tie-in that would inflict output-limiting injury on United States competition. Unless the tie-in will lead to monopolization of a world market or of goods re-exported to the United States, or unless United States competitors would be foreclosed from access to so vital an outlet that foreclosure would concentrate the United States market to a point where collusion would be a dangerous risk, the foreclosure of United States competitors' export opportunities would not rise to such a level that the Justice Department would condemn.[116]

Case F is the first illustrative case in the Guide that requires analysis under the Foreign Trade Antitrust Improvements Act of 1982. The new statute reinforces, at least in part, the Guide's analysis. Pursuant to title IV of the new Act, which promulgates section 7 of the Sherman Act, FTI's requirement that the German licensee of its technology purchase components only from FTI is covered by the Sherman Act only if it has "a direct, substantial, and reasonably foreseeable effect . . . on export trade or commerce with foreign nations, of a person engaged in such trade or commerce in the United States. . . ."[117] If FTI's tie-in does have such an effect, then the Sherman Act applies "only for injury to

113. *Id.*

114. 1982 Interview with William F. Baxter, *supra* note 15, at 33-34.

115. A tie-in may produce inefficiency in the form of output limitation in two cases. In both cases, it must be possible to monopolize the market for the tied product; there must be low elasticity of demand, high barriers, and low supply substitutability. First, a tie-in may restrict output if power over the tying product confers power over the tied product. For example, in the early 1900s the patentee of the only movie film projector required theatre owners to use only the patentee's movie films with its projector, thereby threatening to extend the patentee's monopoly to movie films. *See* Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502 (1917). Alternatively, a tie-in can restrain output if it facilitates collusion. This could occur if the tie removes such a significant share of the market from competition that it deprives the remaining competitors of sufficient market share to maintain optimum size, and thus further concentrates the market.

116. *See* 1982 Merger Guidelines, *supra* note 22, at 49-50.

117. *See* full statutory language, *supra* note 5.

export business in the United States."[118] The relevant question under section 7 of the Sherman Act is: Are there other persons engaged in export commerce in the United States[119] that could sell components of the type required by the German licensee? If so, the substantive principles of the Sherman Act apply to the extent that their export business is injured.

Several technical points could be raised in an attempt to bring FTI's tie-in totally within the language of section 7 of the Sherman Act. FTI might assert, in an action against it by United States producer A who was ready and able to supply the needed components to BMW, that the tie-in did not have a "direct" effect on A because the only direct victim of a tie-in is the coerced purchaser; any other effect is incidental and merely speculative. Second, FTI might assert that the opportunity to supply the components to BMW existed only because of BMW's desire for FTI's technology; that FTI would not supply its technology unless it supplied its components, and therefore, but for the tie, there would be no export opportunity at all.[120] Third, FTI might claim, there is no more reason to suppose that A or another United States exporter would win the competition to supply BMW's needs than to suppose that Mitsui, Mitsubishi, or any one of a number of other foreign producers would have won the business. Therefore, FTI might claim that the impact on United States export trade is indirect and speculative. FTI might claim also that any effect was not "substantial" for the foregoing reasons and on grounds that the opportunity foreclosed represented a minute percentage of the world market.

These arguments seem contrary to the spirit of section 7, which merely confines Sherman Act application to cases in which inter-

118. *Id.*

119. The statutory language refers to an effect on the export commerce of a person "engaged in" export commerce in the United States. There would seem to be no policy reason why the person must be actually engaged in export commerce rather than actually or potentially so engaged, since the purpose of the statute is to limit the Sherman Act without interfering with United States interests. If FTI forces BMW to purchase FTI components in order to get its technology, and United States company A is ready and able to supply the components (and, a fortiori, if it was competing for the right to do so just before FTI's transaction was concluded), it should make no difference that A has previously made no sales in export trade.

