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# Through a Glass Darkly: The Case Against Pilkington plc. under the New U.S. Department of Justice International Enforcement Policy

*Jeffrey N. Neuman*

*Trade and commerce, if they were not made of India-rubber, would never manage to bounce over the obstacles which legislators are continually putting in their way. . .*

- Henry David Thoreau, *Civil Disobedience*

## I. INTRODUCTION

A complaint and consent decree filed on May 25, 1994 by the Antitrust Division of the U.S. Department of Justice against Pilkington plc., a British flat glass manufacturer, is yet another indication that tough Federal Government antitrust enforcement policy is back in vogue.<sup>1</sup> The Government's complaint alleged that Pilkington's

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<sup>1</sup> United States v. Pilkington plc, 6 Trade Reg. Rep. (CCH) ¶ 45, 094, at 44, 689 (D. Ariz. filed May 25, 1994), *final judgment entered*, 1994-2 Trade Cas. (CCH) ¶ 70,842 (D. Ariz. 1994). After settling its case with the Department of Justice, Pilkington was still a defendant in two actions: PPG Indus., Inc. v. Pilkington plc, 825 F. Supp. 1465 (D. Ariz. 1993) and International Technology Consultants, Inc. v. Pilkington plc, No. 93-552 (D. Ariz. 1993). In PPG Indus., Inc. v. Pilkington, PPG sought treble damages for Pilkington's alleged violation of §§ 1 and 2 of the Sherman Act. After Pilkington's stay to compel arbitration was granted, a U.K. arbitration panel held against Pilkington. On April 4, 1995, prior to Pilkington's appeal of the arbitration board's decision to the Arizona district court, the parties jointly moved for dissolution of the suit. Finally, in International Technology Consultants v. Pilkington, Pilkington and two other U.S. flat glass manufacturers were alleged to have monopolized and conspired to restrain the market for float process technology. The plaintiff in that action, ITC, is not itself a manufacturer of glass. Rather, ITC is an engineering and consulting services company active in the construction of float process manufacturing facilities. Although the court granted Pilkington's co-defendants' motions for dismissal—Guardian Industries Corporation and AFG Industries, Inc.—Pilkington and Libby-Owens-Ford Co. remain defendants in the suit.

overseas technology licensing practices restrained U.S. commerce, resulting in foreclosure of U.S. exports.<sup>2</sup> It was the first time since 1982, and only the second time ever, that the Justice Department had acted against a foreign concern for conduct which took place wholly outside of U.S. territory.<sup>3</sup> *U.S. v. Pilkington plc.* was followed in short succession by the release of new draft Justice Department *Guidelines for the Licensing and Acquisition of Intellectual Property*<sup>4</sup> and more general *Antitrust Enforcement Guidelines for International Operations*,<sup>5</sup> both of which detailed the sorts of activities, whether conducted within the territorial United States or extraterritorially, that are likely to land a foreign corporation in trouble with the Antitrust Division. On the legislative front, the Department was also active in its support of new legislation designed to facilitate antitrust investigations and lawsuits against suspected foreign violators of U.S. antitrust laws.<sup>6</sup>

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<sup>2</sup> *British Glass Manufacturer Settles Case Attacking Restrictions on U.S. Exporters*, 66 Antitrust & Trade Reg. Rep. (BNA) No. 1666, at 617 (June 2, 1994).

<sup>3</sup> Those cases were: *United States v. C. Itoh & Co.*, 1982-83 Trade Cas. (CCH) ¶ 65,010 (W.D. Wash. 1982) (consent decree filed based on DoJ's allegation that eight Japanese trading companies had fixed prices paid to Alaskan producers of seafood exports to Japan); *Daishowa International v. North Coast Export Co.*, 1982-2 Trade Cas. (CCH) ¶ 64,774 (N.D. Cal. 1982). See Marina Lao, *Jurisdictional Reach of the U.S. Antitrust Laws: Yokosuka and Yokota, and "Footnote 159" Scenarios*, 46 RUTGERS L.J. 821, 836 (1994) (discussing previous paucity of government cases against foreign buyers' cartels whose extraterritorial activities restrained U.S. exports).

<sup>4</sup> The Draft U.S. Department of Justice Antitrust Guidelines for the Licensing and Acquisition of Intellectual Property were released for public comment on August 8, 1994. 67 Antitrust & Trade Reg. Rep. (BNA) No. 1676, at 204 (Aug. 11, 1994). The final guidelines were adopted and published on April 6, 1995. U.S. Department of Justice Antitrust Guidelines for the Licensing and Acquisition of Intellectual Property, [hereinafter 1995 Intellectual Property Guidelines] reprinted in 68 Antitrust & Trade Reg. Rep. (BNA) No. 1708 (Aug. 13, 1995). In contrast to past International Guidelines which combined intellectual property antitrust policy with international enforcement policy, the Clinton administration decided to publish a separate Intellectual Property Guideline because there is "nothing uniquely international about most antitrust issues related to intellectual property." Diane P. Wood, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, *Antitrust and Intellectual Property*, Remarks at the National Economic Research Associates, Inc.'s Fifteenth Annual Antitrust and Trade Regulation Seminar, July 7, 1994 at 4 (transcript on file with *The Northwestern Journal of International Law and Business*).

<sup>5</sup> The Draft Antitrust Enforcement Guidelines for International Operations were released for public comment on October 13, 1994. Trade Reg. Rep. (CCH) No. 338, part 2, at 39 (Oct. 18, 1994). The final guidelines were adopted and published on April 5, 1995. Antitrust Enforcement Guidelines for International Operations: Issued by the U.S. Department of Justice and the Federal Trade Commission, reprinted in 68 Antitrust & Trade Reg. Rep. (BNA) No. 1707 (April 6, 1995) [hereinafter 1995 Guidelines].

<sup>6</sup> S. 2297, 103d Cong., 2d Sess. (1994) and H.R. 4781, 103d Cong., 2d Sess. (1994), were introduced on July 19, 1994. *International Antitrust Enforcement: Proposed Legislation*, Trade Reg. Rep. (CCH) No. 326, at 5 (Aug. 2, 1994). H.R. 4781, the International Antitrust Enforcement Assistance Act of 1994, Pub. L. No. 103-438, 1994 U.S.C.A.N. (108 Stat. 4597) 3647 [hereinafter Enforcement Assistance Act], was signed into law by President Clinton on Novem-

The case against Pilkington is therefore likely to herald a new age in antitrust enforcement. The Assistant Attorney General responsible for antitrust enforcement hailed the Pilkington action as a "paradigm for how U.S. antitrust enforcement can. . . open export markets previously closed by anticompetitive practices."<sup>7</sup> Indeed, the Pilkington case and the new enforcement guidelines represent a sea of change for U.S. extraterritorial antitrust enforcement policy. In the words of the Attorney General, antitrust enforcement is now a means "to preserve the ability of American enterprises to compete on fair terms in international markets for U.S. export business."<sup>8</sup> As a matter of dollars and cents, the government reckoned that its case against Pilkington was worth \$150 million to \$1.25 billion in export revenues by the year 2000 for American firms engaged in flat glass export and the construction of float glass factories overseas.<sup>9</sup>

Moreover, contrary to the earlier claims of some commentators that the Clinton administration antitrust policy shift would be "largely symbolic," it now appears that the Justice Department means business.<sup>10</sup> During an August 4, 1994 Senate subcommittee hearing in support of the Enforcement Assistance Act, the Assistant Attorney General stated that the Antitrust Division has at least 30 major Sherman Act section 1 and 2 investigations pending which implicate non-

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ber 2, 1994. Enforcement Assistance Act, Pub. L. No. 103-438 at 3669-71. See also *President Signs International Antitrust Enforcement Assistance Bill*, 341 Trade Reg. Rep. (CCH) No. 341, at 1 (Nov. 8, 1994) (thus enabling the Department of Justice to enter into cooperative agreements with their foreign counterparts in order to obtain antitrust evidence outside the U.S.). The Enforcement Assistance Act aims to facilitate antitrust actions against non-U.S. corporations by permitting the Attorney General and Federal Trade Commission to share evidence with foreign antitrust authorities so long as the recipient of such information has signed an "antitrust mutual assistance agreement." The Clinton administration regarded difficulties in obtaining information and documents from outside the U.S. as one of the "most significant obstacles" to greater antitrust enforcement of foreign-owned companies. As a result of the Act's passage, the Clinton Administration expects that U.S. antitrust officials will now have the "firepower" they need "to crack down on. . . collusion among foreign firms that significantly affects U.S. foreign and export commerce." *Enforcement: Clinton Signs Bill to Help Enforcers Obtain Foreign-Located Antitrust Evidence*, Antitrust Trade Daily (BNA), at D-2 (Nov. 3, 1994).

<sup>7</sup> Anne K. Bingaman, Assistant Attorney General, Antitrust Division, *Innovation and Antitrust*, Address Before the Commonwealth Club of California (July 29, 1994) Department of Justice Press Release at 8 (on file with *The Northwestern Journal of International Law and Business*).

<sup>8</sup> *United States v. Pilkington plc. and Pilkington Holdings Inc.*, 6 Trade Reg. Rep. (CCH) ¶ 45, 094, at 44, 689 (D. Ariz. filed May 25, 1994) (the Attorney General was speaking about the *Pilkington* case).

<sup>9</sup> Bingaman, *supra* note 7, at 8.

<sup>10</sup> Joseph P. Griffin, *The Impact of Reconsideration of U.S. Antitrust Policy Intended to Protect U.S. Exporters*, 15 WORLD COMP. L & ECON. REV. 5, 13 (1992).

U.S. defendants.<sup>11</sup> That the Department's international activism is more than a flash in the pan also has been demonstrated by several other recent enforcement actions: a consent decree with British Telecom amending a proposed purchase of a twenty percent stake in MCI Communication;<sup>12</sup> and, a cooperative enforcement action with the European Union against Microsoft's worldwide software licensing practices.<sup>13</sup>

At the core of the Justice Department's case against Pilkington and the 1995 Guidelines is the question of what constitutes subject matter jurisdiction. At what point does conduct, undertaken outside the borders of the U.S., but objectionable according to U.S. antitrust law, fall within the purview of a U.S. court? Over the past twenty years, the judiciary and Justice Department's thinking on antitrust subject matter jurisdiction has gyrated between two extremes. On the one hand, a belief in strict territoriality implies that jurisdiction should arise only when the illegal conduct creates immediate U.S. effects such as increased prices or reduced supply. At the other extreme, an aggressive notion of subject matter jurisdiction supports the U.S.'s right

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<sup>11</sup> *International Antitrust Enforcement — Subcommittee Hearing*, Trade Reg. Rep. (CCH) No. 327, at 3 (Aug. 10, 1994).

