NOTES

INTERNATIONAL IMPLICATIONS OF THE 1982 MERGER GUIDELINES

I. INTRODUCTION

On June 14, 1982 the United States Department of Justice (Department) issued a new set of guidelines[1] designed to outline the enforcement policy of the Department concerning acquisitions and mergers (hereinafter referred to collectively as mergers)[2] under section 7 of the Clayton Act[3] or section 1 of the Sherman Act.[4] The *1982 Guidelines* replaces prior guidelines issued in 1968[5] and is designed to reflect changes in "economic thinking and judicial attitudes" that have rendered the *1968 Guidelines* obsolete in important areas,[6] including relevant market definition.[7]

While the primary impact of the new guidelines will be felt domestically, their international effect is likely to be substantial, given the historically aggressive extraterritorial application of the federal antitrust laws,[8] the annually large number of mergers in-

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[1] UNITED STATES DEPARTMENT OF JUSTICE MERGER GUIDELINES (1982), *reprinted in* TRADE REG. REP. (CCH) No. 546, at 9-54 (June 16, 1982) [hereinafter cited as 1982 GUIDELINES].

[2] *Id.* at 11.

[3] 15 U.S.C.A. § 18 (1973). Section 7 of the Clayton Act of 1914 was designed to deal with problems of economic concentration which the nation's first antitrust law, the Sherman Act of 1890, had failed to combat effectively. Mergers subject to section 7 are prohibited if their effect "may be substantially to lessen competition, or to tend to create a monopoly." *Id.*

[4] 15 U.S.C.A. § 1 (1973). The Sherman Antitrust Act was enacted in the wake of widespread public concern over economic abuses perpetrated by trusts and other business combinations in the late 19th century. Mergers subject to section 1 of the Sherman Act are prohibited if they constitute a "contract, combination . . . , or conspiracy in restraint of trade." *Id.*

[5] UNITED STATES DEPARTMENT OF JUSTICE MERGER GUIDELINES (1968), *reprinted in* 2 TRADE REG. REP. (CCH) ¶4510, at 6881-21 to 6889 (Aug. 9, 1982) [hereinafter cited as 1968 GUIDELINES].

[6] William French Smith, U.S. Attorney General, *Introduction to Merger Guidelines*, June 14, 1982, *reprinted in* TRADE REG. REP. (CCH) No. 546, at 5, 6 (June 16, 1982). French views the *1982 Guidelines* as "an evolutionary change— not a revolutionary change." *Id.*

[7] *See Special Analysis, 1982 Department of Justice Merger Guidelines*, ANTITRUST REP. (MB) 12, 14 (July 1982) [hereinafter cited as *Special Analysis*].

[8] This policy of the United States has been much criticized on an international basis. *See, e.g., British Minister Criticizes Exercise of Extraterritorial Jurisdiction by U.S.*, 43 ANTITRUST & TRADE REG. REP. (BNA) No. 1088, at 861-62 (Nov. 4, 1982). For a discussion of

volving United States and foreign firms,[9] and the expressed intention of the current administration to have international competition play a more prominent role in the analysis of mergers.[10] Significantly, one of the first Department challenges under the *1982 Guidelines* involved the acquisition of a British firm by a United States corporation,[11] which reflects the scrutiny to which

both United States and foreign viewpoints on this topic, see generally PERSPECTIVES ON THE EXTRATERRITORIAL APPLICATION OF U.S. ANTITRUST AND OTHER LAWS (J. Griffin ed. 1979). *See also* Mirabito & Friedler, *The Commission on the International Application of the U.S. Antitrust Laws: Pulling in the Reins?*, 6 SUFFOLK TRANSNAT'L L.J. 1, 3-6 (1982) (analysis of proposed legislation).

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MERGER AND ACQUISITION ACTIVITY

	1st Quarter 1981	2nd Quarter 1981	3rd Quarter 1981	4th Quarter 1981
U.S. acquiring U.S.	444	472	506	542
Non-U.S. acquiring U.S.	57	74	65	70
U.S. acquiring Non-U.S.	20	17	21	25
	1st Quarter 1982	2nd Quarter 1982	3rd Quarter 1982	4th Quarter 1982
U.S. acquiring U.S.	526	493	439	502
Non-U.S. acquiring U.S.	65	51	67	40
U.S. acquiring Non-U.S.	43	35	33	27

(Includes only transactions valued at $1 million or more in cash, market value of capital stock exchanged or debt securities.)

Adapted from *For the Record*, 17 MERGERS AND ACQUISITIONS 56 (Spring 1982); *For the Record*, 17 MERGERS AND ACQUISITIONS 60 (Fall 1982); *For the Record*, 17 MERGERS AND ACQUISITIONS 72 (Winter 1983); 18 MERGERS AND ACQUISITIONS 65 (Spring 1983).

[10] *See, e.g., Baxter Seeks Greater Consideration of International Competition in Merger Cases*, [Jul.-Dec.] ANTITRUST & TRADE REG. REP. (BNA) No. 1030, at A-17 to A-19 (Sept. 3, 1981) (head of Department's Antitrust Division emphasizing role of international competition in formulating new guidelines); *Interview with William F. Baxter*, 51 ANTITRUST L.J. 23, 27 (1982) (explaining role of international competition in market definition).

[11] United States v. American Brands, Inc., No. 82 Civ. 5020 (S.D.N.Y. filed Aug. 2, 1982). *See Justice Attacks American Brands' Acquisition of British Company*, 43 ANTITRUST & TRADE REG. REP. (BNA) No. 1076, at 291 (Aug. 5, 1982). American Brands, Inc. is a holding company involved in the manufacture and sale of home and office staplers through its wholly-owned subsidiaries, Swingline Inc. and Ace Fastener Co. The Department's complaint alleged that American Brands' acquisition of Ofrex Group, Ltd., a British office supply manufacturer and distributor that makes sales in the United States, violated section 7 of the Clayton Act because the acquisition may tend to substantially lessen competition or create a monopoly in the production and sale of home and office staplers. In 1980 American Brands, the dominant producer of home and office staplers in the United States market, accounted for approximately 67% of the market while Ofrex, the fourth largest seller, accounted for 6% of the market. In challenging this merger, the Department specifically used the *1982 Guidelines* in defining the relevant market and analyzing market concentration under the Herfindahl-Hirschman Index. For discussion of the Herfindahl-Hirschman Index, see *infra*

international mergers will be subject under the new guidelines.

This Note will trace briefly the development of the *1982 Guidelines* and analyze their anticipated impact on international corporate operations. Emphasis will be placed on evaluating the effect of the *1982 Guidelines* on the crucial issues of geographic and product market definition and of the degree to which these guidelines achieve the Department's goal of reducing uncertainty in the field of international mergers.[12]

II. HISTORY

The first serious efforts to set forth comprehensive merger guidelines began in 1955.[13] Severe criticism of the impracticality of this early attempt to predict the effect of mergers through extensive economic analysis[14] was followed by judicial adoption of market share analysis as the primary consideration in merger analysis.[15] Emphasis on market structure created a need for additional guidance for lawyers and businessmen contemplating mergers.[16] Responding to this need, the Department issued merger guidelines on May 30, 1968.[17]

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notes 30-31 and accompanying text. Subsequently, American Brands agreed to divest its ownership and control over its wholly owned subsidiary Ace Fastener Co., a division of Swingline, Inc., to settle the Department's challenge. *See American Brands Agrees to Divest Stapler Producer to Settle §7 Suit*, 43 ANTITRUST & TRADE REG. REP. (BNA) No. 1085, at 748 (Oct. 14, 1982).

[12] *See* Smith, *supra* note 6 (outlining goals of the new guidelines).

[13] *See* REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS (1955). The *Report* lists over 50 factors to be considered in the analysis of mergers. *Id.* at 123, 125-27. For a more detailed discussion of the *Report*, see Edwards, Joffe, Kolasky, McGowan, Mendez-Penate, Ordover, Proger, Solomon, & Toepke, *Proposed Revisions of the Justice Department's Merger Guidelines*, 81 COLUM. L. REV. 1543, 1548 (1981) [hereinafter cited as Edwards]. *See also Symposium on the Report of the Attorney General's National Committee to Study the Antitrust Laws*, 7 A.B.A. SEC. OF ANTITRUST PROC. 12 (1955-56).

[14] *See* Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226 (1960). Professor Bok criticized the "dizzying list of factors" used in the *Report* and its failure to preserve "a workable system of judicial administration and enforcement." *Id.* at 256-57. Instead Bok suggested a more practical approach based on market shares. *Id.* at 309.

[15] *See, e.g.*, United States v. Philadelphia National Bank, 374 U.S. 321, 362-67 (1963); United States v. Pabst Brewing Co., 384 U.S. 546, 550-52 (1966); United States v. Von's Grocery Co., 384 U.S. 270, 272-74 (1966).

[16] *See* E. KINTNER, PRIMER ON THE LAW OF MERGERS 213 (1973) (discussion of the need for guidance in this area).

[17] For further discussion of the events surrounding the issuance of the *1968 Guidelines* and the initial reaction to them, see *The Merger Guidelines*, 37 ANTITRUST L.J. 872, 874 (1968).

