

ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS, Antitrust Division, U.S. Department of Justice, Washington, D.C.: Government Printing Office, 1977 (Revised March 1, 1977). Pp. 63. \$1.30.

On January 26, 1977 the Antitrust Division of the United States Department of Justice issued a 63 page booklet entitled *Antitrust Guide for International Operations (Guide)*. The *Guide* "is intended as a general statement of enforcement policy for use by business decisionmakers, lawyers, and others concerned with antitrust enforcement in the international sector."<sup>1</sup> It is divided into two segments. The first is a nine page review of general principles and antitrust enforcement policy considerations. The second segment contains an analyses of 14 hypothetical situations. The analyses of these hypotheticals are intended to exemplify the thought processes utilized by Antitrust Division personnel in arriving at a particular enforcement decision and the factors deemed relevant to such processes.

The nine page Introduction is a well written, concise and comprehensive expression of the Antitrust Division's enforcement policy. With the exception of the *Guide's* statement that "to apply the Sherman Act to a combination of United States firms for foreign activities which have no direct or intended effect on United States consumers or export opportunities would, we believe, extend the Act beyond the point Congress must have intended,"<sup>2</sup> the Introduction contains no new enforcement policy positions. The most noteworthy aspects of the Introduction are its emphasis on the increasing importance of comity<sup>3</sup> and its recognition that "the rule of reason may have a somewhat broader application to international transactions . . . ."<sup>4</sup>

The analyses of the 14 hypothetical cases suffer from an obvious inherent problem. Because the basic mode of analysis is the rule of reason, each analysis and its results "usually turns heavily on facts."<sup>5</sup> Thus, a slight change in the facts may lead to a different result. The *Guide* would be of more help if it distinguished the facts of great analytical importance from those that are less significant. Moreover, these analyses do not illustrate the types of factors that would be considered in an "international rule of

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<sup>1</sup> ANTITRUST DIVISION, U.S. DEP'T JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS (rev. ed. 1977) Preface [hereinafter cited as the GUIDE].

<sup>2</sup> *Id.* at 7. For an elaboration on this point see Address by Douglas E. Rosenthal, Subject Matter Jurisdiction in United States Export Trade, before the American Society of International Law (Apr. 23, 1977), partially reprinted in [1977] PROC. OF THE AM. SOC'Y OF INT'L L. 214.

<sup>3</sup> See, e.g., Address by Attorney General Griffin B. Bell before the American Bar Association (Aug. 8, 1977); Address by Michael J. Egan, Associate Attorney General, before the International Bar Association (Nov. 3, 1977); Address by Joe Sims, Deputy Assistant Attorney General, Antitrust Division, The Justice Department's International Antitrust Program, before the Practising Law Institute (Jan. 20, 1978).

<sup>4</sup> GUIDE *supra* note 1, at 2.

<sup>5</sup> *Id.* at 9.

reason" type analysis. For example, the hypothetical involving a United States firm's foreign acquisition makes no mention of the relevance of the special problems of entering a foreign market.

A significant criticism of the *Guide* is that it fails to explain adequately what it was intended to be and not to be. Businessmen and non-experts may not fully comprehend the significance of the *Guide's* silence on some issues and very brief caveats on other issues. To their credit, since publication of the *Guide*, senior officials of the Antitrust Division have been careful to emphasize the statement in the *Guide's* Introduction that it is not intended to be "a substitute for experienced private antitrust counsel."<sup>6</sup> Nevertheless, such warnings may fail to reach those readers of the *Guide* who do not monitor speeches and articles by Division personnel.