<sup>12</sup> *U.S. v. MCI Communications Corp*, 1994-2 Trade Cases (CCH) ¶ 70,730 (D.D.C. 1994) (Proposed consent decree arising from MCI's sale of \$4.3 billion of its shares to British Telecom). The Federal Government was concerned that a planned U.S. joint venture between the two companies to provide global telecommunications services could have inhibited U.S. competition because of the joint venture's access to British Telecommunication's (BT's) United Kingdom network. Hence, in the consent decree, the parties agreed to prohibit discrimination against U.S. carriers, refrain from sharing proprietary or pricing information regarding U.S. competitors, and cease any efforts to bypass the international telecommunications regulatory regime and gain access to BT's network until all other carriers can also exempt themselves from restrictions currently imposed by international regulation. Bingaman, *Briefs Seminar on International Fronts*, Antitrust & Trade Reg. Daily (BNA) No. 67, at d6 (Nov. 10, 1994).

<sup>13</sup> *U.S. v. Microsoft, Inc.*, 7 Trade Reg. Rep. (CCH) 50,764 (D.D.C. 1994) (proposed consent decree). The Department alleged that Microsoft's licensing agreements with PC manufacturers effectively blocked competing operating systems from the software market. In particular, the Government objected to the "per processor" royalty arrangements and other impediments to competition resulting from the onerous terms of Microsoft's licensing agreements. The Assistant Attorney General saw the cases against Pilkington and Microsoft as two of a kind; both involved companies which had gained a dominant market position and "then chose to employ various unlawful practices to cement its dominance and thwart innovation. Bingaman, *supra* note 7, at 9. However, unlike the case against Pilkington, the Government's action against Microsoft had an unhappy ending when a federal court judge rejected the Department's proposed consent decree stating "that the U.S. government is either incapable or unwilling to deal effectively with a potential threat to this nation's economic well-being." Viveca Novak and Don Clark, *Microsoft Antitrust Pact Rejected by Federal Judge*, WALL ST. J., Feb. 15, 1995, at A3.

to enforce its antitrust laws whenever prohibited overseas conduct produces any U.S. effect whatsoever.<sup>14</sup>

Current Justice Department thinking and practice demonstrates perhaps the most aggressive approach to subject matter jurisdiction since the 1960s. However, due to the Department's fondness for consent decrees, neither its extraterritorial enforcement policy nor its views on subject matter jurisdiction—including the case against Pilkington plc.—have yet been tested in court.<sup>15</sup> Nevertheless, close attention to the new enforcement policy, as embodied in *U.S. v. Pilkington plc.*, is warranted. The approach to subject matter jurisdiction which underpins the Department's action against Pilkington threatens to bring within the embrace of the U.S. federal courts a wide array of overseas commercial activities conducted by non-U.S. companies. Indeed, in a private action, a Danish company has recently brought suit in the Southern District of New York against a European competitor alleging that anticompetitive conduct in Europe has had sufficient U.S. domestic effects to warrant U.S. subject matter jurisdiction.<sup>16</sup> An influx of unwilling foreign litigants will undoubtedly cause U.S. courts to re-examine traditional notions of subject matter jurisdiction and could heighten existing trade tensions.

The Department's invigorated international enforcement policy is also worthy of detailed analysis because it represents a *volte face* on

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<sup>14</sup> William F. Baxter, *Antitrust in an Interdependent World*, in CURRENT ISSUES IN INTERNATIONAL ANTITRUST, 13, 15 (Joseph P. Griffin ed. 1981).

<sup>15</sup> "[A] consent decree is a compromise settlement . . . [n]egotiated by the Justice Department and the antitrust defendant, it is later ratified as an order of the federal court." Allen Boyer, *Form As Substance: A Comparison of Antitrust Regulation by Consent Decrees in the USA, Reports of the Monopolies and Mergers Commission in the UK, and Grants of Clearance by the European Commission*, 32 INT'L & COMP. L. Q. 904, 905 (1983). Consent decrees therefore do not represent a finding of guilt or innocence, merely an agreement by the Justice Department to cease litigation in exchange for the defendant's promise to terminate the objectionable conduct. Most significantly, consent decrees allow defendants to escape the effects of § 5 of The Clayton Act; namely, a finding of liability in a litigated government enforcement action is treated as a *prima facie* finding of guilt in subsequent private actions, 15 U.S.C. § 2(5)(a) (1990), whereas a consent decree implies no guilt. According to Boyer, consent decrees have been the "basic tool of antitrust enforcement" since the early days of government antitrust enforcement. *Id.* at 904. By the early 1980s, nearly 80% of the Department's antitrust suits were being settled by consent decrees. *Id.* at 905. Once negotiated, consent decrees must be submitted to a district court for approval. 15 U.S.C. § 16(b) (Supp. 1993) (the "Tunney Act"). While court approval has historically been virtually automatic, *United States v. Microsoft, Inc.* presents a sharp break with past practice. *See supra* note 13.

<sup>16</sup> *Eskofot A/S v. E.I. DuPont de Nemours & Co.*, No. 93-6137 (S.D.N.Y. 1993). The dispute arose after DuPont U.K. repudiated contracts under which the plaintiff, Eskofot, was to import photographic equipment into the U.S. The court determined that it would have jurisdiction because of the "direct, substantial and reasonably foreseeable" effects which DuPont's action would have on the U.S. market. 68 Antitrust & Trade Reg. Rep. (BNA) 66 (Jan. 19, 1995).

the enforcement policies pursued by the Reagan-Bush administrations. Arguably, the Department's policy stretches to the limit the type of conduct which should fall within the jurisdiction of U.S. courts under the "effects" test as embodied in the 1982 Foreign Trade Antitrust Improvement Act (FTAIA)<sup>17</sup> and case law going back to Judge Learned Hand's seminal opinion in *United States v. Aluminum Co. of America*.<sup>18</sup>

An inquiry into subject matter jurisdiction under the 1995 Guidelines and in *U.S. v. Pilkington, plc.* requires a brief examination of the history of extraterritorial enforcement policy since the mid-1970s. This is set forth in section II. Next, in section III, the comment analyzes the ebb and flow of judicial approaches to U.S. antitrust subject matter jurisdiction, focusing on the pre- and post-FTAIA eras. Section IV looks specifically at the 1995 Guideline and the Justice Department's grounds for asserting U.S. subject matter jurisdiction against Pilkington. In doing so, the comment suggests that in an interdependent global economy, an aggressive jurisdictional philosophy risks embroiling U.S. courts in disputes involving the competitive structure of transnational and foreign markets. While guarding U.S. domestic commerce from the direct spillover effects of international trade is a well accepted justification for aggressive antitrust enforcement, defending U.S. export opportunities has a "more ambiguous position in antitrust theory" and seems closer to competition policy and less like legal theory.<sup>19</sup> Finally, in section V, the comment concludes that if U.S. international antitrust enforcement policy continues on its present course, it risks becoming a tool of strategic trade policy rather than a compliant body of public law.

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<sup>17</sup> The Foreign Trade Antitrust Improvement Act (FTAIA) was passed as Title IV of the Export Trading Company Act of 1982 and set forth amendments to the Sherman Act, Clayton Act and Federal Trade Commission Act. The Sherman Act amendment clarified the test for when extraterritorial conduct is actionable under U.S. antitrust law. H.R. Rep. No. 686, 97th Cong., 2d Sess., at 2 (1982). The FTAIA stipulates that extraterritorial conduct violates U.S. antitrust law only where there is "a direct, substantial, and reasonably foreseeable effect" on U.S. export commerce. 15 U.S.C. § 6a (1982). The House Judiciary Committee Report identified nearly seven "effects test" which had been applied by U.S. courts. H.R. Rep. No. 686 at 5. See *infra* text accompanying notes 74-112.

<sup>18</sup> 148 F.2d 416 (2d Cir. 1945).

<sup>19</sup> 1 BARRY E. HAWK, UNITED STATES COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE 170 (2d ed. 1993 Supp.).

II(A) HISTORY OF U.S. DEPARTMENT OF JUSTICE  
EXTRATERRITORIAL ANTITRUST ENFORCEMENT POLICY:  
OVERVIEW

The Department of Justice, through its Antitrust Division, has exclusive Sherman Act enforcement power and, at its discretion, may seek either civil or criminal remedies against a would be defendant.<sup>20</sup> Given this power, the Antitrust Division has been formally publicizing its views about when and on what basis the government will pursue extraterritorial antitrust violators since at least the mid-1950s.<sup>21</sup> Although they constitute neither law nor formal administrative regulation, these enforcement policy utterances began to take the form of "Guides" or "Guidelines" with the issuance of the first "Antitrust Guide for International Operations" in 1977,<sup>22</sup> followed by a second Guidelines in 1988,<sup>23</sup> and finally, the release of the most recent Guidelines in April 1995.<sup>24</sup> Although differing in content, each set of guidelines has set forth the Department's enforcement policy and included a number of illustrative cases. For example, the 1977 and 1988 Guidelines included technology and know-how licensing, whereas the 1995 Guidelines promulgated by the current administration treat this area separately.<sup>25</sup> Moreover, where the 1977 Guide limited itself to mainly the Sherman Act, the 1988 and 1995 Guidelines have incorporated a bevy of antitrust and trade-related legislation, including: National Cooperative Research and Production Act of 1993,<sup>26</sup> Export Trading Company Act of 1982,<sup>27</sup> Wilson Tariff Act,<sup>28</sup> Trade Act of

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<sup>20</sup> Stephen J. Squeri, *Government Investigation and Enforcement: Antitrust Division*, 847 PLI/Corp. 11, 16 (June-July 1994). The Department of Justice shares enforcement power of The Clayton Act, 15 U.S.C. § 12 (1990) with the Federal Trade Commission (FTC).

<sup>21</sup> In 1955, the Attorney General's Antitrust Committee was among the earliest organizations to publicly discuss Justice Department enforcement policy. 1 WILBUR L. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS § 2.1, at 44 (3d. ed. 1982).

<sup>22</sup> United States Department of Justice Antitrust Enforcement Guidelines for International Operations, *reprinted in* Antitrust and Trade Reg. Rep. (BNA) No. 799 (Feb. 1, 1977) [hereinafter 1977 Guide].

<sup>23</sup> United States Department of Justice Antitrust Enforcement Guidelines for International Operations, *reprinted in* 55 Antitrust & Trade Reg. Rep. (BNA) No. 1391 (Nov. 17, 1988) [hereinafter 1988 Guidelines].