The *1968 Guidelines* relied extensively on highly restrictive market share statistics in evaluating the potential anticompetitive effects of horizontal, vertical, and conglomerate mergers under the Clayton Act.[18] The *1968 Guidelines* was used extensively until the late 1970's, when its use declined due to changing judicial attitudes toward antimerger enforcement.[19]

In 1977 the Department issued its *Antitrust Guide for International Operations (International Guide)*,[20] designed "to provide a working statement of operating government policy" and intended to help businesses plan international transactions that would not invoke Department challenges.[21] Although the *International Guide* purported to follow the format of the *1968 Guidelines*,[22] in fact it did not. While the *1968 Guidelines* consists of specific and restric-

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[18] Horizontal mergers, i.e. mergers between direct competitors in the same product line and associated geographic markets, are likely to be challenged under the *1968 Guidelines* at market share levels as low as 5% for the acquiring firm or the acquired firm. 1968 GUIDELINES, *supra* note 5, at 6883-84. With respect to vertical mergers, i.e. in which one company acquires another who is a customer or supplier of the acquiring firm, challenges may be issued at levels as low as 10% (supplier) and 6% (customer) of the market. *Id.* at 6885-86. Conglomerate mergers, i.e. mergers which involve non-competitors and no customer-supplier relationship, are likely to be challenged when they involve a likely entrant to the market and any firm with a 10% or greater share of the market, provided that that firm is one of the four largest firms and that the shares of the eight largest firms amount to 75% or more. *Id.* at 6887-88. Additionally, the *1968 Guidelines* indicates that where factors such as high market concentration (a market where the shares of the four largest firms account for 75% or more of the total) or a danger of reciprocity (favoring one's customer when making purchases of a product which is sold by the customer) exist, there is a greater chance of a challenge. *Id.* at 6884, 6888. Defenses to a charge of illegality are limited to the failing company doctrine and to proving economies. The former defense is used when one or more of the parties to a merger was in a failing financial condition prior to the merger. Thus it is argued that the merger should be allowed, since without it one or more of the merging parties would be doomed to financial ruin. The latter defense, proving economies, or showing improvements in efficiency through the merger, is applicable only in exceptional circumstances. *Id.* at 6884-885. *See also* Edwards, *supra* note 13, at 1545; *Special Analysis, supra* note 7, at 13 (concerning restrictiveness of the *1968 Guidelines*).

The *1968 Guidelines* notes that while merger challenges may be made under the Sherman Act, the majority of such challenges will fall under section 7 of the Clayton Act. *See* 1968 GUIDELINES, *supra* note 5, at 6881.

[19] Although the *1968 Guidelines* was intended to reflect the policies of the Department exclusively, the Federal Trade Commission (FTC) relied upon them as well. Edwards, *supra* note 13, at 1545-46. *See also Special Analysis, supra* note 7, at 13 (discussion of declining use of the *1968 Guidelines* in the 1970's).

[20] UNITED STATES DEPARTMENT OF JUSTICE, ANTITRUST DIVISION, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS (1977) [hereinafter cited as INTERNATIONAL GUIDE].

[21] *Id.* at 1.

[22] *See* Fugate, *The Department of Justice's Antitrust Guide for International Operations*, 17 VA. J. INT'L L. 645 (1977).

tive limitations,[23] the *International Guide* provides a much more liberal and generalized approach, adopting no strict statistical standards and setting forth a policy of nondiscrimination against international operations.[24] By the late 1970's anti-merger regulation, especially in the international area, was clouded by inconsistent departmental guidelines and evolving judicial standards.

Increasing denunciation of the theories underlying the *1968 Guidelines*,[25] coupled with the failure of the Department to periodically update them,[26] prompted the Department to draft a wholly new set of merger guidelines.[27] The *1982 Guidelines* represents over a year of preparation and internal comment.[28]

III. ANALYSIS OF THE 1982 GUIDELINES

A. *General Considerations*

The *1982 Guidelines*, although representing modern economic theory, retains the same basic approach to the analysis of mergers as the *1968 Guidelines*. The relevant market in which the effects of the merger are to be measured is first defined, then the market shares of the merging firms and the other firms within the relevant market are calculated, and the resulting figures are used to measure the level of market concentration within the relevant market. The decision to challenge a merger is largely based on the level of market concentration.

While the procedural aspects of the *1982 Guidelines* are not

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[23] *See supra* note 18 and accompanying text.

[24] *See* INTERNATIONAL GUIDE, *supra* note 20, at 15-18. *See also* Fugate, *supra* note 22, at 646 (comparison of *1968 Guidelines* and the *International Guide*). For additional analysis of the *International Guide*, see generally Griffin, *A Critique of the Justice Department's Antitrust Guide for International Operations*, 11 CORNELL INT'L L.J. 215 (1978); Baker, *Critique of the Antitrust Guide: A Rejoinder*, 11 CORNELL INT'L L.J. 255 (1978); Seki, *The Justice Department's New Antitrust Guide for International Operations—A Summary and Evaluation*, 32 BUS. LAW. 1633 (1977).

[25] *See* Edwards, *supra* note 13, at 1550-51. The basic assumption underlying reliance on concentration statistics, that market performance is tied to market concentration, has been challenged by many scholars. *See, e.g.*, Demsetz, *Industry Structure, Market Rivalry and Public Policy*, 16 J.L. & ECON. 1 (1973); Brozen, *The Concentration—Collusion Doctrine*, 46 ANTITRUST L.J. 826 (1977).

[26] *See* 2 TRADE REG. REP. (CCH) ¶4500, at 6881 (Aug. 9, 1982). While it was clearly intended that the *1968 Guidelines* be subjected to periodic revision, this never occurred. *See* Joffe, *Guidelines—Past, Present and Future*, 50 ANTITRUST L.J. 187, 196 (1981).

[27] *See Justice Department's New Merger Guidelines May be Ready By Winter, Baxter Indicates*, [Jul.-Dec.] ANTITRUST & TRADE REG. REP. (BNA) No. 1027, at A-4 (Aug. 13, 1981) [hereinafter cited as *Baxter Interview*].

[28] *See Special Analysis*, *supra* note 7, at 14.

new, there are important technical and policy changes. Under the *1982 Guidelines*, the Department will not challenge vertical or conglomerate mergers in the absence of horizontal effects such as the elimination of potential entrants to a market and the creation of barriers to entry.[29] The *1982 Guidelines* also adopts the Herfindahl-Hirschmann Index (HHI) as a standard for measuring market concentration and for issuing challenges.[30] Basically, the HHI is the sum of the squares of the market shares of all the firms in the relevant market.[31] The HHI is preferable to the more established four and eight firm formulas[32] because it recognizes firms outside the top group and gives proportionately greater weight to the larger firms, corresponding to their relative importance in any collusive activities.[33] The HHI is primarily used to measure the effects of horizontal mergers. Such mergers will be challenged according to anticipated changes in the HHI that arise following the merger.[34] The effect of this standard is to create "safe harbors" in which challenge by the Department is unlikely, thereby increasing certainty for those persons contemplating mergers.

B. *Market Definition Under the* 1982 Guidelines

1. *Introduction*

The most critical area in international merger analysis is market

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[29] *See* 1982 GUIDELINES, *supra* note 1, at 29-31, 34. This represents the current view of the Department and of leading economists that the only significant anticompetitive effects from mergers are horizontal in nature. *See* R. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 231-38 (1978); *Baxter Interview*, *supra* note 27, at A-5.

[30] 1982 GUIDELINES, *supra* note 1, at 17.

[31] For example, a market consisting of four firms with market shares of 30%, 30%, 20%, and 20% has an HHI of 2600 ($30^2 + 30^2 + 20^2 + 20^2 = 2600$). The HHI ranges from 10,000 in the case of a pure monopoly to a number approaching zero in the case of an atomistic market. Although it is desirable to include all firms in the calculation, lack of information about small firms is not critical because such firms do not affect the HHI significantly. *Id.*

[32] For example, the *1968 Guidelines* considered only the market shares of the four largest firms in the relevant market for purposes of determining market concentration. 1968 GUIDELINES, *supra* note 5, at 6884.

[33] *See* 1982 GUIDELINES, *supra* note 1, at 27.

[34] The general standards set forth are as follows:

a). Post-merger HHI below 1000 (unconcentrated market): Challenge unlikely.
b). Post-merger HHI between 1000 and 1800 (moderately concentrated):
  1) Challenge unlikely where HHI increase is less than 100 points.
  2) Challenge likely where HHI increase is more than 100 points.
c). Post-merger HHI over 1800 (highly concentrated):
  1) Challenge unlikely where HHI increase is 50-100 points.
  2) Borderline situation where HHI increase is 100 points or more.

Id. at 29-30.

definition.[35] The *1982 Guidelines* emphasizes this process and, unlike earlier procedures which largely ignored the international arena, introduces a variety of updated analytical techniques.

The "unifying theme" of the *1982 Guidelines* is the prevention of mergers which create, enhance, or facilitate the existence of "market power."[36] Market power is defined as the ability of a firm (or group of firms acting in concert) profitably to maintain prices above competitive levels for a significant length of time.[37]

In order to ascertain the effects a merger may have on market power, the *1982 Guidelines* sets forth standards to define and measure the market for each product or service (hereinafter "product") of the merging firms.[38] A market is formally defined by the *1982 Guidelines* as follows:

> [a] market consists of a group of products and an associated geographic area such that (in the absence of new entry) a hypothetical, unregulated firm that made all the sales of those products in that area could increase its profits through a small but significant and non-transitory increase in price (above prevailing or likely levels).[39]

The *1982 Guidelines* then turns to an analysis of product and geographic markets.