Businessmen and non-specialist lawyers often fail to understand that, in the area of the applicability of the United States antitrust laws to international business transactions, the United States Government has more than one enforcement agency. The *Guide* is no more than a statement of the enforcement policies of the Justice Department, which is one of those agencies. The Press Release accompanying the *Guide* stated:

The Guide does not describe the Federal Trade Commission's enforcement policies. It does not deal with either the Federal Trade Commission Act or the Clayton Act, as administered by the FTC.<sup>7</sup>

Regrettably, this disclaimer does not appear in the *Guide* itself. In fact, the Introduction to the *Guide* states "we try here to provide a working statement of government enforcement policy . . . ."<sup>8</sup> A few pages later there is a discussion of the two major purposes of "[a]ntitrust enforcement by the United States Government."<sup>9</sup> Perhaps because of these statements in the *Guide*, John T. Fischbach, the Assistant to the General Counsel for International Affairs at the Federal Trade Commission (FTC), lost little time in pointing out that the *Guide* "is not a complete directory to United States antitrust laws or their enforcement" and that businessmen should not be misled "into thinking that, if only they comply with the policies set forth in the *Guide*, they need not fear any United States antitrust problems."<sup>10</sup>

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<sup>6</sup> *Id.* at 1; see, e.g., Shenefield, *Foreward*, 1 REVUE SUISSE DU DROIT INTERNATIONAL DE LA CONCURRENCE 3, 4 (1977); Donald A. Farmer, Jr., An Overview of the Justice Department's Guide to International Operations (June 8, 1977), reprinted in 5 TRADE REG. REP. (CCH) ¶ 50,325.

<sup>7</sup> Department of Justice, Press Release (Jan. 26, 1977). See also, Organization for Economic Cooperation and Development, Annual Reports on Competition Policy 1977/No. 2, at 121. ("The Guide does not cover the enforcement policies of the Federal Trade Commission.")

<sup>8</sup> GUIDE, *supra* note 1, at 1 (emphasis added).

<sup>9</sup> *Id.* at 4.

<sup>10</sup> Fischbach, *Possible Applications of United States Restrictive Business Practices Laws to International Operations—A few steps beyond the United States Department of Justice's*

In addition to the FTC, the International Trade Commission (ITC) is involved in the application of the antitrust laws to international transactions. Section 337 of the Tariff Act of 1930 prohibits "unfair methods of competition and unfair acts in the importation of articles into the United States . . . ."<sup>11</sup> The ITC has exclusive primary jurisdiction under section 337 and has taken a broad view of the types of anticompetitive conduct falling within its jurisdiction.<sup>12</sup> Moreover, in two recent cases the ITC has taken enforcement positions inconsistent with views expressed by the Justice Department in the same cases.<sup>13</sup> Consequently, it is reasonable to speculate that the *Guide* may have little or no effect on ITC enforcement activities.

The *Guide* is neither a statement of the law, nor a list of rules in that it was not promulgated pursuant to the Administrative Procedure Act.<sup>14</sup> Consequently, it is not binding on the Justice Department, and the Department is free to bring actions against those who acted in accordance with their understanding of the *Guide*. In fact, the Preface to the *Guide* concludes with the statement that "positions stated in the Guide should not be regarded as barring any action believed appropriate under the antitrust laws." The significance of this statement may not be apparent to non-expert readers of the *Guide*.

The Chief of the Division's Intellectual Property Section has stated that:

[T]he *Guide* is an informal indication of the enforcement intentions of

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"Antitrust Guide for International Operations," 1 REVUE SUISSE DU DROIT INTERNATIONAL DE LA CONCURRENCE 48, 48-49 (1977).

<sup>11</sup> 19 U.S.C. § 1337 (1976).

<sup>12</sup> See, e.g., de Kieffer, *Unfair Trade Practices and Section 337 — Promises and Uncertainties*, 2 N. CAR. J. INT'L L. & COMM'L REG. 107 (1977); Minchew, *The Expanding Role of the United States International Trade Commission*, 27 MERCER L. REV. 429 (1976); *U.S. Agencies Vie for Jurisdiction on Regulation of Trade Relations*, N.Y. Times, Dec. 27, 1977, at 57, col. 7; *Symposium: Section 337 of the Trade Act of 1974*, 8 GA. J. INT'L & COMP. L. 27 (1978).

<sup>13</sup> In *Certain Color Television Receiving Sets*, Investigation No. 337-TA-23 (I.T.C., filed Jan. 15, 1976), the ITC proceeded against Japanese color television exporters despite Justice Department objections that the Commission lacked jurisdiction and that the alleged activities of the exporters did not warrant an ITC proceeding. See Letter from Donald I. Baker, Assistant Attorney General, to Senator Edward M. Kennedy (Feb. 16, 1977), *partially reprinted in* TRADE REG. REP. (CCH) No. 274, at 15-16. For Senator Kennedy's letter to Mr. Baker (Jan. 17, 1977) see [1977] TRADE REG. REP. (CCH) No. 269, at 7-8. The case was eventually settled by a consent decree. 42 Fed. Reg. 39492 (1977).