<sup>24</sup> 1995 Guidelines, *supra* note 5.

<sup>25</sup> *See supra* note 4.

<sup>26</sup> 15 U.S.C. § 4301-06 (1994)(amended 1993)(specifying that certain forms of research-oriented business combinations receive rule of reason treatment under U.S. antitrust law).

<sup>27</sup> 15 U.S.C. § 4001-4053 (1994) (promoting U.S. exports by, among other things, modifying the application of the antitrust laws to certain export trade).

<sup>28</sup> 15 U.S.C. § 8 (1994)(prohibiting restraints of trade when made between two or more persons involving imports into the U.S.).



1974,<sup>29</sup> among others. The 1995 Guidelines thus represent the third major pronouncement on U.S. extraterritorial antitrust enforcement in the space of twenty years.

Enforcement guidelines have been considered an appropriate mode for expression of U.S. antitrust policy both because antitrust laws do not lend themselves well to mechanical application, and because antitrust enforcement policy is “a form of industrial policy” and therefore, like any economic policy, is open to judgment based on results.<sup>30</sup> The benchmark against which the international antitrust enforcement policies of the Carter, Reagan, Bush and Clinton administrations have been judged has been the U.S. merchandise trade deficit. Reducing the trade deficit has been an explicit goal since the publication of the 1977 Guide.<sup>31</sup> Judged in this light, actual results have been disappointing. In 1977, the burgeoning U.S. merchandise trade deficit stood at \$26 billion. Eleven years later, in 1988, the deficit had ballooned to \$123 billion. By 1993, policymakers were nearly apoplectic as the deficit continued its growth to reach a staggering \$131 billion.<sup>32</sup> That U.S. exports have also risen steadily since 1977—U.S. merchandise exports stood at \$119 billion in 1977, but had grown to \$322 billion in 1988 and \$461 billion in 1993<sup>33</sup>—has been seen as a success, of sorts, but one that has been dwarfed by the towering merchandise trade deficit. Thus, each successive international enforcement guideline, and the successive presidential administrations that have implemented the guidelines, has had to contend with the relentless growth in the U.S.’s merchandise trade deficit.

## II (B) JUSTICE DEPARTMENT ENFORCEMENT POLICY AND VIEWS ON SUBJECT MATTER JURISDICTION UNDER THE 1977 GUIDE

The 1977 Guide began with a fairly non-controversial premise. Extraterritorial enforcement of U.S. antitrust laws should “protect the American consuming public” and, more importantly, “protect the

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<sup>29</sup> 19 U.S.C. § 2101-495 (1994)(promoting international trade and establishing punitive trade measures when U.S. exporters are confronted by overseas trade barriers).

<sup>30</sup> Joel Davidow, *U.S. International Antitrust Enforcement: Goals and Guidelines*, 1988 FORDHAM CORP. L. INST. 2-1, 2-5.

<sup>31</sup> Douglas E. Rosenthal, Chief, Foreign Commerce Section of the Antitrust Division, Department of Justice, *Antitrust Enforcement Policy of the Department of Justice in International Trade*, 1979 FORDHAM CORP. L. INST. 301, 302.

<sup>32</sup> *Survey of Current Business Statistics*, United States Department of Commerce, Economic and Statistics Administration, Bureau of Economic Analysis.

<sup>33</sup> *Id.*

U.S. domestic market against restraints on competition — restraints on entry, pricing and terms of sales.”<sup>34</sup> The subtext of the 1977 Guide was somewhat more complex. At the time, the U.S. business community saw itself as the long-suffering victim of over-zealous antitrust enforcement and was convinced that Justice Department antitrust enforcement was having a deleterious effect on U.S. exports.<sup>35</sup> Less, not more, enforcement appeared to be the path to greater prosperity. The Justice Department hoped that the 1977 Guide’s opening statement of intent would mollify the concerns of the U.S. export community and provide evidence that the U.S. was now “following more enlightened policies.”<sup>36</sup> Later, when the administrative efforts were deemed to have failed, Congress made a legislative effort to address U.S. industry’s concern by passing the Foreign Trade and Antitrust Improvement Act (FTAIA)<sup>37</sup> in 1982.

The 1977 Guide’s stance on subject matter jurisdiction was based upon a bewildering array of “effects” tests that were then enjoying varying degrees of popularity among the circuit courts. On its face, at least, the 1977 Guide’s test for when U.S. jurisdiction justifiably could be asserted foreshadowed the FTAIA formulation: “the U.S. antitrust laws should be applied to an overseas transaction when there is a *substantial* and *foreseeable* effect on U.S. commerce.”<sup>38</sup> By “foreseeable,” the 1977 Guide meant that the conduct’s “clear purpose” was “to restrain significant commerce in the U.S.,”<sup>39</sup> language which seems to be a nod in the direction of specific intent, or at least a general intent to harm U.S. exporters. As for the meaning of “substantial,” in the context of export foreclosure, there was “no argument about the *affirmative* assertion of U.S. jurisdiction” when overseas conduct lead to foreclosure of U.S. exports.<sup>40</sup>

Thus, in order to assert U.S. jurisdiction, the Department was not required to find direct spillover effects in the U.S. domestic economy such as price movements or supply disruptions. In the view of one Department official, a commendable example of U.S. subject matter jurisdiction deployment was the Justice Department’s offensive

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<sup>34</sup> 1977 Guide, *supra* note 22, at E-2.

<sup>35</sup> George E. Garvey, *The Foreign Trade Antitrust Improvements Act*, 14 LAW & POL’Y INT’L BUS. 1, 4 (1982).

<sup>36</sup> Davidow, *supra* note 30, at 2-7.

<sup>37</sup> See *supra* note 17.

<sup>38</sup> 1977 Guide, *supra* note 22, at E-2, E-3 (emphasis added).

<sup>39</sup> 1977 Guide, *supra* note 22, at E-3.

<sup>40</sup> Douglas E. Rosenthal, *Subject Matter Jurisdiction in U.S. Export Trade*, 1977 AM. SOC’Y INT’L L. PROC. OF THE 71ST ANN. MEETING 214, 214.

in the late 1950s against General Electric and a group of U.S. manufacturers with operations in Canada. The alleged antitrust offense was that the U.S. manufacturers had refused to issue technology licenses to competing U.S. manufacturers who sought to export American-made radios to Canada rather than establish a Canadian manufacturing plant. Like *U.S. v. Pilkington plc.*, the *General Electric* court approved a consent decree without reaching the merits of the case. It was the Department's view that the court justifiably exercised jurisdiction because the licensing arrangement "foreclosed U.S. export competition."<sup>41</sup>

Yet, the outwardly aggressive stance of the 1977 Guide towards Sherman Act jurisdiction was moderated by its respect of principles of international comity. In contrast to its successor policy guides, the 1977 Guide incorporated international comity as an affirmative defense to the exertion of U.S. subject matter jurisdiction.<sup>42</sup> International comity is the extent to which U.S. courts accord deference and respect to the legislative, executive or judicial acts and policies of other nations when those acts have a knock-on effect within the U.S.<sup>43</sup> Taking its cue from the Restatement (Second) of Foreign Relations Law, the 1977 Guide supported the jurisdictional rule of reason enunciated in *Timberlane Lumber Co. v. Bank of America*:<sup>44</sup> conflicts between the laws of two countries should be decided according to which

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<sup>41</sup> *Id.* at 218. The cases known collectively as the *Radio Patents Pool* cases were settled in a series of consent decrees in 1962 and were heavily protested by the Canadian government even though no Canadian companies were named as defendants. See *U. S. v. General Electric Company*, 1962-1 Trade Cas. (CCH) ¶ 70,342 (S.D.N.Y. 1962); *U. S. v. General Electric Company*, 1962-1 Trade Cas. (CCH) ¶ 70,428 (S.D.N.Y. 1962); *U. S. v. General Electric Company*, 1962-1 Trade Cas. (CCH) ¶ 70,546 (S.D.N.Y. 1962).

<sup>42</sup> 1977 Guide, *supra* note 22, at E-3.

<sup>43</sup> Baxter, *supra* note 14, at 17. According to Black's Law Dictionary, "[i]n general, principle of 'comity' is that courts of one state or jurisdiction will give effect to laws and judicial decisions of another state or jurisdiction, not as a matter of obligation but out of deference and mutual respect." *Brown v. Babbitt Ford, Inc.* 571 P.2d 689 (Ariz. Ct. App. 1977), in BLACK'S LAW DICTIONARY 267 (6th ed. 1990). International comity considerations are invoked when adherence to U.S. law affects non-U.S. nationals. Based on an eight factor analysis, U.S. courts may find the exercise of U.S. jurisdiction to be "unreasonable" when compliance with U.S. impinges on another nation's sovereignty. Restatement of the Law (Third) The Foreign Relations Law of the United States § 403 cmt. a (1986) [hereinafter Restatement (Third)].

<sup>44</sup> 549 F.2d 597, 615 (9th Cir. 1976), *aff'd*, 749 F.2d 1378 (9th Cir. 1984), *cert. denied*, 472 U.S. 1032 (1985) (developing a tripartite balancing test which considered (a) whether the conduct was intended to or did effect the foreign commerce of the U.S. (b) whether the conduct was of a magnitude so as to be a cognizable violation of the Sherman Act, and (c) whether, as a matter of international comity, the extraterritorial jurisdiction of the U.S. should be asserted). The Third, Fifth, Tenth, and Ninth Circuits had adopted the *Timberlane* test prior to passage of the FTAIA. Griffin, *supra* note 10, at 7.

nation has "the more important national interest at stake. . . ."<sup>45</sup> Another moderating influence was the Guide's stance that an overseas wrongdoer's conduct must have a relatively substantial impact on domestic U.S. commerce before U.S. courts could justifiably get involved. For example, in "Case L" which deals with an offshore price cartel run by a government-owned mining corporation, subject matter jurisdiction is premised on the fact that the foreign-owned defendant controls seventy-five percent of the U.S. market for the commodity subject to the price-fixing arrangement.<sup>46</sup> Even in a case where there is a large domestic impact, the comment to "Case L" indicates that principles of international comity would trump U.S. jurisdiction, limiting the willingness of the Justice Department to prosecute the foreign wrongdoer.<sup>47</sup>

## II(C) JUSTICE DEPARTMENT ENFORCEMENT POLICY AND VIEWS ON SUBJECT MATTER JURISDICTION UNDER THE 1988 GUIDELINES

The Republican presidential victory in 1980 brought with it "Chicago School" thinking on economic policy, and the Antitrust Division's enforcement policy reflected this change from day one.<sup>48</sup> What "Chicago School" thinking meant in real-world terms was the introduction of "about as minimal an antitrust program as can be imagined."<sup>49</sup> In comparison to the 1977 Guide and Carter-era en-

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<sup>45</sup> 1977 Guide, *supra* note 22, at E-14. Nevertheless, the 1977 Guide takes a fairly stern tone in the illustrative cases which it reviews. For example, in Case K, a foreign government orders independent U.S. companies operating in that country to take action which is contrary to U.S. antitrust law and which has domestic effects. Because the defendant is a U.S. corporation, however, international comity does not protect the defendant from suit within the U.S. 1977 Guide, *supra* note 22, at E-14.