2. *Product Market Definition: Background*

Product market definition has been of primary concern in both Sherman Act and Clayton Act cases. Product market definition in cases involving foreign commerce generally raises questions similar to those arising in the domestic context.[40] In *United States v. E.I.*

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[35] Market definition has been viewed by the courts as a process of extreme importance because "unless this task is well done, the results will be distorted in terms of the conclusion as to whether the law has been violated and what the decree should contain." United States v. Grinnell Corp., 384 U.S. 563, 587 (1966) (Fortas, J., dissenting). *See also* R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 125 (1976) (importance of market definition in merger cases).

[36] 1982 GUIDELINES, *supra* note 1, at 12.

[37] *Id.* at 12-13; Landes & Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937 (1981). The creation of market power is to be avoided since it transfers wealth from buyers to sellers and results in a misallocation of resources. 1982 GUIDELINES, *supra* note 1, at 13. Proof of market power is vital to a finding of monopolization in violation of section 2 of the Sherman Act. Furthermore, the main purpose of section 7 of the Clayton Act is to prevent mergers that increase market power. *See* Landes & Posner, *supra*, at 937.

[38] 1982 GUIDELINES, *supra* note 1, at 13.

[39] *Id.*

[40] *See* 1 J. ATWOOD & K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 208 (2d

Du Pont de Nemours & Co. (Cellophane case),[41] the Supreme Court set forth what has come to be known as the "reasonable interchangeability" test: The "market which one must study . . . will vary with the part of commerce under consideration. The tests are constant. That market is composed of products that have reasonable interchangeability for the purpose for which they are produced—price, use and qualitites considered."[42] Additional factors used in determining the relevant product market were set forth in *Brown Shoe Co. v. United States.*[43] These factors include: 1) the product's peculiar characteristics and uses, 2) unique production facilities, 3) sensitivity to price changes, and 4) industry or public recognition of the interchangeability.[44] The Court has also held that the relevant product market need not be limited to a single industry where inter-industry competition includes products of different characteristics but similar uses in a single market.[45] While the reasonable interchangeability test is widely used by United

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ed. 1981).

[41] 351 U.S. 377 (1956).

[42] *Id.* at 394, 409. The primary legal issue in this Sherman Act section 2 case was whether the relevant market consisted of cellophane or flexible packaging material in general. The Court held that the applicable market covered all flexible packaging material including aluminum foil, glassine, and polyethylene, based on reasonable interchangeability, or cross-elasticity of demand. *Id.*

Cross-elasticity of demand is defined as the effect on the quantity demanded of one product given a change in the price of another product. A high cross-elasticity of demand indicates that the products are good substitutes at the current price. *See* Landes & Posner, *supra* note 37, at 960 n.39.

For a more complete treatment of the *Cellophane* case, see E. SINGER, ANTITRUST ECONOMICS AND LEGAL ANALYSIS 60-65 (1981).

[43] 370 U.S. 294 (1962). The Court used this language in adopting the *Cellophane* test: "The outer boundaries of a product market are determined by the reasonable interchangeability of use or cross-elasticity of demand between the product itself and substitutes for it." *Id.* at 325.

[44] *Id.*

[45] United States v. Continental Can Co., 378 U.S. 441 (1964). The Court stated: "Thus though the interchangeability of use may not be so complete and the cross elasticity of demand not so immediate as in the case of most intraindustry mergers, there is over the long run the kind of customer response to innovation and other competitive stimuli that brings the competition between these two industries within § 7's competition-preserving proscriptions." *Id.* at 455. In the *Continental Can Case*, the second largest metal container manufacturer bought the third largest glass container manufacturer (Hazel-Atlas Glass Co.). The Court analyzed the historical competition among glass, metal, and plastic containers and found that the reasonable interchangeability test was met. *Id.* at 447-58. Note that in so ruling the Court in effect changed what started out as a conglomerate (between non-competitors) merger into a horizontal (between direct competitors) merger. *See* E. KINTNER, *supra* note 16, at 227. The ruling in *Continental Can* was made over strong dissent by Justice Harlan who found the combination of glass and metal containers into a single market "completely fanciful." 378 U.S. 441, 469-70.

States courts, it has been disregarded where other factors such as price and market dominance overshadow the products' interchangeability.[46]

Product market definition under the *1968 Guidelines* utilized a version of the reasonable interchangeability test.[47] This market definition section was soundly criticized as "so loose and unprofessional as to be positively embarassing."[48]

3. *Product Market Definition Under the* 1982 Guidelines

The first step in market definition under the *1982 Guidelines* is to decide which product(s) to include in the relevant market of the merging firms. The relevant product market is defined as "a group of products such that a hypothetical firm that was the only present and future seller of those products could raise price [sic] profitably."[49] The method of product market definition under the new guidelines involves the establishment of a provisional market which includes those products that the merging firms' customers view as good substitutes at prevailing prices.[50] This provisional market is subject to expansion or contraction in light of any relevant evidence dealing with product substitutability.[51] Products will

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[46] *See, e.g.*, United States v. Aluminum Corp. of America, 377 U.S. 271 (1964). The Court found that insulated aluminum cable and insulated copper cable did not constitute a single product market. This finding was made despite evidence that: the two products were functionally interchangeable by the users; the conductor cable industry did not differentiate between copper and aluminum insulated products; both could be produced interchangeably on the same machinery; and neither had distinct customers or specialized vendors. The Court noted that insulated aluminum conductor cable was generally priced 50 to 60% less than equivalent copper conductor and that the dominance of insulated aluminum conductor in the insulated overhead line market (75% of the total market) gave the product advantages such that separate product markets existed. *Id.* at 273-77.

[47] *See* 1968 GUIDELINES, *supra* note 5, at 6884.

[48] *Report of the Task Force on Productivity and Competition*, 2 ANTITRUST L. & ECON. REV. 13 (Spring 1969). For particular criticism, see R. POSNER, *supra* note 35, at 130-33.

[49] 1982 GUIDELINES, *supra* note 1, at 15. Prices could only be raised profitably where there were no readily available product alternatives because, given such alternatives, an attempt to raise prices would theoretically result in a buyer shift to products that were acceptable substitutes. *Id.* This is the economic theory of cross-elasticity of demand. *See* Landes & Posner, *supra* note 37, at 960 n.39.

[50] 1982 GUIDELINES, *supra* note 1, at 15.

[51] *Id.* at 17. Particular weight will be given to the following factors concerning product substitutability:

> (1) Evidence of buyers' perceptions that the products are or are not substitutes, particularly if those buyers have shifted purchases between the products in response to changes in relative prices or other competitive variables;(2) Similarities or differences between the products in customary usage, design, physical composition and other technical characteristics;(3) Similarities or differences in the price

also be added to the market if a significant percentage of buyers of products already included would be likely to shift to these additional products in response to a price increase.[52] In order to approximate this process, a 5% price increase is hypothesized, and the number of buyers likely to shift to the other products within a year is calculated.[53] This procedure is designed to eliminate the potential weakness in basing a product market solely on existing patterns of supply and demand where those patterns might change substantially due to a price increase.[54] The provisional market will be expanded, if necessary, until the profitability standard stated above is met.[55] At this point the product group is termed the "relevant product" market.[56]

Once the relevant product market is defined, the *1982 Guidelines* then identifies the firms that produce and sell the relevant product. In most cases, these will be the firms that currently produce and sell the relevant product.[57] However, the number of firms may be expanded in three circumstances: 1) where firms may use existing facilities to switch to production of the relevant product in response to a price increase,[58] 2) where recycled or reconditioned goods are good substitutes,[59] or 3) where the relevant product is produced only for internal consumption as part of a vertically integrated firm and may be induced by a price increase to sell in an outside market.[60]

Thus, in product market definition, the *1982 Guidelines* continues to follow the economic theory of cross-elasticity of demand as expressed in the earlier case law and guidelines as the reasonable interchangeability test, while it changes to meet the complaints of

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> movements of the products over a period of years; and(4) Evidence of sellers' perceptions that the products are or are not substitutes, particularly if business decisions have been based on the perceptions.

Id.

[52] *Id.* at 16.

[53] *Id.*

[54] *Id.* at 15.

[55] *Id.* at 16.

[56] *Id.* at 17 n.12.

[57] *Id.* at 18-19.

[58] *Id.* at 20.

[59] Firms that recondition or recycle such products will be included in the market. *Id.*

[60] The Department recognizes, however, that vertically integrated firms could actually frustrate an effort by the sellers of the relevant product to exercise market power through sales of relevant products. The Department will consider this in evaluating internally consumed production. *Id.* at 21 n.20.

critics, especially in the area of product substitution.[61] Perhaps the most distinctive feature is the hypothetical 5% price increase test. The principle of cross-elasticity of demand basically examines the effects of a small increase in price on the demand of a product and its substitutes. The 5% increase, while arguably somewhat arbitrary, is designed to replicate the effects of a small increase in price. Ostensibly, the application of this test will provide a practical standard that is economically defensible.[62]

4. *Geographic Market Definition: Background*

Geographic market definition has developed in a fashion similar to that of product market definition. In *Brown Shoe Co. v. United States*[63] the Court put geographic market definition into perspective:

> [J]ust as a product market may have Section 7 significance as the proper "line of commerce," so may a geographic submarket be considered the appropriate "section of the country." . . . Congress prescribed a pragmatic, factual approach to the definition of the relevant market and not a formal, legalistic one. The geographic market selected must, therefore, both "correspond to the commercial realities" of the industries and be economically significant. Thus, although the geographic market in some instances may encompass the entire Nation, under other circumstances it may be as small as a single metropolitan area.[64]

The following year, in *United States v. Philadelphia National Bank*,[65] the Court again emphasized the pragmatic nature of geographic market definition, noting that the geographic market does not necessarily coincide with where the parties do business, but instead is the area of competition in which the effect of the merger will be "direct and immediate."[66] Geographic market definition does not require a precise delineation by "metes and bounds," but

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[61] *See* R. POSNER, *supra* note 35, at 132. Professor Posner's main problem with product market definition under the *1968 Guidelines* was the lack of any reference to substitutes in production. The *1982 Guidelines* deals with this problem specifically by recognizing firms that do not presently produce the relevant product but would do so in response to a 5% price increase. *See* 1982 GUIDELINES, *supra* note 1, at 19-20.