120. *See supra* note 111.

ests of the United States are at stake.[121] The fact that a tie-in by a producer in the United States excludes or arguably excludes a competitor in the United States should be a sufficient basis for holding section 7's limitation inapplicable.[122] The issues raised in the paragraph above should be heard in the context of litigating the section 1 claim. Otherwise, the mini-trial necessary for determining the mere applicability of the Sherman Act would create an extra layer of litigation, interfere with the efficient conduct of litigation, and thus impair the enforcement of the antitrust laws.

G. Case G: Tying of Licensed Technology

In Case G, Big Wheels Corporation, a major United States manufacturer, wishes to do business in X, a less developed country. It finds exporting to X impractical in view of restrictive local laws, and therefore decides to license a local company to manufacture its products under Big Wheels' country X patents and Big Wheels' know-how. Royalty rates in X are subject to government approval and are "notoriously low." To get an acceptable return, Big Wheels decides to impose the following conditions: (1) the licensee must buy, exclusively from Big Wheels, all components, supplies, and equipment necessary to manufacture under the license, and (2) the licensee must take a license for certain other patents, which the licensee has no intention of using.[123]

The Guide notes the United States rule: It is per se illegal[124] to require a licensee to take unwanted patents in order to get a desired patent. It adds, however, that the Department would be unlikely to invoke the United States antitrust laws unless the packaged license would have a material effect on United States exports or imports. Likewise, even prior to enactment of the Foreign Trade Antitrust Improvements Act,[125] current Department officials could be expected not to enforce the law against the

121. *See* Report of the Judiciary Committee of the House of Representatives on H.R. 5235, 97th Cong., 1st Sess. (1981), *reprinted in* 43 ANTITRUST & TRADE REG. REP. (BNA) No. 1076, at 306, 308-09 (1982).

122. *Id.* at 309.

123. GUIDE, *supra* note 2, at 37. The tie-in analysis is similar to that in Case F and will not be repeated. Case G frames the question as follows: Whether the tie "unreasonably forecloses other U. S.-based sellers from making sales, or affects goods reexported to the United States." *Id.* at 37-38.

124. *Id.* at 37.

125. *See supra* text accompanying note 5.

package licensing. A Justice Department official has noted that package patent licensing may be efficient, for it may avoid costly separate negotiations among licensees. In any event, "[the patentee's] return is necessarily limited to the maximum amount that he could extract lawfully in a world of perfect information and zero transaction costs. Thus, the practice of package licensing ought not be subjected to any general prohibition on antitrust grounds."[126]

Despite the Department's position, tying of one patent to another in domestic commerce remains illegal per se under the United States antitrust laws.[127] It appears, however, that no United States competitor or consumer will suffer antitrust injury as a result of the tie. Therefore, under the new section 7 of the Sherman Act, the prohibitions of the Sherman Act are not applicable.[128]

H. Case I: Exclusive Grantback Licensing

United States company X has granted a license to a leading local firm in country C to practice certain patents and know-how in that country. The local firm has agreed to grant back to X title to or an exclusive license for any new patents or know-how the local firm may obtain or develop related to the licensed technology rights. The local firm has agreed to pay X a royalty.[129]

The Guide "questions the need for and appropriateness of exclusive grantback provisions"[130] and suggests that an exclusive grantback may be illegal when the licensee is a leading firm in its country, it is capable of competing in the United States, and the exclusive grantback broadly includes any new patent or know-how related to the licensed technology. When this is the case, the grantback clause may enable the licensor to "carve out for [itself] broad spheres of territorial and market exclusivity affecting U.S.

---

126. Remarks of A.B. Lipsky, Jr., *supra* note 23, at 55,989. It may be the case that the package license is in fraud of the foreign government's regulations because the government of X allows only a specified return on each patent. The package was a method to circumvent government policy. If the package license were otherwise illegal under United States law, it would be particularly inappropriate to allow invocation of the foreign government's regulations as a defense.

127. *See, e.g.*, American Sec. Co. v. Shatterproof Glass Corp., 268 F.2d 769, 777 (3d Cir.), *cert. denied*, 361 U.S. 902 (1959).

128. *See supra* text accompanying note 5.