<sup>46</sup> 1977 Guide, *supra* note 22, at E-15.

<sup>47</sup> 1977 Guide, *supra* note 22, at E-15.

<sup>48</sup> At the heart of the Chicago School model of antitrust policy is the belief that the sole *raison d'être* of U.S. antitrust policy should be enhancement of allocative efficiency in the marketplace. Thus, its proponents advocate dispensing with a number of concepts which heretofore were staples of the antitrust lexicon: tie-ins which result when a seller requires a buyer to purchase a second product as a condition to purchasing the first; resale price maintenance agreements, which under *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911) (a.k.a., "*Dr. Miles* rule") are accorded *per se* treatment; and, the doctrine of predatory pricing. Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979). In Posner's words, "the focus of the antitrust laws should not be on unilateral action; it should instead be on: (1) cartels and (2) horizontal mergers large enough to create monopoly directly, as in the classic trust cases, or to facilitate cartelization by drastically reducing the number of significant sellers in the market." *Id.* at 928.

<sup>49</sup> Robert Pitofsky, *Antitrust Policy in a Clinton Administration*, 62 ANTITRUST L.J. 217, 217 (1993).

forcement, the Department of Justice policy became far less intrusive towards foreign conduct with possible U.S. antitrust implications. The 1988 Guidelines—the culmination of eight years of policy evolution—took the admonition of Robert Bork to heart; namely, the sole value underlying U.S. antitrust law should be consumer welfare.<sup>50</sup> The shift in emphasis reflected the 1988 Guideline framers' belief that the real intent of the Sherman Act was the protection of consumers and that Department action should be measured by improvements to long-run consumer welfare.<sup>51</sup> More tellingly, in Footnote 159 of the 1988 Guidelines, the Department expressly foreswore extension of U.S. jurisdiction where U.S. consumers were not directly harmed.<sup>52</sup> Not surprisingly, extraterritorial application of U.S. antitrust laws was minimal throughout the Reagan era.

The 1988 Guidelines outdid its 1977 predecessor in moderating the extraterritorial extension of The Sherman Act by softening its jurisdictional requirements. That the Reagan administration Justice Department had overseen passage of the FTAIA meant that the 1988 Guidelines' drafters were inclined to follow its "direct, substantial and foreseeable" formulation to the letter. Footnote 159 described the substantiality and directness requirements in terms of "adverse effects on competition that would harm U.S. consumers by reducing output or raising prices."<sup>53</sup> Moreover, a logical corollary of Footnote 159 was that foreclosure of U.S. export commerce did not invoke U.S. jurisdiction except where the exclusion of a U.S. exporter from a foreign market was "essential" to the ability of that exporter to compete in the U.S.<sup>54</sup> The 1988 Guidelines also implicitly incorporated *Timberlane's* jurisdictional rule of reason: ". . . in determining whether it would be reasonable to assert jurisdiction. . . in a given case, the Department considers whether significant interests of any foreign sovereign would be affected. . . ."<sup>55</sup> Thus, unlike both its predecessor and successor policy guides, the 1988 Guidelines clearly required the pres-

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<sup>50</sup> Robert Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 11 (1966).

<sup>51</sup> Joel Davidow, *Keiretsu and U.S. Antitrust*, 24 LAW & POL'Y INT'L BUS. 1035, 1048 (1993); At the heart of the 1988 Guidelines' approach to both domestic and international enforcement policy was the proposition that "only conduct which reduces output in the market as a whole and thus threatens to injure consumers should violate antitrust laws." Davidow, *supra* note 30, at 2-11.

<sup>52</sup> 1988 Guidelines, *supra* note 23, at S-21 n. 159.

<sup>53</sup> 1988 Guidelines, *supra* note 23, at S-21 n. 159.

<sup>54</sup> Charles T. Rule, *U.S. Enforcement Policy and Jurisdiction*, 1987 CORP. L. INST. N. AM. & COMMON MKT. ANTITRUST & TRADE LAWS 1, 3.

<sup>55</sup> 1988 Guidelines, *supra* note 23, at S-22.

ence of domestic spillover effects before sanctioning assertion of U.S. subject matter jurisdiction.

## II(D) DEVELOPMENTS IN ENFORCEMENT POLICY DURING THE BUSH AND CLINTON ADMINISTRATIONS

During the Bush administration, "pragmatism replaced ideological rigidity" as the pendulum began to swing back towards meaningful antitrust enforcement in a whole range of substantive areas that had been abandoned during the Reagan years.<sup>56</sup> In the waning days of the Bush presidency, with the trade deficit exceeding the boundaries of political acceptability, the Department abandoned its tolerant attitude towards extraterritorial conduct that violated U.S. antitrust laws. In part as a stick-waving gesture in the wake of President Bush's ill-fated "jobs-trip" to Japan,<sup>57</sup> then Attorney General William P. Barr announced that the Department was dropping Footnote 159, which had essentially renounced Department of Justice extraterritorial enforcement against foreign defendants where the effects were felt solely by U.S. exporters, from the 1988 Guidelines.<sup>58</sup> The U.S. Department of Justice was now fully prepared to bring lawsuits against non-U.S. companies whose conduct outside U.S. territory violated U.S. antitrust laws to the detriment of U.S. exporters.

After the Democratic presidential victory in 1992, Clinton administration officials quickly made known their intention to vigorously enforce U.S. antitrust laws on behalf of U.S. exporters. During a U.S.-Japan Framework negotiation, the Justice Department told the Japanese negotiators that "it is our policy to apply and enforce the law as the facts warrant," regardless of the nationality of the alleged violator.<sup>59</sup> More tangible steps were taken to reinvigorate enforcement policy when the Administration moved to beef-up the 1988 Guidelines by replacing those sections related to intellectual property and technology.<sup>60</sup> Finally, in October 1994, the Clinton administration scrapped the 1988 Guidelines altogether and circulated for public

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<sup>56</sup> Pitofsky, *supra* note 49, at 218.

<sup>57</sup> By his own assessment, President Bush's trip to Japan was "essentially a journey aimed at creating jobs, jobs, jobs." Ellen Warren, *Bush Turns Up Trade Rhetoric*, DETROIT FREE PRESS, Jan. 3, 1992, at 2E. The trip failed to relieve U.S.-Japan trade tensions.

<sup>58</sup> *United States Department of Justice Policy Regarding Anticompetitive Conduct that Restricts U.S. Exports: Statement of Antitrust Enforcement Policy* (Apr. 3, 1992), reprinted in 62 *Antitrust and Trade Reg. Rep. (BNA)* No. 1560, at 479 (Apr. 9, 1992).

<sup>59</sup> *U.S. Officials Urge More Activity by Japanese in Antitrust Enforcement*, 65 *Antitrust and Trade Reg. Rep. (BNA)* No. 1642, at 717 (Dec. 2, 1993).

<sup>60</sup> Proposed U.S. Guidelines Create Intellectual Property "Safety Zone," *id.*, at 1.

comment a draft of the new international enforcement guidelines. The 1995 Guidelines' goal was not only the protection of U.S. consumers, but also the enforcement of "our antitrust laws against anticompetitive practices that harm U.S. commerce."<sup>61</sup>

Throughout its history, U.S. international antitrust enforcement policy has responded to the perceived needs of U.S. exporters rather than a concern for the U.S. competitive business environment. When, in the early 1980s, Chicago School antitrust pundits suggested that excessive enforcement of U.S. antitrust laws retarded exports, the Justice Department obligingly played dead. In terms of subject matter jurisdiction, the Justice Department focused its efforts on cases meeting the requirements of the "strict territoriality" doctrine.<sup>62</sup> Enforcement efforts were targeted at cases involving "significant activities in the United States, even where some of the conspirators may never have set foot within the U.S."<sup>63</sup> Moreover, the Justice Department expressly endorsed a jurisdictional test which gave wide berth to principles of international comity.<sup>64</sup> Today, as is evident in *U.S. v. Pilkington* and the 1995 Guidelines, the Clinton administration's antitrust gurus subscribe to a new wisdom. Objective territoriality has supplanted strict territoriality, and tough international antitrust enforcement is one part of the administration's strategy to reduce the trade deficit.

### III(A) SUBJECT MATTER JURISDICTION UNDER THE SHERMAN ACT, PRE-FTAIA

The controversy concerning U.S. subject matter jurisdiction over non-U.S. antitrust laws has its origins in the legislative debate over passage of the Sherman Act.<sup>65</sup> At best, that debate was inconclusive.

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<sup>61</sup> International Antitrust Guidelines for Public Comment, United States Department of Justice Press Release, Oct. 13, 1994, Trade Reg. Rep. (CCH) No. 338, part 2, at 37 (Oct. 18, 1994).

<sup>62</sup> John H. Shenefield, Associate Attorney General, *Extraterritorial Application of U.S. Antitrust Law*, Remarks Before the International Law Institute and American Bar Association's International Law Section (Dec. 10, 1980), in [1969-83 Transfer Binder] 475 Trade Reg. Rep. (CCH) ¶ 50,424, at 55, 959-60 (Feb. 2, 1981). Although the Reagan administration pursued an enforcement policy based exclusively on "strict territoriality," Shenefield recognized the validity of "objective territoriality" or the "effects" doctrine which held that U.S. jurisdiction ensued whenever overseas antitrust violations effected U.S. commerce. *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 55,961. See *supra* note 44, discussing the 9th Circuit's subject matter requirements in *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976) and its relationship to comity.