[62] *See Antitrust Division's Chief Economist Defends Value of New Merger Guidelines*, 42 ANTITRUST & TRADE REG. REP. (BNA) No. 1070, at 1302 (June 24, 1982) (emphasizing practical value of this test).

[63] 370 U.S. 294 (1962).

[64] *Id.* at 336-37.

[65] 374 U.S. 321 (1963).

[66] *Id.* at 357.

only that the government prove the merger may have an anticompetitive effect somewhere in the United States.[67] The relevant geographic market has been described as the area "in which the seller operates, and to which the purchasers can practically turn for supplies"[68] and must take into account the area in which the relevant products are marketed by the acquired firm.[69]

While the Unitad States courts have thus presented a relatively liberal picture of geographic market definition domestically, they have been reluctant to extend the market beyond national boundaries.[70] This is apparently due to reading the language of the Clayton Act prohibiting those mergers which lessen competition "in any section of the country"[71] as precluding consideration of international markets. However, while the effects of a merger must be evaluated within the United States, there is no reason to exclude the definition of international markets in so far as the effects are felt within the country.[72]

A few courts have accepted this concept and have recognized markets extending beyond the United States. In *United States v. Standard Oil Co. (N.J.)*[73] the court enjoined the acquisition of the Potash Company of America by Standard Oil, a major purchaser of potash. While noting that the anticompetitive effect of the acquisition must be felt in the United States to constitute a violation of the Clayton Act, the court stated that "United States producers sell potash for consumption, not only in the United States, but also

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[67] United States v. Pabst Brewing Co., 384 U.S. 546, 549 (1965).

[68] United States v. Philadelphia National Bank, 374 U.S. 321, 359 (1963). *See also* Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 20 (1961) (similar test used in Sherman Act case).

[69] United States v. Marine Bancorporation, Inc., 418 U.S. 602, 620-21 (1961).

[70] *See, e.g.,* Platt Saco Lowell Ltd. v. Spindelfabrik Suessen-Schurr, 1978-1 Trade Cas. (CCH) ¶ 61,898 (N.D. Ill. 1977); United States v. International Tel. & Tel. Corp., 306 F. Supp. 766, 780 (Conn. 1969), *appeal dismissed,* 404 U.S. 801 (1971). *But see* Yoerg, *Foreign Entry and the Potential Competition Doctrine Under Section 7 of the Clayton Act,* 46 ANTITRUST L.J. 973, 990-91 nn.73-74 (1978) (citing cases suggesting worldwide market may be appropriate).

[71] Clayton Act, 15 U.S.C.A. §18 (West 1973).

[72] It seems to me that there has almost been a jurisprudential determination that the process of market definition steps at the water's edge whatever the realities. I have heard people ascribe this result, quite wrongly I think, to the language in Section 7. . . . It is true that Section 7 does only talk about competitive effects in the United States, but you cannot determine the competitive effects in the United States without looking at a properly defined market, and if a properly defined market is an international market, you have to look at the international market.

Interview with William F. Baxter, 51 ANTITRUST L.J. 23, 27 (1982). *See also* Yoerg, *supra* note 70, at 988-92 (espousing the same concept).

[73] 253 F. Supp. 196 (N.J. 1966).

in the rest of the Free World. Therefore, the market in which the potash producers must compete is measured by consumption in the United States and the rest of the Free World."[74] In another section 7 challenge, *United States v. Tracinda Investment Corp.*,[75] the court refused to enjoin the partial acquisition of Columbia Pictures by a firm which had a controlling interest in another major film producer. The *Tracinda* court found that the relevant geographic market in motion picture production and distribution was worldwide. This finding was based on the competition of foreign films within the United States, foreign distribution by United States firms, and the worldwide competition for supplies.[76]

The *1968 Guidelines* basically adopted the existing geographic definitions and did not deal specifically with the international market problem.[77]

5. *Geographic Market Definition under the* 1982 Guidelines

Geographic market definition under the *1982 Guidelines* begins by recognizing that a single firm may operate in a number of economically discrete geographic markets.[78] These geographic markets may be as small as a part of a city or as large as the entire world.[79] The Department defines the geographic market as "a geographic area such that a hypothetical firm that was the only present or future producer of the relevant product in that area could profitably raise price."[80]

The process used to define the geographic market begins with the establishment of a provisional market, based on the shipping patterns of the merging firms and their competitors.[81] The geographic market is then further defined by analyzing the effects of a hypothetical 5% price increase on this provisional market. If a firm outside the provisional market could readily respond to the price increase by providing the relevant product to buyers within the market in sufficient quantities and at comparable prices, an at-

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[74] *Id.* at 210.

[75] 477 F. Supp. 1093 (C.D. Cal. 1979).

[76] *Id.* at 1105. *See* Baker, *Market Definition and International Competition*, 15 N.Y.U.J. INT'L L. & POLITICS 377, 385-89 (1983) (discussion of *Standard Oil* and *Tracinda* and the recognition of international markets).

[77] *See* 1968 GUIDELINES, *supra* note 5, at 6883.

[78] 1982 GUIDELINES, *supra* note 1, at 21. The Department will determine the geographic market(s) for each product market of each merging firm.

[79] *Id.*

[80] *Id.* at 22.

[81] *Id.*

tempt to raise price would not be profitable. Thus the market would have been too narrowly defined.[82] The provisional market is subject to expansion in light of any relevant evidence until the profitability standard is met.[83] Where geographic price discrimination is possible,[84] more narrowly defined geographic markets oriented to those buyers who are subject to the exercise of market power will be established.[85]

The *1982 Guidelines* states that these geographic market standards will apply to both international and domestic markets.[86] This impact, however, will be tempered somewhat in its international application due to the existence of constraints not present in a purely domestic context.[87] Examples of such constraints include changes in exchange rates, tariffs, and general political conditions that may limit the ability of firms outside the United States to respond to domestic price increases.[88]

The new guidelines are structured along established geographic

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[82] *Id.* at 23.

[83] While consideration will be given to all relevant factors concerning geographic substitutability, weight also will be given to the following factors:

> 1) Evidence of buyers' actually having shifted their purchases among sellers at different geographic locations, especially if the shifts corresponded to changes in relative price or other competitive variables;
>
> 2) Similarities or differences in the price movements of the relative product in different geographic areas over a period of years;
>
> 3) Transportation costs;
>
> 4) Costs of local distribution; and
>
> 5) Excess capacity by firms outside the provisional market.

Id. at 23-24.

[84] An example of geographic price discrimination is "charging different prices net of transportation costs for the same buyers in different places." *Id.* at 24.

[85] *Id.*

[86] *Id.*

[87] *Id.* at 25.

[88] *Id.* at 24-25. While the *1982 Guidelines* does not provide specific examples of such barriers to foreign firms, it is assumed that these would include immigration laws, more stringent tax regulations controlling a foreign entity's United States operations, laws subjecting foreign assets to seizure in the event of a national emergency, and restrictions on foreign participation in the defense, communication, transportation, energy, banking, and insurance industries. Anti-dumping laws and other protectionist activities could also be factors. Export restrictions by the foreign firm's home nation as well as potential currency devaluation and other uncertainties of international trade may also be considered. Economic factors such as higher transportation costs and lack of familiarity with United States business practices could also be taken into account. *See* Yoerg, *supra* note 70, at 992-93 (suggesting that these factors be considered in challenges under section 7 of the Clayton Act). *See also* Almond & Goldstein, *Foreign Direct Investment in the United States: An Overview*, 2 N.C.J. INT'L L. & COM. REG. 153, 156-61 (1982) (further discussion of laws regulating foreign investment).

market notions, but also take into account suggestions made by scholars since the *1968 Guidelines* was issued.[89] The major changes from the *1968 Guidelines* come in the area of international geographic market definition. Apparently, the Department has been influenced in its thinking by prominent scholars who have suggested that when a foreign firm has some (non-trivial) sales in a market, all its sales, wherever made, should be considered a part of the market.[90] This would recognize the ability of the foreign firm to increase sales in the relevant market given a price increase.[91] This concept is reflected in the 5% hypothetical increase test and the explicit recognition by the *1982 Guidelines* of the importance of extranational competition.[92] This represents a compromise between excluding or including foreign production in market share calculations on the part of the Department leadership who were in basic agreement with the scholarly suggestions in this area, but were seeking a simple mechanism to reflect the concept in the *1982 Guidelines*.[93]

When foreign competition is considered, it will usually have the effect of enlarging the relevant market, thus making a finding of market power less likely. Correspondingly, fewer mergers should be challenged when the geographic market expands to include foreign competition. Once the relevant market is defined, the market shares are calculated by using the total sales or the total capacity of the appropriate firms.[94] The HHI is then employed to evaluate the market concentration and to determine if a challenge is appropriate.[95]

6. *International Impact of the* 1982 Guidelines

a. *Introduction*

The international impact of the *1982 Guidelines* is a function of both the specific provisions of the guidelines and the jurisdictional reach of the United States antitrust law. Unless a merger involving

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[89] *See, e.g.*, R. POSNER, *supra* note 35, at 13.