129. GUIDE, *supra* note 2, at 42.

130. *Id.*

commerce. [The restriction] may isolate the U.S. market from significant import competition from a leading foreign firm."[131] On the other hand, a grantback obligation, even an exclusive grantback, is likely to be reasonable and thus legal where the obligation is narrowly defined, limited to the term of the original patent, and limited to improvement patents that could not be used alone without infringing the original licensed patent.[132]

Current Justice Department officials agree that exclusive grantbacks have the "troublesome . . . tendency to reduce the incentives of licensees to engage in their own inventive activity, and to guarantee the licensor that its licensee-competitors will obtain no unique advantage over it."[133] The Department further agrees that, in the extreme case, when an exclusive grantback provision is in licenses granted to most of the significant actual or potential competitors of the patentee, and when it applies to all related technology, whether or not the subject of the grantback is an improvement to the patent, the practice would be objectionable.[134] "Between the extremes, our approach must necessarily constitute a fact-sensitive and careful evaluation of the risks that the incentives to invent have been sacrificed to a degree unnecessary for adequate exploitation of the patentee's monopoly rights."[135]

The Guide and current policy thus seem remarkably similar. One would expect, however, that current enforcement authorities would place great emphasis on market questions. What is the market? What are the buyers' alternatives? Are producers few? Who are the potential entrants? Are barriers high? These questions, which are so central to currently accepted modes of analysis, are not even posed in the statement of Case I.

I. Case J: Exclusive Distributorship

USC and GAG are substantial, nondominant manufacturers of machine tools within the United States and Germany, respectively. Their lines of tools are essentially complementary, but a few of their products are directly interchangeable. Neither makes substantial sales in the home country of the other. USC wishes to appoint GAG as its exclusive distributor in the European Com-

131. *Id.* at 43.
132. *Id.*
133. Remarks of A.B. Lipsky, Jr., *supra* note 23, at 55,988.
134. *Id.*
135. *Id.*

mon Market, and GAG wishes to appoint USC as its exclusive distributor in North America. The appointment will be for a term of five years. Each would prohibit the other forty distributors of its products worldwide from re-exporting its products into either the Common Market or the United States. Each recognizes that the other, as a distributor, is not likely to promote sales of the imported products that are competitive with products produced by the distributor. Nevertheless, each believes that its local exports will be greater if sales are promoted by a well-established distributor than if it were to distribute through an independent firm.[136]

Is the agreement lawful? The Guide answers no, in light of then-existing law.[137] It interprets the arrangement as a territorial allocation between substantial manufacturers which can compete in the territory of the other, and states that the exclusive appointment and the agreement to restrict exports by other distributors fall within the per se rule of *Timken*,[138] *Topco*,[139] and *Schwinn*.[140] The Guide suggests that the arrangement might be treated differently if the competitive products were excluded from the exclusive distributorship, and that an even safer course would be for each manufacturer to appoint someone other than a competitor as its exclusive foreign distributor.[141]

Changes in the law since the Guide was issued, particularly the overruling of *Schwinn* by *GTE Sylvania*,[142] would require a different result today. To the extent that the restraint is vertical, as it appears to be, the entire arrangement will be judged under the rule of reason and probably will be legal unless it restrains interbrand competition.[143] The Justice Department would ask the following questions, focusing on the companies' tool lines that are competitive: Is the American market highly concentrated? Does it have high barriers to entry and low elasticity of demand? Is GAG one of few substantial likely entrants into the United States mar-

---

136. GUIDE, *supra* note 2, at 45.
137. *Id.* at 46.
138. Timken Roller Bearing Co. v. United States, 341 U.S. 593, 596 (1951).
139. United States v. Topco Assocs., Inc., 405 U.S. 596 (1972).
140. United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), *overruled*, Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).
141. GUIDE, *supra* note 2, at 47.
142. *See supra* note 80.
143. *See Continental T.V., Inc.*, 433 U.S. 36; *In re* Beltone Elec. Corp., 3 TRADE REG. REP. (CCH) ¶ 21,934 (July 6, 1982).