<sup>65</sup> 15 U.S.C §§ 1 and 2 (1990) (declaring illegal restraints of trade, "among the several States, or with foreign nations, . . ."). Inclusion of international trade was hotly debated during the legislative debates. For example, in an amendment to the final draft over whether the Sherman

One scholar has observed that, with respect to overseas application of the Sherman Act, the trust-busting Congress had two goals in mind: first, the drafters had a keen appreciation of the relationship between imports and domestic effects on competition, and second, the framers wished to prevent "jurisdiction hopping" by U.S. companies whose Sherman Act violations may have been perpetuated extraterritorially.<sup>66</sup> There was no mention in the legislative record that U.S. antitrust laws could or should somehow be used to maintain the competitive integrity of foreign markets on behalf of U.S. exporters.<sup>67</sup>

However, the ambiguity of the legislative record has not stopped the Supreme Court from consistently including extraterritorial conduct within the Sherman Act's jurisdictional reach.<sup>68</sup> In fact, pinning down the exact location of those jurisdictional boundaries has been the subject of an ongoing debate that has engaged some of the country's greatest jurists but yielded little common agreement.<sup>69</sup> Indeed, ever since Judge Learned Hand announced the "effects test" for exertion of U.S. subject matter jurisdiction over extraterritorial conduct in *Alcoa*, the federal circuits have been badly splintered, disagreeing over the type of conduct and the degree of domestic effects required to find a non-U.S. entity liable under the Sherman Act.<sup>70</sup>

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Act should encompass "commerce. . . with foreign nations," there was considerable skepticism over the extent to which the federal government had the power to regulate foreign commerce not directly related to the "importation, transportation, or sale of articles imported into the United States." A number of the debate-participants stated their belief that U.S. antitrust jurisdiction could extend no further than the federal government's regulatory power over interstate commerce. 21 Cong. Rec. 598 - 99 (daily ed. March 25, 1890)(statement of Senator George).

<sup>66</sup> 1 JAMES R. ATWOOD & KINGMAN BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD § 2.03, 25 (2d ed. 1981).

<sup>67</sup> *Id.*; Indeed, Robert Bork has written that "the wide variety of other policy goals that have since been attributed to the framers of the Sherman Act is not to be found in the legislative history." ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 21 (1978).

<sup>68</sup> See *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704 (1962).

<sup>69</sup> Justice Holmes was among the earliest to address the issue. Writing for the majority in *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909), Holmes made clear his belief that U.S. courts should strictly adhere to territorial limitations on the enforcement of the Sherman Act. See 1 Hawk, *supra* note 19, at 63 n. 3 (1991 Supp.). Some forty years later, however, Judge Learned Hand, sitting in the stead of the Supreme Court which at the time lacked a quorum, held in *United States v. Aluminum Company of America, Inc.* that (a) where general intent can be demonstrated to affect U.S. exports or imports, and (b) such effects can be shown, then a non-U.S. corporation could be held liable for U.S. antitrust violations. 148 F.2d 416, 443 (2d Cir. 1945). But, lacking specific intent, Judge Hand was emphatic that "Congress did not intend the Act" to cover extraterritorial violations of U.S. antitrust laws. *Id.*

<sup>70</sup> Edward L. Rholl, *Inconsistent Application of the Extraterritorial Provisions of the Sherman Act: A Judicial Response Based Upon the Much Maligned 'Effects' Test*, 73 MARQ. L. REV. 435, 456 (1990).



Another broad area of general confusion prior to the FTAIA was the question of international comity and its relationship to subject matter jurisdiction. In antitrust law, as with other substantive areas of commercial regulatory law, there was—and some would argue continues to be—no judicial or legislative agreement on how to reconcile the fact that in an interdependent global economy the legitimate regulatory activities of our foreign trading partners are bound to have substantial effects on U.S. commerce.<sup>71</sup> Up until 1982, *Timberlane's* tripartite “jurisdictional rule of reason” test, which balanced the magnitude and foreseeability of harm to U.S. commerce against concerns of international comity and fairness, still enjoyed wide circulation.<sup>72</sup> Yet, there was confusion as to whether the comity leg of the factor analysis trumped *Timberlane's* other two factors—intent and magnitude of harm—or whether all three factors should be given equal weight. Given this level of uncertainty in an area fraught with non-judicial policy considerations, it was wholly anticipated that Congress would enter the fray and make “explicit” the Sherman Act’s application to overseas conduct.<sup>73</sup> The FTAIA was the result.

### III(B) SUBJECT MATTER JURISDICTION UNDER THE FTAIA

In 1982, Congress undertook to legislate a uniform “effects test” by amending the Sherman Act so that export commerce with foreign nations would only be subject to U.S. antitrust laws where there was “a direct, substantial and foreseeable effect” on U.S. commerce.<sup>74</sup> FTAIA seemed to jettison considerations of comity. Although the FTAIA’s stated intent was “neither to prevent nor to encourage *additional* judicial recognition of the special international characteristics of transactions,”<sup>75</sup> the House Report did single out an effects test laid down by the Second Circuit in *National Bank of Canada v. Interbank*

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<sup>71</sup> The Reagan Administration policy was to follow procedures laid down by the OECD which provided for “notification, exchange of information and consultation between OECD member countries whenever important interests of one member country are affected by an anti-trust investigation or proceeding of another member country.” Baxter, *supra* note 14, at 16-17.

<sup>72</sup> See *supra* note 44 and accompanying text.

<sup>73</sup> H.R. Rep. No. 686, 97th Cong., 2d Sess., at 2 (1982).

<sup>74</sup> FTAIA, *supra* note 17. The FTAIA did “not affect the legal standards for determining whether conduct violates the antitrust laws, and thus the substantial antitrust issues on the merits of a claim. . . . Rather, the FTAIA addresses only the subject matter jurisdiction of U.S. antitrust law. . . .” H.R. Rep. No. 686, *supra* note 73, at 13.

<sup>75</sup> H.R. Rep. No. 686, *supra* note 73, at 13. (emphasis added). At the time, the Reagan Administration’s top antitrust lawyer, Assistant Attorney General William Baxter, set forth a number of reasons for separating the effects test from considerations of international comity: comity involves subjective considerations, whereas the effects test is meant to be objective, and comity considerations are more properly within the purview of the executive branch.

*Card Association* that dispensed with the comity-leg of the *Timberlane* test.<sup>76</sup> That is, while the court in *National Bank of Canada* did not question outright the "pertinence" of international comity, its analysis of Sherman Act jurisdiction set aside the issue of possible conflicts between a foreign nation's right to regulate commerce and the effect that regulation may have on U.S. markets.

Little else pertaining to what constitutes "direct, substantial and foreseeable" effects is as clear. As for whether harm solely to U.S. exporters is sufficient to invoke subject matter jurisdiction, the legislative history provides little illumination and is, in fact, downright contradictory. On the one hand, the Judiciary Committee Report quotes Chairman Rodino as saying that "restraints on export trade will only violate the Sherman Act if they have a direct and substantial effect on commerce within the United States *or* a domestic firm competing for foreign trade."<sup>77</sup> The use of the conjunctive "or" would indicate that harm to U.S. export commerce alone provides a sufficient nexus to U.S. commerce for jurisdiction to ensue. Yet, two pages later, the Report states that, "absent a spillover effect on the domestic marketplace," illegal conduct directed "solely to exported products. . . would normally not have the requisite effects on domestic or import commerce."<sup>78</sup>

What can be safely deduced is that the FTAIA's drafters had two goals in mind: first, counter the extant perception in the U.S. business community that U.S. antitrust laws are a detriment to export activities, and second, clarify the different circuit tests for determining whether United States antitrust jurisdiction over international transactions exists.<sup>79</sup> While the drafters shared the perennial goal of all antitrust policymakers to boost exports, their basic views reflected the dominant mood of the Reagan years; as far as government regulation was concerned, less was more. Reduced antitrust enforcement would boost exports.<sup>80</sup> Specifically, the drafters believed that the FTAIA would make U.S. exporters more internationally competitive by allowing them to enter into "arrangements. . . that may involve the allocation of territorial responsibilities or the establishment of common prices or other terms of trade, [or] technology licenses that restrict sales by the contracting parties to particular countries or re-

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<sup>76</sup> 666 F.2d 6, 8 (2d Cir. 1981).

<sup>77</sup> See H.R. Rep. 686, *supra* note 73, at 7-8.

<sup>78</sup> See H. R. Rep. 686, *supra* note 73, at 10.

<sup>79</sup> H.R. Rep. No. 686, *supra* note 73, at 2.

<sup>80</sup> Harold R. Schmidt, *The Extraterritorial Application of the U.S. Antitrust Laws*, 5 J.L. & Com. 321, 344-345 (1985).

gions. . . .”<sup>81</sup> The belief that U.S. exporters should band together to conquer the Japanese *et al.* was further reflected in the first three titles of the Export Trading Act of 1982 which allowed the Department of Commerce to register and immunize from antitrust prosecution various types of export associations and limit damages in private antitrust suits.<sup>82</sup>

Congress’s choice as a guide to what it meant by a “direct, substantial and reasonably foreseeable” effect is contained in *National Bank of Canada v. Interbank Card Ass’n.*,<sup>83</sup> a case exhibiting a relatively moderate view of when subject matter jurisdiction should be exerted. Indeed, the *National Bank of Canada* court rejected the first two legs of the *Timberlane* test—intent and cognizable injury to the plaintiff—because it feared that the first two tests “may lead unwarrantedly to an assertion of jurisdiction whenever the challenged conduct is shown to have some effect on American foreign commerce, even though the actionable aspect of the restraint, the anticompetitive effect, is felt only within the foreign market in which the injured plaintiff seeks to compete.”<sup>84</sup> Thus, *National Bank of Canada* stands for the proposition that jurisdiction-conferring effects are to be found only “where the challenged restraint has, or is intended to have any *anticompetitive* effect upon United States commerce, either commerce within the United States or export commerce from the United States.”<sup>85</sup> Although the *National Bank of Canada* formulation appears to indicate that foreclosure of export commerce alone triggers jurisdiction, the Second Circuit decision in that particular case leads one to suspect that foreclosure plus specific intent to harm U.S. export commerce is required. The court found no effects, and hence no jurisdiction, where a Canadian licensor of the Mastercard trademark included exclusivity and non-assignability provisions in a licensing agreement that effectively excluded a U.S. bank from the Canadian credit card market. Somewhat novelly, the court based its holding on the fact that the Canadian bank could not have “foreseen” that its restrictive licensing contract would have “any appreciable anticompetitive effects on United States commerce.”<sup>86</sup> Foreseeability would

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<sup>81</sup> *Foreign Trade Antitrust Improvements Act: Hearings Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 108 (1981)(statement of Martin F. Connor).

<sup>82</sup> See *supra* note 17.

<sup>83</sup> 666 F.2d 6 (2d Cir. 1981); H.R. Rep. No. 686, *supra* note 73, at 11.