[90] Landes & Posner, *supra* note 37, at 964; Elzinga & Hogarty, *The Problem of Geographical Market Definition in Antimerger Suits,* 18 ANTITRUST BULL. 45, 72-80 (1973).

[91] Landes & Posner, *supra* note 37, at 963.

[92] 1982 GUIDELINES, *supra* note 1, at 23. *See also* Baker, *supra* note 76, at 394 (recognizing validity of Landes and Posner's theory but acknowledging practical problems with it).

[93] *See Baxter Seeks Greater Consideration of International Competition in Merger Cases, supra* note 10, at A-17 to A-19.

[94] 1982 GUIDELINES, *supra* note 1, at 15.

[95] *Id.* at 17.

international business falls within a United States court's jurisdiction, the *1982 Guidelines* will necessarily be inapplicable. Therefore, a brief examination of jurisdictional issues is necessary before turning to an evaluation of the guidelines' effects on the various types of mergers involving international commerce.

b. *Jurisdictional Aspects*

In order for a federal court to issue a binding adjudication in any action initiated under the *1982 Guidelines*, the court must have subject matter jurisdiction, personal jurisdiction over the parties, and proper venue. Therefore the jurisdicational reach of the Sherman Act and Clayton Act over mergers involving international interests is of extreme importance.

1. *Subject Matter Jurisdiction*

Subject matter jurisdiction concerns a court's competence to hear a particular category of cases.[96] It is a threshold issue that must be addressed in any case involving the application of United States antitrust law to foreign commerce.[97] Subject matter jurisdiction in the area of antitrust is governed by specific statutory provisions. The Sherman Act extends its prohibitions to all persons monopolizing or restraining trade or commerce among the several States or with foreign nations,[98] thereby constituting a strong assertion of Congressional power over commerce.[99]

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[96] Maines, *Antitrust Personal Jursidiction and Venue in International Trade*, in 17TH ANNUAL ADVANCED ANTITRUST LAW SEMINAR, INTERNATIONAL TRADE AND THE ANTITRUST LAWS 73 (Practicing Law Institute 1977). Subject matter jurisdiction is a requirement separate from personal jurisdiction.

[97] Subject matter jurisdiction is the power to regulate foreign commerce.

> It is based upon the Constitution (Article I, Section 8, clause 3) and is implemented by statute. Subject matter jurisdiction is the threshold issue in any dispute to determine whether the antitrust laws have been violated by conduct involving foreign commerce. It is not to be confused with whether, in other respects, a substantive offense has occurred.

Kiltgaard, *Subject Matter Jurisdiction*, in 17TH ANNUAL ADVANCED ANTITRUST LAW SEMINAR, INTERNATIONAL TRADE AND THE ANTITRUST LAWS 19 (Practicing Law Institute 1979) (*citing* Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92, 102-03 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir. 1972), *cert. denied*, 409 U.S. 950 (1972)).

[98] 15 U.S.C.A. §§ 1-2 (1973). *See also* P. AREEDA, ANTITRUST ANALYSIS: PROBLEMS, TEXT, CASES 135 (3d ed. 1981) (discussion of jurisdictional issues in this area); L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 708-17 (1977) (definition of interstate and foreign commerce; Sherman Act jurisdiction over foreign commerce).

[99] The language of the Sherman Act has been described as extending "to the utmost extent of [Congress'] constitutional power." United States v. South-Eastern Underwriters Ass'n., 322 U.S. 533, 558 n.58 (1944).

In the majority of cases jurisdiction over mergers is governed by section 7 of the Clayton Act.[100] The provisions of section 7 were significantly strengthened by the Antitrust Procedural Improvement Act of 1980.[101] Prior to 1980, both the acquiring and the acquired firm were required to be "engaged in commerce."[102] The wording of this provision suggested limitations on its extraterritorial application.[103] Further, section 7 applied only to corporations, not to individuals.[104] As rewritten, section 7 expresses Congress' desire to reinforce the impact of the Clayton Act on foreign commerce[105] by expanding the applicability of the Act to situations where "any person engaged in commerce or in any activity affecting commerce" acquires the stock or assets of another such person and where "in any line of commerce or in any activity affecting commerce in any section of the country" the effect might be to lessen competition.[106] This potentially expands "section 7's jurisdictional reach to the full extent of the Sherman Act and of Congressional authority under the Commerce Cause."[107]

In view of its expanded jurisdictional reach, it is anticipated that most merger challenges will be made under section 7 of the Clayton Act. Nevertheless, where a potential jurisdictional problem under section 7 does exist, the Sherman Act could reach any acqui-

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[100] 15 U.S.C.A. § 18 (1973).

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

[102] The "engaged in commerce" requirement was not satisfied merely by showing an effect on commerce. *See, e.g.*, United States v. American Bldg. Maintenance Indus., 422 U.S. 271 (1975).

[103] The statute was applicable only "where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C.A. § 18 (1973). This led to uncertainty concerning the statute's reach into foreign commerce. *See, e.g.*, Crane Fruehauf Ltd. v. Fruehauf Corp., 1977-2 Trade Cas. (CCH) ¶61,708 (S.D.N.Y. 1977); INTERNATIONAL GUIDE, *supra* note 20, at 15-17.

[104] Section 7 begins by providing that "[n]o *corporation* engaged in commerce. . . ." 15 U.S.C.A. § 18 (1973) (emphasis added).

[105]
> [The Antitrust Subcommittee] is concerned about the issue of the application of section 7 to acquisitions of American corporations by foreign firms who may be likely potential entrants into the American market place and thus may not be engaged in U.S. foreign commerce. According to former Assistant Attorney General John Shenefield, under the current strictures of the law, "The Department of Justice cannot reach mergers or acquisitions involving companies that only 'affect commerce' whether those companies are foreign or domestic."

H.R. REP. No. 871, 96th Cong., 2d Sess. 6 (1980) (quoting *Hearings on Antitrust Procedural Improvements Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 45 (1979)) [hereinafter cited as H.R. REP. No. 871].

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

[107] H.R. REP. No. 871, *supra* note 105, at 2.

sition that has a substantial effect on the foreign or domestic trade of the United States[108] and would probably be used despite its more stringent substantive standards.[109]

Historically, United States courts have generally been willing to extend federal antitrust law to violations occurring outside the boundaries of the country, even though the Supreme Court rejected initial attempts to apply antitrust law extraterritorially. In *American Banana Co. v. United Fruit Co.*,[110] both plaintiff and defendant were American corporations operating banana plantations in Central America. The suit, brought privately by American Banana Co., alleged that the United Fruit Co. had monopolized the Central American banana trade with the United States and sought relief under the Sherman Act. The Court, in dismissing the claim, found it "startling" that the plaintiff would argue expanding the Sherman Act's reach to include acts occurring within the jurisdiction of other nations.[111]

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[108] Section 1 of the Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is declared to be illegal." 15 U.S.C.A. § 1 (1973). Section 2 provides that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize any part of the trade or commerce . . . shall be deemed guilty of a felony." *Id.* § 2. Thus the Sherman Act, unlike the pre-1980 Clayton Act, neither required both parties to be "engaged in commerce" nor limited its application to corporate entities. For merger cases under the Sherman Act, see, *e.g.*, United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947 (Mass. 1950); United States v. Monsanto Co., 1967 Trade Cas. (CCH) ¶72,001 (W.D. Pa. 1967).

[109] Under the substantive requirements of the Sherman Act, the plaintiff must show a "specific intent" on the defendant's part to unreasonably restrict trade through acquisition or merger. United States v. Columbia Steel Co., 334 U.S. 495, 531-33 (1947). Under section 7 of the Clayton Act, however, in recognition of its design to arrest "incipient" threats, the plaintiff must show only the "tendency" toward monopoly or the "reasonable likelihood" of a substantial lessening of competition through merger or acquisition. United States v. Penn-Olin Chemical Co., 378 U.S. 158, 170-71 (1963). *See also* Donovan, *The Legality of Acquisitions and Mergers Involving American and Foreign Corporations Under the United States Antitrust Laws—Part II*, 40 S. CAL. L. REV. 38, 48-54 (legislative history of the Clayton Act and the incipiency standard).

[110] 213 U.S. 347 (1909).