ket, and would it have entered as an effective independent force in the United States market but for the exclusive distributorship agreement? Only if all of the answers are in the affirmative would the Justice Department have any concerns about the exclusive distribution.[144] If all of the questions are answered in the affirmative, the elimination of GAG as an independent competitor in the United States might facilitate collusion or remove an important opportunity to dissipate collusion. Otherwise, the arrangement would be viewed as pro-competitive; the whole point of the arrangement was to sell more, not less, and each party believed that this would be the result.[145]

The parties also agreed to restrict exports by their other distributors. Most importantly, GAG agreed that none of GAG's German products will be re-exported to the United States. This undertaking was part of a vertical agreement whereby GAG induced USC to work the territory more fully and to promote GAG's product without fear that its promotional efforts would be the subject of a free ride by intrabrand competitors. Again, unless conditions for collusion are present, and this does not appear to be the case, the Justice Department would not disapprove the restraint.

J. Case M: Political Risk Insurance

Four United States companies—A, B, C, and Maverick— operate oil concessions in an African country and in a Latin American country. They are concerned about the long-term stability of their operations and about their bargaining position with both governments. They are also concerned about continued access to low sulfur oil from the African country because they must have this low sulfur oil to comply with environmental standards, and substitutes are scarce. A, B, C, and two major Western European companies that operate concessions in the African country agree to form a joint venture company incorporated in the Bahamas and called Oil Guarantee Ltd. Each member gives backup commitments to the other members by providing for a "pool" and

144. *See* 1982 Merger Guidelines, *supra* note 22, at 39-43.

145. Filling out a line of complementary products may increase efficiencies, particularly where buyers often need either a full line or several products within a line. To the extent that USC will probably not push the few competitive tools of GAG, the consumer is protected by the competition offered by the tools of other manufacturers.

guaranteeing that each member is entitled to a pro rata share of that pool based on prior production percentages.[146] Each member thereby strengthens its bargaining position against the host governments. Maverick has not been included in this joint venture because A, B, and C wished to exclude it. Maverick "has been an unpredictable factor in the industry and an important source of supply to independent refiners in the United States."[147]

The Guide notes that the joint venture was in essence reasonable. It was reasonably necessary for "the sharing of large and unusual risks."[148] Moreover, it imposes no impermissible collateral restraint on any individual member's ability to compete.[149] The Guide suggests, however, that the joint venturers should establish a termination date to avoid the risk that the joint venture might remain as "a forum for cooperation among its competitor-members after its original purposes pass."[150]

Is the joint venture an essential facility which places the excluded firm "at a serious disadvantage in its efforts to import oil and compete in the United States?"[151] If so, the Guide says, exclusion of Maverick would constitute a violation of section 1 of the Sherman Act, and the joint venturers must give Maverick access on equitable terms.[152] The question whether the joint venture is an essential facility "will depend on how much it adds to the members' ability to bargain with the foreign government and to enter into . . . contracts for delivery of oil to U.S. customers."[153] Moreover, says the Guide, if Maverick was excluded as punishment for its independent competitive tactics, this fact would tend to rebut any good faith defense on the part of the joint venturers, and would be an additional relevant factor in favor of compulsory access for Maverick.

---

146. The GUIDE may have reference to a political risk insurance pool such as that formed by United States oil companies having concessions in Libya. The companies agreed that, if the concession of any one company was nationalized, the victim of the nationalization would receive a backup supply from a pool consisting of oil produced in Libya by all other members of the pool. *See* Hunt v. Mobil Oil Corp., 550 F.2d 68 (2d Cir. 1977), *cert. denied,* 434 U.S. 984 (1979).

147. GUIDE, *supra* note 2, at 57.

148. *Id.*

149. *Id.* at 58.

150. *Id.*

151. *Id.* at 59.

152. *Id.*

153. *Id.*

Current Justice Department analysis of the essence of the transaction would be similar. The only real concern regarding formation of the joint venture is whether it will be used as a forum for cooperation among competitors in a concentrated, high-barrier United States market. This concern can be addressed by precautions against opportunities for collusion.