<sup>84</sup> *National Bank of Canada*, 666 F.2d at 8.

<sup>85</sup> *Id.* (emphasis added).

<sup>86</sup> *Id.* at 9.

have been met had the defendant known that its action would have lead to increased credit card fees for merchants in the United States. Although the defendant's action may have increased merchant fees within Canada, "decreased profitability of Canadian merchants is not a proper concern of the United States. . ." <sup>87</sup> Finally, the court re-emphasized the well-known antitrust aphorism: "the antitrust laws were enacted for the protection of competition, not competitors." <sup>88</sup>

In the FTAIA's own words, "reasonably foreseeable" means an objective standard for determining intent, "not whether actual knowledge or intent can be shown." <sup>89</sup> That is, a foreign defendant's intent to affect U.S. export commerce must be inferable from surrounding circumstances and "may be satisfied by the rule that a person intends the natural consequences of his actions." <sup>90</sup> An objective standard of intent also finds support in *Alcoa*; a defendant must have foreseen that the challenged conduct would have an effect on U.S. export commerce. <sup>91</sup> Applied to possible antitrust violations arising from extraterritorial licensing arrangements such as the ones at issue in *U.S. v. Pilkington plc.*, objective foreseeability would suggest that where a licensing agreement incorporates territorial restraints, <sup>92</sup> subject matter jurisdiction could not be asserted unless the agreement specifically named the United States and thus demonstrated the requisite intent to affect U.S. commerce. <sup>93</sup>

An effects test that sticks strictly to "intent" avoids being perceived as an effort by the U.S. Justice Department to protect competitors rather than competition. In fact, by asserting subject matter jurisdiction only when significant effects were intended within the U.S., the effects test is not really extraterritorial enforcement at all; it is only the recognition that not all "causative factors" producing an-

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<sup>87</sup> *Id.*

<sup>88</sup> *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977), *in Id.* at 8.

<sup>89</sup> H.R. Rep. No. 686, *supra* note 73, at 9.

<sup>90</sup> *FUGATE*, *supra* note 21, at § 2.11.

<sup>91</sup> Earl W. Kintner & Joseph P. Griffin, *Jurisdiction over Foreign Commerce under the Sherman Act*, 28 BOSTON COLL. IND. & COMM. L.R. 199, 212 (1977).

<sup>92</sup> Territorial restraints are restrictions on where a licensee of technology may use, sell or claim rights to licensed technology. Although not inherently illegal, *Brownell v. Ketchum Wire & Mfg. Co.*, 211 F.2d 121, 129 (9th Cir. 1954), territorial restrictions violate U.S. antitrust law where the licensing agreement impedes the licensee from competing freely against the licensor using alternative technology or the licensee's own technology which it independently developed. A.B.A. Antitrust Sec., Monograph No. 6, *U.S. Antitrust Law in International Patent and Know-How Licensing* 21 (1981).

<sup>93</sup> James A. Rahl, *Foreign Commerce Jurisdiction of The American Antitrust Laws*, 43 ANTI-TRUST L.J. 521, 526 (1974).

ticompetitive results will necessarily occur within the U.S.<sup>94</sup> Thus, in a post-FTAIA case, *Laker Airways Limited v. Sabena, Belgian World Airlines*, Judge Starr asserted U.S. jurisdiction over a non-U.S. airline company whose predatory pricing of fares and interference with the refinancing attempts of the plaintiff “were *designed specifically* to drive Laker out of business and eventually to raise the fares paid by trans-Atlantic passengers, the bulk of whom are American.”<sup>95</sup> Because the trans-Atlantic passenger airline market had a relatively small number of competitors, it was foreseeable that the elimination of Laker would lead to higher fares for U.S. passengers. The result in *Laker* is consistent with *National Bank of Canada* in terms of its treatment of foreseeability and, with the Supreme Court’s view that “American antitrust laws do not regulate the competitive conditions of other nations’ economies.”<sup>96</sup>

Although a would be foreign defendant’s conduct may meet the objective foreseeability leg of the FTAIA effects test, an agreement intended to affect imports or exports is not covered by the Sherman Act unless there is some actual effect.<sup>97</sup> While the FTAIA stipulates that the effect must be “direct” and “substantial,” neither the amendment itself nor the case law suggests a consistent meaning.<sup>98</sup> *National Bank of Canada* makes clear that jurisdiction is “unwarranted” when the anticompetitive effect is felt “only within the foreign market in which the injured plaintiff seeks relief.”<sup>99</sup> The Second Circuit required more than damage to the earnings prospects of a single U.S. credit card company before would assert subject matter jurisdiction based on “direct and substantial” domestic effects. Several courts, facing similar jurisdictional issues, have followed *National Bank of Canada’s* example. These opinions suggest that subject matter jurisdiction requires a connection between the objectionable conduct and an identifiable market within the U.S. where anticompetitive effects can be demonstrated.<sup>100</sup> Thus, in *Eurim-Pharm Gmgh v. Pfizer Inc.*, the plaintiff’s inability to establish a connection between a manufacturer’s offshore market allocation scheme and inflated prices within

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<sup>94</sup> *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 923 (D.C. Cir. 1984).

<sup>95</sup> *Id.* at 925 (emphasis added).

<sup>96</sup> *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 582 (1986).

<sup>97</sup> *United States v. Aluminum Co. of America*, *supra* note 18, at 444.

<sup>98</sup> *Lao*, *supra* note 3, at 856.

<sup>99</sup> 666 F.2d. at 8.

<sup>100</sup> *Id.* at 8-9; *Power East Ltd. v. Transamerica Delaval Inc.*, 558 F. Supp. 47, 49 (S.D.N.Y. 1983), *aff’d*, 742 F.2d 1439 (2d. Cir. 1983)(failure to demonstrate a nexus with American trade or “relevant market” within the U.S. warranted dismissal for inadequate subject matter jurisdiction).

the United States for the drug Vibramycin was fatal under the "direct, substantial and reasonably foreseeable" test.<sup>101</sup>

Subsequent Second Circuit decisions have been even more strict in applying the effects test, reasoning that extraterritorial conduct "must cause actual injury to *domestic* commerce."<sup>102</sup> Extending jurisdiction on the basis of "intended or actual effect on United States foreign trade" was "unwarranted."<sup>103</sup> Where a U.S. travel agent lost business as a result of a foreign hotel operator's refusal to accept the plaintiff's tour booking, there was no jurisdiction because the extraterritorial conduct did not "have any direct, substantial or reasonably foreseeable effect on competition among United States tour operators."<sup>104</sup> As applied to the question of substantial and direct effects in *U.S. v. Pilkington, plc.*, more than lost export opportunities for certain U.S. glass manufacturers would be required to meet the Second Circuit's rigorous jurisdictional test. What the Department would be required to demonstrate is that Pilkington's conduct resulted in some anticompetitive effect in the U.S. flat glass manufacturing industry or float glass plant construction industry through a direct spillover such as increased prices, reduced supply or increased cost to market participants

A tough standard for direct and substantial effects is consistent with the stated preference of the majority of commentators who testified at the legislative hearings associated with the enactment of the FTAIA. Their concerns were severalfold. First, they wanted to free U.S. exporters from the restraining shackles of U.S. antitrust laws so long as the exporters conduct had "no direct and substantial effect on *domestic commerce*."<sup>105</sup> Second, they wished to prevent private actions against U.S. exporters where the primary effect of the alleged antitrust conduct was "on a foreign company in a foreign country."<sup>106</sup> One observer closely involved with the drafting of the FTAIA reported that it was the drafters' intent to legislate out of existence "aberrational" cases in which U.S. courts had asserted jurisdiction based on effects to foreign markets and where the consequences for U.S.

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<sup>101</sup> 593 F. Supp. 1102, 1104 -7, (S.D.N.Y. 1984).

<sup>102</sup> *Liamuiga Tours v. Travel Impressions, Ltd.*, 617 F. Supp. 920, 923 (E.D.N.Y. 1985)(emphasis added).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 925.

<sup>105</sup> *Hearings Before the Subcomm. on Monopolies and Commercial Law of the House Comm on the Judiciary*, *supra* note 81, at 72 (statement of John H. Shennenfield)(emphasis added).

<sup>106</sup> *Id.* at 38 (statement of David Goldsweig).

corporations had been ancillary.<sup>107</sup> For example, the FTAIA precluded subject matter jurisdiction based on the “nexus” test employed in *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.* by the D.C. Circuit.<sup>108</sup> In that instance, Judge Leventhal asserted U.S. jurisdiction over an alleged conspiracy by American-flag shipping services to exclude certain rivals who were shipping commodity products between Taiwan and South Vietnam. Even though the trade was wholly unconnected to U.S. commerce, the court determined that there was a “nexus” between the overseas shipping activities of the defendants and the U.S. by virtue of the fact that the commodities in question were financed by the State Department’s AID program, which stipulated that participants in the shipping program had to be American.<sup>109</sup> If an extraterritorial shipping program financed by the U.S. government whose participants were American-flag shipping companies was deemed to be outside the jurisdiction of U.S. antitrust laws by the FTAIA’s drafters, because of insufficient domestic effects, it seems difficult to believe that those same drafters intended the “direct, substantial and reasonably foreseeable” test to apply to a non-American corporation whose licensing agreements only affected overseas markets.

As the post-FTAIA case law indicates, there is no clear test for determining what degree of effects on U.S. exporters is sufficient to trigger U.S. jurisdiction in instances where the defendant lacks specific intent to foreclose exports. As discussed, courts have recognized the effects from foreclosure of U.S. exports in two ways: (1) spillover into the U.S. domestic market that affects prices, supply, cost or other market factors, and (2) harm to U.S. export opportunities.<sup>110</sup> The legislative history of the FTAIA, while ambiguous on the issue of whether export foreclosure alone triggers Sherman Act jurisdiction, advocates an overall relaxation of U.S. jurisdiction over extraterritorial conduct in order to avoid making U.S. courts the antitrust watchdogs of foreign markets. And the case law recommended by the drafters of the FTAIA demonstrates that where the harm is to competitors and not the competitive market, subject matter jurisdiction does not ensue. Where export foreclosure is concerned, the determination of whether

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<sup>107</sup> Joseph P. Griffin, *Comparison of the Export Trading Company Act and the Foreign Antitrust Improvements Act*, in *EXPORT TRADING ACT OF 1982*, 17 (Joseph P. Griffin, ed. 1982).