[111] It is obvious, however stated, that:

> the plaintiff's case depends on several rather startling propositions. In the first place the acts causing the damage were done, so far as it appears, outside the jurisdiction of the United States and within that of other states. . . .[W]ords having universal scope, such as "Every contract in restraint of trade," "Every person who shall monopolize," etc., will be taken as a matter of course to mean only everyone subject to such legislation, not all that the legislator subsequently may be able to catch. In the case of the present statute the improbability of the United States attempting to make acts done in Panama or Costa Rica criminal is obvious, yet the law begins by making criminal the acts for which it gives a right to sue. We think it entirely plain that what the defendant did in Panama or Costa Rica is not

While *American Banana* has been recognized as a landmark statement of the presumptive territoriality of penal legislation,[112] United States courts subsequently adopted what has come to be known as the "effects" test. Under this test, jurisdiction is asserted if conduct violative of the antitrust laws, no matter where performed, has an effect within the United States. This jurisdictional concept was first enunciated in *United States v. Aluminum Company of America (Alcoa)*.[113] In *Alcoa*, two French corporations, two British corporations, and a Canadian subsidiary of Alcoa were accused of a conspiracy to divide the world aluminum market through participation in a European cartel. In his opinion, Judge Learned Hand extended subject matter jurisdiction to cover such foreign activity where there was an intent to affect United States imports or exports, coupled with an actual impact.[114] International criticism of this assertion of extraterritorial jurisdiction has been harsh,[115] and United States Courts have retreated somewhat from their initial stance, adopting a much more balanced approach such as that adopted in *Timberlane Lumber Company v. Bank of America*.[116]

In *Timberlane*, a United States company claimed that acts taken by the defendant and other firms in Honduras unlawfully prevented the company from establishing operations in the Central American nation. The *Timberlane* court, while recognizing the general validity of the effects test, felt that the interests of foreign nations should be given greater consideration. Thus the court adopted a three part test designed to: (1) examine the actual and intended effects on United States commerce, (2) examine the magnitude of the impact, and (3) interject notions of international

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within the scope of the statute so far as the present suit is concerned.
Id. at 356-57.

[112] *See* 1 J. ATWOOD & K. BREWSTER, *supra* note 40, at 141.

[113] 148 F.2d 416, 419 (2d Cir. 1945).

[114] *Id.* at 443. *See also* INTERNATIONAL GUIDE, *supra* note 20, at 6 ("When foreign transactions have a substantial and forseeable effect on U.S. Commerce, they are subject to U.S. law regardless of where they take place"). For other cases applying this test, see, *e.g.*, Continental Ore Co. v. Union Carbide & Carbon Co., 370 U.S. 690 (1962); Westinghouse v. Rio Algon Corp., 617 F.2d 1248 (7th Cir. 1980); Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92 (C.D. Cal. 1971); United States v. Holophane Co., 119 F. Supp. 114 (S.D. Ohio 1954), *aff'd*, 352 U.S. 903 (1956).

[115] *See supra* note 8. The primary concern is with the perceived absence of a limit on the United States assertion of the effects test and not with the theory underlying the exercise of jurisdiction. *See* Note, *Extraterritorial Jurisdiction Under the Proposed Federal Criminal Codes: Senate Bill 1630 and House Bill 1647*, 12 GA. J. INT'L & COMP. L. 305, 314 (1982).

[116] 549 F.2d 597 (9th Cir. 1976).

comity.[117] *Timberlane* and its progeny[118] reflect the current United States approach to extraterritorial application of antitrust law which deemphasizes the effects test in favor of a comity analysis.[119]

2. *Personal Jurisdiction*

Personal jurisdiction refers to a court's ability to exert power over the parties to an antitrust proceeding and to bind them by its adjudication.[120] The due process clause of the fifth amendment of the United States Constitution[121] imposes the basic limitations on the power of the courts to exert personal jurisdiction. The plaintiff is subject to personal jurisdiction upon initiating a suit, while a defendant's actual presence in the applicable judicial district is usually sufficient to establish personal jurisdiction.[122] A defendant not physically present must have "certain minimum contacts" with the forum "such that the maintenance of the suit does not offend

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[117] *Id.* at 611-14. International comity is defined as "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws." BLACK'S LAW DICTIONARY 334 (rev. 4th ed. 1968). *See also* RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965) (factor to be considered under international comity).

[118] In Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297-98 (3d Cir. 1979), the court adopted a similar approach while setting forth a slightly different list of factors for comity considerations. The *Timberlane* analysis was also followed in Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1161, 1189 (E.D. Pa. 1980), and in Dominicus Americana Bohio v. Gulf & Western Indus. Co., 473 F. Supp. 1161 (E.D. Pa. 1980). *But see In re* Uranium Antitrust Litigation, 617 F.2d 1248 (7th Cir. 1980) (court failed to follow *Timberlane*). For recent analysis of *Timberlane* and extraterritorial jurisdiction, see Gill, *Two Cheers for Timberlane*, 10 REVUE SUISSE DU DROIT INTERNATIONAL DE LA CONCURRENCE 3 (1980); Shenefield, *Extraterritoriality and Antitrust—New Variations on a Familiar Theme, reprinted in* [1969-1983 Transfer Binder] TRADE REG. REP. (CCH) ¶50,424 (Feb. 2, 1981); Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280 (1982).

[119] Despite the willingness of the United States courts to soften the effects test, other countries have enacted retaliatory legislation. *See* Comment, *Extraterritorial Application of the Antitrust Laws and Retaliatory Legislation by Foreign Countries*, 11 GOLDEN GATE U.L. REV. 577, 592-608 (1981); Note, *A Comparative Analysis of the Efficacy of Bilateral Agreements in Resolving Disputes Between Sovereigns Arising From Extraterritorial Application of Antitrust Law: The Australian Agreement*, 13 GA. J. INT'L & COMP. L. 49, 58-63 (1983).

[120] *See* Maines, *supra* note 96, at 73. While personal jurisdiction is recognized as a separate consideration from subject matter jurisdiction, the distinction seems to be blurred somewhat in the antitrust field due to the existence of both criminal and civil sanctions. Defendants in civil cases are subject to the "minimum contacts" test. *See infra* note 123 and accompanying text.

[121] U.S. CONST. amend. V. The due process clause states that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." *Id.*

[122] *See* 1 J. ATWOOD & K. BREWSTER, *supra* note 40, at 119.

'traditional notions of fair play and substantial justice' "[123] in order for a court to properly maintain personal jurisdiction.[124] The "minimum contacts" test has been satisfied with respect to foreign antitrust defendants in a variety of situations. For example, where a foreign firm transacts business in a jurisdiction at a level "as to be within the practical everyday business or commercial concept of doing or carrying on business of a substantial character,"[125] even if these business activities are unrelated to plaintiff's antitrust allegations,[126] personal jurisdiction is properly established. Other bases for establishing personal jurisdiction over foreign corporations include local actions of agents[127] and acts by United States subsidiaries.[128]

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[123] International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

[124] The applicability of *International Shoe* to foreign defendants may be limited, since the defendant in that case was a United States corporation acting in a federal system in which other states would be compelled to enforce the judgment. This requirement does not exist in the international context. *See* P. AREEDA, *supra* note 98, at 136. However, while *International Shoe* dealt with jurisdictional power of states, it is generally applicable to any finding of personal jurisdiction. 1 J. ATWOOD & K. BREWSTER, *supra* note 40, at 111. Subsequent cases have noted the necessity of some act "by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." Hanson v. Denckla, 357 U.S. 235, 253, *reh'g denied,* 358 U.S. 858 (1958). *See also* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980); Kulko v. Superior Court, 436 U.S. 84, 93-94, *reh'g denied,* 438 U.S. 908 (1978); Shaffer v. Heitner, 433 U.S. 186, 216 (1977); Rush v. Savchuk, 444 U.S. 320, 327-30 (1980). For an analysis of *International Shoe* and its progeny in an international context, see Comment, *The Minimum Contacts Standard and Alien Defendants,* 12 L. & POL. INT'L BUS. 783 (1980).

[125] O.S.C. Corp. v. Toshiba America, Inc., 491 F.2d 1064, 1068 (9th Cir. 1974).

[126] Superior Coal Co. v. Ruhrkohle, A.G., 83 F.R.D. 414, 410-21 (E.D. Pa. 1979). *See also* Gutor Int'l, A.G. v. Raymond Packer Co., 493 F.2d 938, 947-48 (1st Cir. 1974) (initiating litigation subjected plaintiff to antitrust counterclaim); El Cid, Ltd. v. New Jersey Zinc Co., 444 F. Supp. 845 (S.D.N.Y. 1977) (scattered contacts sufficient if forming the basis of the antitrust claim); Taubler v. Giraud, 655 F.2d 991 (9th Cir. 1981) (personal jurisdiction sustained over French winemakers who had contracted for exclusive distributorship); *In re* Uranium Antitrust Litigation, 1980-81 Trade Cas. (CCH) ¶163,678 (N.D. Ill. 1980); Hunt v. Mobil Oil Corp., 410 F. Supp. 4 (S.D.N.Y. 1975) (conspiratorial meetings within the United States). *But see* Balogh's of Coral Gables, Inc. v. Getz, 510 F. Supp. 741, 743 (S.D. Fla. 1981) (no personal jurisdiction despite substantial sales through exclusive United States distributor); Kramer Motors, Inc. v. British Leyland, Ltd., 628 F.2d 1175 (9th Cir. 1980), *cert. denied,* 449 U.S. 1062 (1980) (no jurisdiction despite scattered contacts and operations of United States subsidiary).

[127] *See, e.g.,* Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 419 (9th Cir. 1977).

[128] *See, e.g.,* Zenith Radio Corp. v. Matushita Elec. Indus. Co., 402 F. Supp. 262, 327-28 (E.D. Pa. 1975). For a detailed discussion of personal jurisdiction over foreign entities, see generally 1 J. ATWOOD & K. BREWSTER, *supra* note 40, at 109-29.