In *Certain Welded Stainless Steel Pipe and Tube*, Investigation No. 337-TA-29 (I.T.C., filed Nov. 15, 1976), the Justice Department advised the ITC to either dismiss the complaint or to require the submission of supporting information from complainants before proceeding. Letter from Jonathon C. Rose, Deputy Assistant Attorney General, to Daniel Minchew, Chairman, ITC (Jan. 25, 1977). The ITC ignored this advice and proceeded. On February 9, 1978, the ITC held that Japanese steel producers had violated section 337. *ITC finds Unfair Rivalry in Japan Sales of Steel*, Wall St. J., Feb. 10, 1978, at 7, col. 2. *But see* Letter from President Carter to Daniel Minchew, Chairman, ITC (Apr. 22, 1978), disapproving the ITC's determination in the *Stainless Steel Pipe* case.

<sup>14</sup> 5 U.S.C. § 553 (1976).

current top officials of the Antitrust Division. Obviously the enforcement intentions of the officials of the Department in the past and the future may differ from this. Moreover, once the Department has decided to commit substantial antitrust enforcement resources to a particular fact situation, the Department's legal position will depend primarily on its view of substantive law, and only secondarily on its present resource-rationing policies. This position obviously will involve the Department's attorneys' interpretation of the whole body of prior court decisions as the major determinative factor. The latter may, or simply may not, coincide with any particular reader's interpretation of the *Guide*, but the Department probably will not (in my view) be willing to engage in a wrangle over the meaning of the *Guide* in lieu of arguing the meaning of the statute and case law.<sup>15</sup>

Moreover, in an interview shortly after the release of the *Guide*, Donald I. Baker, who was then the Assistant Attorney General in charge of the Antitrust Division, stated that in addition to the guidance contained in the *Guide* "you also provide guidance by bringing cases."<sup>16</sup>

Those not completely familiar with United States antitrust laws may also fail to realize that the federal government is not the only enforcer of those laws. Thus, the *Guide's* omission of any mention of private antitrust actions may cause the unwary to believe that compliance with the *Guide* will afford them protection from all antitrust lawsuits.

It would be helpful for the *Guide* to point out that persons who are injured by conduct prohibited by the federal antitrust laws have standing to sue to recover treble damages, costs and attorneys' fees for such injuries.<sup>17</sup> Moreover, standing to sue is not limited to United States citizens, but includes citizens of foreign countries,<sup>18</sup> state governments suing on their own behalf<sup>19</sup> and/or *parens patriae*<sup>20</sup> and foreign governments.<sup>21</sup> All of these "persons" may have substantial financial incentives to sue in cases where, for reasons of enforcement policy, comity, lack of resources, or priorities, the Justice Department might not sue. Two current examples of such situations are the pending cases involving the alleged international

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<sup>15</sup> Address by Richard H. Stern to the Licensing Executives Society (Apr. 1, 1977), at 12. For a very similar more recent statement, see Address by Richard H. Stern to the Electronic Industries Assoc. (Dec. 8, 1977), at 19-20.

<sup>16</sup> *The Antitrusters Aim Overseas*, BUS. WEEK, Mar. 14, 1977, at 100.

<sup>17</sup> 15 U.S.C. § 15 (1976).

<sup>18</sup> See, e.g., *Industria Siciliana Asfalti, Bitumi, S.P.A. v. Exxon Research and Engineering Co.*, 1977-1 Trade Cas. ¶ 61,256 (S.D.N.Y. 1977); *Todhunter-Mitchell & Co., Ltd. v. Anheuser-Busch, Inc.*, 375 F. Supp. 610 (E.D. Pa. 1974), *modified in part*, 383 F. Supp. 586 (E.D. Pa. 1974).

<sup>19</sup> *Georgia v. Evans*, 316 U.S. 159 (1942).