Current Justice Department officials would formulate the access question differently from the Guide, but they could reach the same result. Justice Department officials would bridle at the suggestion that a joint venture which places a firm at a "serious disadvantage" becomes, for that reason, an essential facility to which all competitors must have access.[154] If the exclusion is not likely to affect the price of oil in the United States, the Department would not have an antitrust concern. The exclusion would be likely to affect the price of oil in the United States if: the United States market is highly concentrated; Maverick is a disruptive force in the market and tends to destabilize a cartel; the low sulfur African oil is a scarce and necessary input unavailable elsewhere; and, by excluding Maverick, A, B, and C significantly increase an already significant risk that Maverick will lose its access to the low sulfur African oil and thus eliminate Maverick as an important competitor.[155]

If, on the other hand, the exclusion merely harms a competitor (Maverick) without harming competition and the consumers in the United States (because competition in the United States market is sufficient to guard against cartel behavior), the current Justice Department is not likely to have any antitrust objections; it will leave Maverick to its own remedies.[156]

Application of the Foreign Trade Antitrust Improvements Act to the facts of Case M confirms and complements the Guide's analysis. Even if the joint bargaining by the five major oil compa-

154. *See* 1981 Interview with William F. Baxter, *supra* note 15, at 153, 155.

155. *See* 1982 Merger Guidelines, *supra* note 22, at 37. In determining whether a merger of competitors is collusive, the Department of Justice considers the following factor, among others: "[Whether] the firm to be acquired has been an unusually disruptive and competitive influence in the market. Before invoking this factor, the Department will determine whether the market is one in which performance might plausibly deteriorate because of the elimination of one disruptive firm." *Id.*

156. *See* Products Liab. Ins. Agency, Inc. v. Crum & Forster Ins. Cos., 1982-2 Trade Cas. (CCH) ¶ 64,813 (7th Cir. 1982) (reflecting the antitrust philosophy articulated by officials of the Administration).

nies was undertaken solely to extract better terms from two foreign governments, the joint venture would not consitute a price-fixing violation under section 1 of the Sherman Act if the only direct, substantial, and reasonably foreseeable effect was on the foreign governments and their citizens.[157] On the other hand, even if the joint venture reflects a legitimate pooling of risks, which appears to be the case, it will nonetheless run afoul of the Sherman Act if its operation has a direct, substantial, and reasonably foreseeable spill-over effect on the price of the oil shipped back to the United States or otherwise on competition within the United States. The parties, however, should be able to protect adequately against this risk by structural precautions. Finally, in connection with Maverick's claim of exclusion, section 7 of the Sherman Act gives no protection, and the usual substantive principles apply.[158]

The parties to this joint venture would not have the right to seek an export trade certificate of review from the Secretary of Commerce under the procedure established by the Export Trading Company Act because the procedure is applicable only to export activity and is not available in cases in which the activity is expected to result in the sale of goods or services in the United States.[159]

IV. Conclusion

A comparison of current enforcement policy with the 1977 Guide leads to the following conclusions. The Justice Department of the early 1980s is even more determined than was the Justice Department of 1977 to facilitate, and not to abort, exports and investment abroad. Its more permissive policy flows from (1) its view that private business decisions are nearly always efficiency-producing, and therefore should be viewed favorably, (2) its view that the sole target of antitrust law should be inefficiency, (3) its definition of "inefficient transactions" as only those that artificially reduce output, and (4) case law developed over the past eight years that stresses the role of economic analysis in antitrust law.

Few transactions by United States producers designed to facilitate exports, marketing, and investment abroad are likely to

157. *See supra* note 5 (§ 402 of Pub. L. No. 97-290 (Oct. 8, 1982) adding § 7 to the Sherman Act)).

158. *Id.*

159. *See supra* note 7.

lessen output in a way that impacts upon United States consumers. Thus, Justice Department policy of the early 1980s signals a green light for exports and foreign investment.