<sup>108</sup> 404 F.2d. 804 (D.C. Cir. 1968); Griffin also cites *Dominicus Americana Bohio v. Guld & Western Ind., Inc.*, 473 F. Supp. 680 (S.D.N.Y. 1979), as an example of aberrational assertion of U.S. subject matter jurisdiction. Griffin, *Comparison*, *supra* note 106, at 19.

<sup>109</sup> 404 F.2d at 816-7.

<sup>110</sup> 1 *HAWK*, *supra* note 19, at 167 (1993 Supp.).

that foreclosure is "direct and substantial" should turn on the amount of export commerce foreclosed in light of the importance of exports to that industry and the share of the export market foreclosed by the challenged arrangement.<sup>111</sup> In gauging the "direct and substantial" effects upon export foreclosure, however, courts should be mindful of the Sherman Act's *raison d'être*; namely, that "consumer welfare [was] to be the decisive value" governing antitrust policy, not the welfare of specific exporters or export sectors.<sup>112</sup> Therefore, unless there are direct and substantial effects to U.S. domestic markets, the standard by which "direct and substantial" effects are judged should exclude cases where export trade boosters, whether in the Justice Department or the private sector, seek to use U.S. antitrust jurisdiction as an export weapon.<sup>113</sup>

#### IV(A) THE 1995 GUIDELINES AND *U.S. v. PILKINGTON PLC.*: EXERTION OF SUBJECT MATTER JURISDICTION

The 1995 Guidelines' view of subject matter jurisdiction is far more aggressive than any of its predecessors. In keeping with the FTAIA, the 1995 Guidelines divide jurisdictional issues into three categories: (1) direct imports into the United States; (2) indirect imports into the United States where, for example, the antitrust violation is perpetrated by a producer whose products are sold in the U.S. through a third-party intermediary; and (3) export cases where a violation of U.S. antitrust laws—whether perpetrated within the U.S. or overseas either by U.S. or foreign persons—restrains U.S. exports. Because the FTAIA does not cover import commerce,<sup>114</sup> jurisdictional issues involving direct imports are covered by the generic "effects test" as first revealed in *Alcoa* and universally followed ever since, most recently in *Hartford Fire Ins. Co. v. California*.<sup>115</sup>

That antitrust subject matter jurisdiction can be easily invoked where export commerce is concerned is one of the 1995 Guidelines' most salient features. Its standard for determining jurisdictional ques-

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<sup>111</sup> *Id.* at 171; other factors suggested by Hawk include business justification and duration of foreclosure.

<sup>112</sup> BORK, *supra* note 50, at 11.

<sup>113</sup> See ATWOOD & BREWSTER, *supra* note 66, § 9.28, at 305 (discussing need for greater leniency when prosecuting exclusive dealing and tying contracts as well as when defining foreign markets for determination of the extent to which export opportunities have been foreclosed).

<sup>114</sup> The FTAIA leaves the Sherman Act unchanged with respect to U.S.-bound imports and commercial transactions "within, between, and among other nations" that are neither import nor export transactions, even if American-owned companies are involved. H.R. Rep. No. 686, *supra* note 73, at 9.

<sup>115</sup> 113 S. Ct. 2891, 2910 (1993).



tions emphasizes the degree to which the conduct of an overseas defendant forecloses U.S. exports, regardless of whether that reduction has had an impact on U.S. domestic markets. Illustrative Example D is typical. Where foreign producers of “product Q” in “country Epsilon” collude to prevent a U.S. producer from entering country Epsilon’s markets for product Q, direct and reasonably foreseeable effects on U.S. export commerce trigger U.S. subject matter jurisdiction so long as the export volumes in question are more than *de minimis*.<sup>116</sup> Illustrative Example E is similarly unambiguous in declaring that export foreclosure alone triggers U.S. subject matter jurisdiction. In this example, the 1995 Guidelines set forth a scenario in which a foreign country’s trade association colludes to (1) refuse to adopt any U.S. technology for the goods in question, and (2) boycott the distribution of U.S.-manufactured goods within the foreign country. As in Example D, unless U.S. export volume is *de minimis*, the 1995 Guidelines indicate that the FTAIA’s substantiality and directness requirements would be met: “The mere fact that only the market of Alpha [the fictitious country’s name] appears to be foreclosed is not enough to defeat such an effect.”<sup>117</sup> The text accompanying this example fails, however, to comment on whether any findings of domestic spillover effects need to be found. Even though Illustrative Example E’s export products are large, big-ticket items, it is unclear where the harmful “effects” to U.S. commerce arise. Is it that foreclosure from Alpha’s markets affect U.S. domestic prices and availability of the goods in question? Or, is it that an overwhelming share of U.S. production is destined for export, without which the industry could not survive? Or, is it that the U.S. claims the right to police all anticompetitive practices in foreign markets in which U.S. exports are at stake?

Moreover, the standard for determining when extraterritorial conduct is “foreseeable” is equally expansive. In Illustrative Example B and its variants, a group of non-U.S. widget manufacturers agree to restrict trade in certain goods in a number of foreign markets. None of the manufacturers has any U.S. production or any subsidiaries located in the U.S. However, the putative defendants are aware of sales into the U.S. made through an independent intermediary.<sup>118</sup> Despite what appears to be an intent to avoid jurisdictional contact with the U.S., the Department contemplates U.S. subject matter jurisdiction as

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<sup>116</sup> 1995 Guidelines, *supra* note 5, at S-10.

<sup>117</sup> 1995 Guidelines, *supra* note 5, at S-10.

<sup>118</sup> 1995 Guidelines, *supra* note 5, at S-9.

if the foreign manufacturers made direct sales into the U.S.<sup>119</sup> Illustrative Example B also suggests that where § 1 violations occur—the foreign manufacturers had an agreement in restraint of trade—foreseeability deserves greater weight than directness or substantiality of effects because the Department's focus would be on “the *potential harm* that would ensue if the conspiracy were successful, not on whether actual conduct. . . had in fact the prohibited effect.”<sup>120</sup> Taken to a logical extreme, non-U.S. oil companies participating in the OPEC oil price cartel could be caught in the web of U.S. subject matter jurisdiction if, as a result of the cartel's activity, domestic oil prices and supplies were affected.

Unlike the 1977 Guide which approached subject matter jurisdiction with a similar ferocity, the 1995 Guidelines' aggressive jurisdictional philosophy is not tempered by considerations of international comity. The exclusion of comity is understandable, both because the FTAIA jettisoned comity and, more importantly, because of a 1993 U.S. Supreme Court decision, *Hartford Fire Ins. Co. v. California*, that held that in cases of import commerce, at least, comity considerations and subject matter jurisdiction are two separate issues.<sup>121</sup> The *Hartford Fire* case arose when several state governments brought antitrust actions against British and American insurance companies based on an alleged agreement to restrict insurance coverage for certain risks in the U.S. Unlike *U.S. v. Pilkington*, there was no dispute as to whether the defendants' conduct was intended to and did produce a substantial effect on the U.S. insurance market.<sup>122</sup> Writing for a divided court, Justice Souter set aside the petitioner's international comity claim stating that there is no conflict with foreign law unless a defendant is required by law “to act in some fashion prohibited by the law of the United States” or can claim that “compliance with the laws of both countries would be impossible.”<sup>123</sup> In keeping with Justice Souter's analysis, the 1995 Guidelines state that “no conflict exists for purposes of an international comity analysis. . . if the person subject to regulation by two states can comply with the laws of both.”<sup>124</sup> Essentially, domestic effects now are considered in a vacuum, without regard to possible conflicts with a foreign government's regulatory scheme, so long as compliance with U.S. law does not compel violation of a for-

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<sup>119</sup> 1995 Guidelines, *supra* note 5, at S-9.

<sup>120</sup> 1995 Guidelines, *supra* note 5 (Italics added).

<sup>121</sup> *Hartford Fire Ins. Co.*, *supra* note 115, at 2910.

<sup>122</sup> *Hartford Fire Ins. Co.*, *supra* note 115, at 2909 n. 21.

<sup>123</sup> *Hartford Fire Ins. Co.*, *supra* note 115, at 2910-11.

<sup>124</sup> 1995 Guidelines, *supra* note 5, at S-12.

eign government's law. Nevertheless, many countries regard an "effects test" that ignores considerations of comity to be a radical departure from principles of international law.<sup>125</sup>

That the 1995 Guidelines' view of subject matter jurisdiction is indeed expansive is evident in *U.S. v. Pilkington plc*. The complaint decries Pilkington's foreclosure of export opportunities for U.S. companies which construct float glass manufacturing facilities as well as export float glass exports themselves.<sup>126</sup> What the Complaint does not demonstrate is how Pilkington, with a worldwide market share of only twenty percent, true dominance in only two minor geographic markets, Argentina and Australia, and technology which is over thirty years old, can affect the world's supply of float glass or the supply of float process technology to such an extent that output or price in the U.S. is detrimentally affected. Extrapolating from the logic of the complaint, it seems that even without some demonstration of domestic spillover—either reduced supply or increased prices—non-U.S. participants in any agreement construed to restrain foreign commerce could be subject to U.S. antitrust regulation if a U.S. exporter's opportunities are impaired. The danger is that the effects test thereby becomes a mechanism for policing the competitive integrity of foreign markets, precisely the result foresworn by the FTAIA, earlier case law and the drafters of the Sherman Act.

#### IV(B) *U.S. v. PILKINGTON, PLC*: INDUSTRY OVERVIEW

It was perhaps no accident that the Justice Department chose a flat glass manufacturer for its first major extraterritorial antitrust enforcement action under the newly reinvigorated policy. The industry has been at the center of at least one recent antitrust dispute involving possible antitrust violations within the territorial U.S. by non-U.S.

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<sup>125</sup> An effects test limited to acts with direct, tangible repercussions — such as shooting a firearm across a border — would be more acceptable to those who adhere strictly to principles of comity under international law. Marina Lao, *Jurisdictional Reach of the U.S. Antitrust Laws: Yokosuka and Yokota, and "Footnote 159" Scenarios*, 46 RUTGERS L. REV. 821, 829 n.32 (1994); Over the past several decades, foreign governments have signaled their dissatisfaction with U.S. extraterritorial enforcement of the Sherman Act by passing "blocking statutes" which block the production of evidence in the home country for use in U.S. lawsuits and "claw-back" statutes which allow foreign companies, after being judged guilty and assessed with a penalty in the U.S., to bring suit to recover the penal portion of that judgment in its own jurisdiction. Aiden Robertson & Marie Demetriou, *"But that was in another country. . .": The Extraterritorial Application of U.S. Antitrust Laws in the U.S. Supreme Court*, 43 INT'L & COMP. L.Q. 417, 418 (1994). See also FUGATE, *supra* note 21, at § 2.16.