Due process also requires that the plaintiff provide for proper service of process. Service of process requirements relevant to international antitrust matters can be found in rule 4 of the Federal Rules of Civil Procedure,[129] section 12 of the Clayton Act,[130] and in various state "long-arm" statutes.[131]

The forum in which suit is brought must be proper in terms of venue as well. Venue has been defined as the "place or places where an action may be properly instituted and the suit determined, providing the court has subject matter jurisdiction and the requisite jurisdiction over the defendant."[132] Pertinent antitrust venue statutes can be found in section 12[133] and section 4[134] of the Clayton Act.

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[129] Rule 4(d) provides for service on both resident and nonresident parties. Under rule 4(e) and (f), extraterritorial service is permitted where such service is authorized under federal or state law. FED. R. CIV. P. 4. *See, e.g.*, United States v. First Nat'l City Bank, 379 U.S. 378, 381 (1965); Fisons, Ltd. v. United States, 458 F.2d 1241 (7th Cir. 1972), *cert. denied*, 405 U.S. 1041 (1972); Hoffman Motors Corp. v. Alfa Romeo S.P.A., 244 F. Supp. 70 (S.D.N.Y. 1965).

[130] Provided that the case meets the venue requirements set forth in section 12, *see infra* note 133 and accompanying text, service of process against a corporation may be achieved "wherever it may be found." 15 U.S.C.A. § 22 (1973). Thus an alien corporation may be properly served at its home office abroad. *See, e.g.*, Zenith Radio Corp. v. Matushita Elec. Indus. Co., 402 F. Supp. 262, 329-30 (E.D. Pa. 1975). Service upon a United States subsidiary of an alien corporation has been held to constitute service upon the parent. *See, e.g.*, Sunrise Toyota, Ltd. v. Toyota Motor Co., 1972 Trade Cas. (CCH) ¶74,092 (S.D.N.Y. 1972).

[131] Where the plaintiff is not proceeding under the venue provisions of section 12 he is subject to the varying requirements of the applicable state statutes. For a review of these statutes, see Special Project, *Obtaining Jurisdiction Over Alien Corporations—A Survey of U.S. Practice*, 9 VAND. J. TRANSNAT'L L. 345 (1976); *see also* 1 J. ATWOOD & K. BREWSTER, *supra* note 40, at 131-32 (service problems associated with state statutes).

[132] 1 J. MOORE, J. LUCAS, H. FINK, D. WECKSTEIN & J. WICKER, MOORE'S FEDERAL PRACTICE ¶0.140(1.-1) (2d ed. 1983).

[133] 15 U.S.C.A. § 22 (1973). Under section 12 of the Clayton Act, antitrust actions may be brought against a corporate defendant in the district in which it is an inhabitant, or in any district in which it is found or transacts business. *See* Arco Mfg. Co. v. Automobile Body Research Corp., 352 F.2d 400, 404 (1st Cir. 1965), *cert. denied*, 383 U.S. 947 (1966) (corporation is "inhabitant" or resident of state of incorporation); Eastman Kodak Co. v. Southern Photo Co., 273 U.S. 359, 361 (1976) ("found" means doing business to extent actual presence is established); Lippa & Co. v. Lerox, Inc., 305 F. Supp. 175 (Vt. 1969) ("transacting business" construed through qualitative analysis of contacts between district and corporation in question). For a comprehensive list of factors used in determining whether a corporation is "transacting business," see Victor, *In Personam Jurisdiction, Venue and Service of Process in Antitrust Cases*, in 17TH ANNUAL ADVANCED ANTITRUST LAW SEMINAR, INTERNATIONAL TRADE AND THE ANTITRUST LAWS 61-63 (Practicing Law Institute 1977).

[134] 15 U.S.C.A. § 15 (1973). Under section 4 of the Clayton Act, antitrust defendants may be sued where they reside, where they are found, or where they have an agent. While section 4 is primarily invoked against individual defendants, it may also be used against corporations. *See* Learning Systems, Inc. v. Levin, 351 F. Supp. 352 (E.D. Mo. 1972).

In addition to the concept of international comity,[135] antitrust suits dealing with foreign commerce often involve other international doctrines or defenses that limit the assertion of extraterritorial jurisdiction. These include sovereign immunity,[136] the Act of State Doctrine,[137] and sovereign compulsion.[138]

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[135] *See supra* note 117 and accompanying text.

[136] The general rule of sovereign immunity is that "a state is immune from the exercise by another state of jurisdiction to enforce rules of law." RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 65 (1965). Sovereign immunity also extends to "a corporation created under its laws and exercising functions comparable to those of an agency of the state." *Id.* § 66(g). The doctrine does not apply, however, to "a proceeding arising out of commercial activity outside its territory." *Id.* § 69. Generally, United States courts have recognized the immunity of a foreign sovereign for its public actions but not for its private or commercial activities. *See* Letter of Acting Legal Adviser Jack B. Tate (May 19, 1952), 26 DEP'T ST. BULL. 984 (1952) (formally adopting this position). *See also* Republic of Mexico v. Hoffman, 324 U.S. 30, 36 (1945); *Ex Parte* Republic of Peru, 318 U.S. 578, 587 (1943) (recognizing Department of State policy on sovereign immunity as binding on judiciary); Note, *The American Law of Sovereign Immunity Since the Tate Letter*, 4 VA. J. INT'L L. 75 (1964).

In 1976 Congress enacted the Foreign Sovereign Immunities Act, Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified at 28 U.S.C.A. §§ 1330, 1332(a), 1391(f), 1441(d), 1602-1611) [hereinafter cited as FSIA]. The FSIA adopted the position set forth in the Tate letter (commercial acts of the sovereign subject to suit), *see supra*, and gave the judicial branch exclusive responsibility in ruling on immunity claims. For detailed treatments of the FSIA, see Kane, *Suing Foreign Sovereigns: A Procedural Compass*, 34 STAN L. REV. 385 (1982); Von Mehrer, *The Foreign Sovereign Immunitites Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33 (1978). For antitrust cases involving sovereign immunity, see United States v. Deutsches Kalisyndikat Gesellschaft, 31 F.2d 199 (S.D.N.Y. 1929) (French corporation of which French government owned 11/15ths *not immune to suit*); *In re* Investigation of World Arrangements, 13 F.R.D. 280 (D.C. 1952) (immunity granted to British Oil Company controlled by British Government); Petrol Shipping Corp. v. Greece, 326 F.2d 117 (2d Cir. 1964) (*contra* Tate letter); National City Bank of N.Y. v. China, 348 U.S. 356 (1955) (adopting Tate letter); International Ass'n of Machinists v. OPEC, 477 F. Supp. 553 (C.D. Cal. 1979), *aff'd*, 649 F.2d 1354, 1362 (9th Cir. 1981), *cert. denied*, 102 S. Ct. 1036 (1982) (district court held OPEC nations not engaging in commercial activities; decision affirmed under Act of State Doctrine). The sovereign immunity defense is jurisdictional and must be considered before reaching the antitrust aspects of a case. 477 F. Supp. at 564-65.

[137] The Act of State Doctrine is often confused with the doctrines of sovereign immunity and sovereign compulsion. Where the adjudication of an antitrust claim requires the court to make judgments about the conduct of a foreign sovereign not a party to the suit that might conflict with the responsibilities of the executive branch for United States foreign relations, the Act of State Doctrine may preclude a decision by the court. *See* 1 J. ATWOOD & K. BREWSTER, *supra* note 40, at 238. This Doctrine has been described by United States courts as follows:

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

Underhill v. Hernandez, 168 U.S. 250, 252 (1897).

The Act of State Doctrine was first used in the antitrust area in American Banana Co. v.

c. *Impact on Mergers Involving Foreign Commerce*

Mergers involving foreign commerce can be grouped into several categories, each possessing characteristics which will determine to a large extent the impact of the *1982 Guidelines.*

First, there are cases involving the acquisition of a foreign firm by a United States company. Given the nationality of the acquiring firm, jurisdiction poses few problems as long as there is a measurable effect in the United States. In *United States v. Jos. Schlitz Brewing Co.,*[139] a large United States brewer acquired a majority interest in a Canadian brewer, John Labatt, Ltd. This acquisition was found illegal under section 7 of the Clayton Act since it affected competition between Schlitz and a United States subsidiary of Labatt within the United States. Under similar circumstances the *1982 Guidelines* would apply as in any domestic context with the possible exception of the expansion of the relevant market to

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United Fruit Co., 213 U.S. 347 (1909). In *American Banana,* the plaintiff complained that the United Fruit Co. had persuaded the Government of Costa Rica to seize American Banana's plantation and to eliminate the plaintiff from competition. Justice Holmes utilized the Act of State Doctrine to dismiss both the government's seizure and United Fruit's persuasive role in the foreign sovereign's act. *See* 1 J. ATWOOD & K. BREWSTER, *supra* note 40, at 239-40.

Where there are substantial private conspiratorial acts within the United States, however, leading to discriminatory legislation in foreign nations, the Act of State Doctrine will not bar a suit against private defendants. United States v. Sisal Sales Corp., 274 U.S. 268 (1967). Detailed discussion of this complex area is beyond the scope of this Note. For further discussion in this area, see 1 J. ATWOOD & K. BREWSTER, *supra* note 40, at 238-52; Comment, *The Act of State Doctrine: The Need for a Commercial Exception in Antitrust Litigation,* 18 SAN DIEGO L. REV. 813 (1981); Timbera, *Sovereign Immunity And Act of State Defenses: Transnational Boycotts and Economic Coercion,* 55 TEX. L. REV. 1 (1976).