<sup>20</sup> 15 U.S.C. § 15c (1976). See, e.g., *Burch v. Goodyear Tire & Rubber Co.*, 554 F.2d 633 (4th Cir. 1977); *Washington v. Standard Oil Company of California*, ANTITRUST & TRADE REG. REP. (BNA), No. 834, at D-5 (Oct. 13, 1977).

<sup>21</sup> *Pfizer v. Government of India*, 98 S. Ct. 584 (1978), *aff'g*, 550 F.2d 396 (8th Cir. 1976).

uranium cartel,<sup>22</sup> and claims by American manufacturers of electronic products that Japanese manufacturers of similar products violated several antitrust laws.<sup>23</sup>

The *Guide* also fails to mention that antitrust suits may be instituted under state antitrust laws. Most states have some type of antitrust law. Many of these laws are patterned after the federal antitrust laws and provide for private rights of action.<sup>24</sup> These state antitrust laws may apply to international transactions having some contact with the state.<sup>25</sup> Consequently, in some circumstances, conduct discussed in the *Guide* may be subject to attack under such state antitrust laws.

It is also possible that the *Guide* may be misinterpreted as providing guidance for business conduct that will avoid problems with the antitrust laws of foreign nations. Many corporate counsel advise their clients that the American antitrust laws are the strictest in the world and that, if the clients operate abroad in a manner consistent with the American antitrust laws, they will automatically be in compliance with less strict foreign laws.<sup>26</sup> Although the validity of such advice was always doubtful, today it is clearly wrong. In this connection, Joel Davidow, the Justice Department's representative in the various United Nations fora, recently stated that compliance with the *Guide* does not assure a transnational enterprise of being considered a good corporate citizen in the developing countries.<sup>27</sup>

Much of what is in the *Guide* is not new and merely reflects, in a single handy document, the often repeated enforcement policy positions of the Antitrust Division. A number of the positions taken, particularly in relation to the standards for establishing the defenses of foreign sovereign compulsion and act of state<sup>28</sup> and the applicability of the *Noerr-Pennington* doctrine to petitioning foreign sovereigns,<sup>29</sup> are subject to chal-

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<sup>22</sup> See, e.g., *In re Westinghouse Electric Corp. Uranium Contracts Litigation*, M.D.L. No. 235 (E.D. Va. 1975); *Westinghouse Electric Corp. v. Rio Algom Ltd.* No. 76C3830 (N.D. Ill. 1976); *TVA v. Urangesellschaft*, No. 77 Civ. 5617 (S.D.N.Y. 1977).

<sup>23</sup> *Zenith Radio Corp. v. Matsushita Elec. Industrial Co.*, 402 F. Supp. 244 (E.D. Pa. 1975).

<sup>24</sup> See *American Bar Assoc., State Antitrust Laws* (1974). In 1976 Congress authorized the expenditure of \$10 million per year for three years for grants to state attorneys general submitting approved plans for improving the effectiveness of state antitrust enforcement programs. 42 U.S.C. § 3739 (1976).

<sup>25</sup> See, e.g., *Rosack v. Volvo of America Corp.*, 1977-1 Trade Cas. ¶ 61,395 (San Mateo Cty Superior Court, 1977).

<sup>26</sup> See Rahl, *American Antitrust and Foreign Operations: What is Covered?*, 8 CORNELL INT'L L.J. 1 (1974); Address by Joel Davidow, *Foreign and International Antitrust: Variations on the Themes of U.S. Law*, prepared for the 11th New England Antitrust Conference (Nov. 18, 1977), at 1-2 [hereinafter cited as Davidow].

<sup>27</sup> Davidow, *supra* note 26, at 10.

<sup>28</sup> The Antitrust Division believes that *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291 (D. Del. 1970) was "wrongly decided," *GUIDE, supra* note 1, at 52.

<sup>29</sup> See *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D. Cal. 1971).

lenge as not in accord with current case law. Nevertheless, it is clear that much careful thought and analysis went into the *Guide*. It will undoubtedly prove to be very influential in international antitrust counseling. At \$1.30 per copy, the *Guide* is the best bargain in this field of law and should be considered a "must buy" by anyone interested in the area.

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