[138] The limiting concept of sovereign compulsion arises when the defendant argues that his alleged antitrust violations should be excused because he was acting under compulsion from a foreign sovereign. 1 J. ATWOOD & K. BREWSTER, *supra* note 40, at 260. A particularly cogent statement of the limits of the sovereign compulsion doctrine in the international antitrust field can be found in United States v. Watchmakers of Switzerland Info. Center, 1963 Trade Cas. (CCH) ¶70,600 (S.D.N.Y. 1962), *judgment modified,* 1965 Trade Cas. (CCH) ¶71,352 (S.D.N.Y. 1965):

> In the present case . . ., defendants' activities were not required by the laws of Switzerland. They were agreements formulated privately without compulsion on the part of the Swiss government. It is clear that these private agreements were then recognized as facts of economic and industrial life by that nation's government. Nonetheless, the fact that the Swiss government may, as a practical matter, approve of the effects of this private activity cannot convert what is essentially a vulnerable private conspiracy into an unassailable system resulting from foreign governmental mandate.

Id. ¶¶ 77,456-57.

[139] 253 F. Supp. 129 (N.D. Cal. 1966), *aff'd,* 385 U.S. 37 (1966), *reh'g denied,* 385 U.S. 1021 (1967).

include sales of the parent company outside the United States, depending on the individual circumstances.

Mergers between United States and foreign firms often involve the elimination of potential foreign entrants to United States markets instead of actual, direct anticompetitive effects. In *United States v. Gillette Co.*,[140] the largest United States manufacturer of safety razors and blades merged with the third largest European manufacturer of electric razors, Braun, A.G. The anticipated domestic effect of this merger was the elimination of Braun as a potential entrant to the United States market, thus enhancing Gillette's dominant position. Mergers similar to the one in *Gillette* would be affected by the *1982 Guidelines* in several ways. First, Braun could be identified through the regular market definition process as a producer of the relevant product (if electric shavers are determined to be substitutes for safety razors)[141] and as a part of the relevant geographic market.[142] If this were not the case, Braun might still be covered by the guidelines as a potential entrant, thus creating a horizontal effect from a non-horizontal merger.[143] Where a merger involves the acquisition of a foreign firm that is an importer without a United States affiliate, as was the case in several merger challenges,[144] the relative importance attached to the competitive impact of the imported products is determined by the guidelines' recognition of potential foreign restraints on the supply response of foreign firms to price increases.[145]

The next category represents cases in which a foreign company merges with a United States firm. These cases involve many of the same considerations discussed above. However, previous challenges to this type of merger have often produced strong reaction by foreign governments. For example, in the *British Petroleum-Sohio* case,[146] the Department challenged the merger between British Petroleum and Standard Oil Co. of Ohio under section 7 of the Clayton Act. The Department claimed that since Sohio had thirty per-

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[140] 1976-1 Trade Cas. (CCH) ¶60,691 (Mass. 1975) (consent decree).

[141] *See supra* notes 49-60 and accompanying text.

[142] *See supra* notes 78-88 and accompanying text.

[143] *See supra* note 29 and accompanying text.

[144] *See, e.g.*, United States v. Aluminum Co. of America, 148 F.2d 416, 426 (2d Cir. 1945); Litton Indus., Inc., 82 F.T.C. 793 (1973).

[145] *See supra* note 88 and accompanying text.

[146] United States v. Standard Oil Co., 1970 Trade Cas. (CCH) ¶72,988 (N.D. Ohio 1970) (consent decree).

cent of the Ohio market and since British Petroleum, already operating elsewhere in the United States, was a potential entrant into Ohio, anticompetitive effects would flow from the proposed merger. The case was settled under a consent decree, with Sohio divesting part of its Ohio operations.[147] This challenge produced strong British criticism stemming from that government's willingness to allow the entry of large United States companies into United Kingdom markets.[148] It is difficult to predict whether such foreign disapproval would call for a different result under the *1982 Guidelines*. Because of the recent tendency in both the *1982 Guidelines* and in cases like *Timberlane* to recognize foreign interests, similar foreign concerns might carry greater weight today.

The final category of cases involves the merger of two foreign companies. Cases of this nature potentially stretch the jurisdictional reach of the United States antitrust laws to their limits, even in light of effects felt in the United States. In *United States v. CIBA Corp.*[149] jurisdiction over a potential merger between two Swiss companies, CIBA, Ltd. and J.R. Geigy, S.A., was based on the existence of their United States subsidiaries. Absent these subsidiary operations, however, such a challenge would have been difficult to make under the present standards. It is in cases of this nature that comity will play the largest role.[150]

Where jurisdictional hurdles can be overcome, the *1982 Guidelines* would theoretically apply as in any other case. The impact of a merger between two foreign firms could affect United States interests in a variety of ways, depending on the facts of the individual case. For example, assume a merger between London, Ltd. and Schmidt, GmbH, both foreign firms which manufacture portable black and white television sets (the relevant product market) overseas and which sell them only in the United States. London and Schmidt are the only foreign sellers of the relevant product in the United States and compete with United States firms which have no significant sales in the relevant product abroad. Under these circumstances the relevant geographic market would almost certainly be measured within the United States and since London and Schmidt have no other sales of the relevant product, only the

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[147] *See* Fugate, *Problems in Transnational Acquisitions and Mergers*, 2 CANADA-UNITED STATES L.J. 190, 195 (1979).

[148] *Id.*

[149] 1970 Trade Cas. (CCH) ¶73,269 (S.D.N.Y. 1970) (consent decree).

[150] *See* Fugate, *supra* note 147, at 200-01 (discussion of role of comity in cases of this nature).

United States sales would be included in the analysis. Assuming a sufficiently high post-merger HHI and no significant complicating factors that exclusively affect the foreign firms, a Departmental challenge would likely result. Thus, even where a merger is between foreign entities, the analysis of the merger might involve only traditional domestic concerns.

Where either the merging foreign firms or the United States companies had substantial overseas sales, the circumstances might call for the expansion of the relevant geographic market beyond United States boundaries, the inclusion of foreign sales in computing market concentration, or the recognition of additional international factors.

Even where only the exports of a United States firm into a foreign nation are affected by a merger involving foreign firms, the *1982 Guidelines* would appear to apply. For example, assume that West, Inc., a United States corporation, produces personal home computers (the relevant product market) which are sold exclusively in country A. Grande, S.A. and Compagnie Generale Blanc, both foreign firms, also sell the relevant product exclusively in country A. Grande and Blanc merge with anticipated deleterious effects on West's export sales. Barring major comity considerations, the effects test would seem to establish jurisdiction for a departmental challenge under the *1982 Guidelines* since the effect of the merger was felt in the United States through West. Although the relevant geographic market, country A, is totally outside the boundaries of the United States, this would not pose significant difficulty since the *1982 Guidelines* recognizes the creation of geographic markets based on economic realities rather than on national boundaries. If there were appropriate HHI results, a challenge under the *1982 Guidelines* could be issued even where the merger of two foreign firms affected only the sales of a United States company in a foreign country.

IV. CONCLUSION

Much of the domestic criticism expressed against the *1982 Guidelines* is applicable in an international context as well. Commentators have been critical of the large role played by economics in the *1982 Guidelines*. In fact, some have referred to the guidelines as the "Economists Relief Act of 1982," apparently only

partly in jest.[151] The graceful translation of economic theory into the legal setting has traditionally proven to be extremely difficult and presents numerous problems for lawyers, judges, and juries.[152] Due to the technical nature of the *1982 Guidelines* this is likely to be a continuing problem, unless efforts are made to educate legal practitioners and jurists more fully in the finer points of economic theory. It has been suggested that the legal battleground has been merely switched to the economic front, without a corresponding improvement in predictability.[153]

On the other hand, various aspects of the *1982 Guidelines* smooth the path of those entities considering mergers involving international markets. The creation of "safe harbors", especially for most vertical and conglomerate mergers, should lead to increased predictability of challenge. The attention devoted to the inclusion of international competition in market definition should lead to the recognition of larger markets, thus reducing the level of concentration and making a challenge less likely.

However, problems peculiar to the international arena still exist. While the *1982 Guidelines* appears to be sensitive to problems faced by foreign firms doing business in the United States and generally presents a liberal attitude toward international concerns, steps have been taken to assure the reach of the Clayton Act over foreign commerce. This conflict is not completely resolved by the *1982 Guidelines*, which gives a general description of the constraints that will be recognized, but does not set forth specific guidance or examples. The area of international mergers is sufficiently complex to warrant guidelines specifically directed to problems faced in foreign commerce. What is needed is a revamping of the Department's *International Guide* designed to reflect the changes made by the *1982 Guidelines* and to give those involved in international business some badly needed clarification and guidance.

Vincent Draa

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[151] *See Antitrust Practioners React Favorably to New Merger Guidelines*, 42 ANTITRUST & TRADE REG. REP. (BNA) No. 1070, at 1315, 1317 (June 24, 1982).

[152] *See generally* DeLong, *The Role, if any, of Economic Analysis in Antitrust Litigation*, 12 Sw. U.L. REV. 298 (1981).

[153] *See Special Analysis*, *supra* note 7, at 24.