<sup>126</sup> Complaint, *U.S. v. Pilkington plc*, No. 94-345 (D. Ariz, May 25, 1994) at 14 (on file with *The Northwestern Journal of International Law and Business*).

manufacturers<sup>127</sup> and, until recently, was at the center of a major international trade controversy with Japan.<sup>128</sup> The industry's oligopolistic structure makes it a natural target of antitrust suspicions. The world's top three producers account for approximately sixty-four percent of annual global sales.<sup>129</sup> Moreover, domestic producers have not been shy in their efforts to enlist Justice Department support in cracking overseas markets.<sup>130</sup>

Of the \$48 billion in annual worldwide glass sales, the flat glass segment accounts for \$16 billion.<sup>131</sup> Approximately seventy-five percent of U.S. flat glass production goes towards the construction and automotive industries with the remainder going towards specialty products.<sup>132</sup> In the U.S., only two of the four major producers of flat glass are independent, PPG Industries and Guardian Industries. Nippon/Libbey-Owens-Ford (LOF), which is the second largest of the three U.S. producers, is a two-way joint venture between Pilkington and Nippon Sheet Glass Co. of Japan, which own eighty percent and twenty percent, respectively. U.S. production has been weak in recent years with shipments declining from \$2.6 billion in 1987 to an estimated \$2.2 billion in 1993.<sup>133</sup> The one bright spot for U.S. producers has been exports, which have risen from \$497 million in 1989 to \$853

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<sup>127</sup> In 1990 the FTC approved a consent decree prohibiting Nippon/Libbey-Owens-Ford (LOF) from limiting capacity in the U.S. and restricting U.S. imports. See Prepared Statement of Kevin J. Arquit, Director, Bureau of Competition, Federal Trade Commission, before the Senate Commerce, Science and Transportation Committee, Consumer Subcommittee, July 19, 1990.

<sup>128</sup> Flat glass is one of the specific sectors addressed in the "United States-Japan Framework for a New Economic Partnership" announced in July 1993 by President Clinton and Prime Minister Japan and was the subject of an "Action Plan" announced in January 1992 as part of the Bush-Miyazawa Tokyo Declaration. Specifically, the U.S. is critical of the exclusive relationship between Japan's three dominant flat glass manufacturers which control 95% of the market and their wholesalers. United States Trade Representative, 1994 National Trade Estimate Report on Foreign Trade Barriers 174 (1994). Japan and the U.S. reached an agreement on December 12, 1994 under which the Japanese Government will compel Japanese glass manufacturers to sell more imported flat glass and related products. David E. Sanger, *U.S. Glass Makers in Tokyo Accord*, N.Y. TIMES, Dec. 13, 1994.

<sup>129</sup> *Giants in Glass*, 143 CERAMIC INDUSTRY 53 (Aug. 1994).

<sup>130</sup> For example, Guardian Industries, a major U.S. flat glass manufacturer, presented the Justice Department with evidence of anticompetitive behavior by the Japanese glass manufacturing industry as part of its effort to demonstrate the "exclusionary business practices, including threats and intimidation," the company experienced in Japan. William Spindle and Catherine Yang, *Commerce Cops*, BUS. WK., Dec. 13, 1993, at 70. Guardian Industries' political connections also played a role in resolution of the flat glass trade dispute with Japan. Guardian's President Ralph Gerson, who the *New York Times* described as "politically well-connected in Washington," was able to raise the issue of Japan's flat glass market "high on the agenda of trade negotiators." *U.S. Glass Makers in Tokyo Accord*, *supra* note 128.

<sup>131</sup> *Giants in Glass*, *supra* note 129, at 53.

<sup>132</sup> *Flat Glass Trends and Forecasts*, GLASS MAGAZINE, Jan. 1993, at 61.

<sup>133</sup> *Flat Glass Shipments to be up in 1994*, GLASS INDUSTRY 14, 15 (Jan. 1994).

million in 1993.<sup>134</sup> However, because of flat glass' size and weight, continued growth in exports is likely to be limited.<sup>135</sup> The real action is in direct investment in overseas plant and equipment including sales of flat glass manufacturing facilities and related construction services. A typical flat glass facility, including equipment and construction, requires a \$100 to \$150 million investment, and over the next fifteen years between thirty and fifty new facilities are projected to be built, many in the developing world.<sup>136</sup> In 1993 alone, two of the three major U.S. producers announced major overseas plant expansions: Guardian Industries is building two new float glass plants in Gujarat, India and Tudela, Spain, and PPG Industries is building a new joint venture float glass plant in Dalian, China.<sup>137</sup>

#### IV(C) PILKINGTON'S WORLDWIDE TECHNOLOGY LICENSING PRACTICES

Pilkington achieved a major technological jump on its competitors in the flat glass industry when it developed and patented a float process for manufacturing flat glass during the late 1950s.<sup>138</sup> By using the float glass process, molten glass can be bent, curved and cut for use in automobiles or new building construction, and the process is far superior to either sheet glass or rolled and polished glass processes. So superior is the technology that nearly all flat glass sold worldwide is manufactured using the float process in one form or another.<sup>139</sup> Pilkington began to take advantage of its new found competitive advantage in 1962 by entering into patent and know-how licensing agreements with all its principal competitors.<sup>140</sup> By the time of the Department's action against Pilkington, over ninety-five percent of flat glass worldwide was manufactured under its licenses.<sup>141</sup> In the United States, however, only two out of the three big flat glass makers are still subject to Pilkington's technology licenses, and one of those,

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<sup>134</sup> *Id.* The U.S. had a flat glass export surplus of \$318 million in 1993.

<sup>135</sup> Frank C. Zanone, *The Globalization of Glass: An Act of Survival*, 75 GLASS INDUSTRY 26, 27 (April 10, 1994)

<sup>136</sup> Competitive Impact Statement, *United States v. Pilkington plc.* No. 94-345 (D. Ariz., filed May 25, 1994) at 5 (on file with *The Northwestern Journal of International Law and Business*).

<sup>137</sup> *Giants in Glass*, *supra* note 129, at 54.

<sup>138</sup> Complaint, *Pilkington plc.*, *supra* note 126, at 4.

<sup>139</sup> Complaint, *Pilkinton plc.*, *supra* note 126, at 6.

<sup>140</sup> Complaint, *ITC v. Pilkington, plc.*, No. 93-552 (D. Ariz., Aug. 10, 1993), at 8 (on file with *The Northwestern Journal of International Law and Business*).

<sup>141</sup> *Id.* at 7.

Libbey-Owens-Ford Co., is eighty percent owned by Pilkington itself.<sup>142</sup>

In its float license agreements Pilkington disclosed all its "float process" know-how and granted non-exclusive licenses under patents for specified countries.<sup>143</sup> However, in exchange for the right to use its patented technology, Pilkington placed a host of restrictions upon the licensee, including: (1) territorial restrictions permitting the licensee to construct and operate float glass plants in a limited number of countries; (2) use restrictions limiting the use of float glass technology to flat glass manufacturing only; (3) sublicensing restrictions; and (4) grant-back provisions which required the licensee to report and grant-back on an exclusive basis all technological improvements to Pilkington's float glass know-how.<sup>144</sup>

IV(D) *UNITED STATES V. PILKINGTON PLC.*: SUBJECT MATTER  
JURISDICTION AND ALLEGED ANTITRUST VIOLATIONS

That the case against Pilkington plc. involved technology licensing makes no difference to the question of subject matter jurisdiction. No matter how restrictive, licensing agreements are not violative of U.S. antitrust laws until "U.S. foreign or domestic commerce is affected."<sup>145</sup> Indeed, the FTAIA's seminal case, *National Bank of Canada*, involved exclusivity provisions in a trademark licensing agreement. Whether involving licensing restrictions or not, the key elements of a well-plead Sherman or Clayton Act complaint against a non-U.S. corporation for extraterritorial conduct are the assertion of both personal and subject matter jurisdiction as well as specific allegations of conduct in violation of U.S. antitrust laws.<sup>146</sup> Personal jurisdiction is only problematic where a foreign corporation lacks a U.S. subsidiary and therefore does not meet the "minimum contacts" re-

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<sup>142</sup> Competitive Impact Statement, *supra* note 136, at 7, 12 (In 1983, following a lawsuit by Pilkington, Guardian Industries was released from the majority of its obligations under the licensing agreements such that Guardian was able to construct float glass plants outside the territory in which it had been previously constrained.).

<sup>143</sup> In addition, Pilkington promised to convey all patented and unpatented improvements developed within a defined period. The licenses required lump-sum and continuous royalties and required that all disputes be resolved by arbitration in London under U.K. law. Competitive Impact Statement, *supra* note 136, at 8.

<sup>144</sup> *Pilkington plc.*, *supra* note 1, at 9.

<sup>145</sup> *ATWOOD & BREWSTER*, *supra* note 66, § 11.06 at 6; *see also National Bank of Canada*, *supra* note 76, at 9 (holding that a restrictive licensing of credit card trademark is not in violation of U.S. antitrust laws unless it "can be foreseen to have any appreciable anticompetitive effects on U.S. commerce.").

<sup>146</sup> James F. Rill, *Competition Policy: A Force for Open Markets*, 61 ANTITRUST L.J. 637, 649 (1993).

quirement of *International Shoe*.<sup>147</sup> Because Pilkington Holdings Inc., a Delaware corporation that is wholly-owned by Pilkington, was named as a co-defendant by the government, personal jurisdiction was not disputed.<sup>148</sup> Assuming that Pilkington's licensing arrangements did violate the U.S. antitrust laws, the Government's case rested on demonstrating that Pilkington's conduct met the FTAIA's subject matter jurisdiction formulation: conduct that had a "direct, substantial and reasonably foreseeable effect" on U.S. export trade.<sup>149</sup>

The Justice Department attempted to meet the FTAIA's jurisdictional specifications by alleging that Pilkington deprived U.S. business and consumers of "the benefits of free and open competition."<sup>150</sup> More pointedly, the Government also alleged effects pertaining to U.S. exporters involved in the overseas design and construction of float glass plants and related equipment as well as exporters of flat glass itself.<sup>151</sup> Turning to the antitrust violations themselves, the Department contended that Pilkington's licensing procedures violated sections 1 and 2 of the Sherman Act. The section 1 charge was based on Pilkington's licensing agreements which were an unreasonable restraint of trade because of the existence of territorial restraints, use restraints, sublicensing restraints, and export restraints and because Pilkington attempted to enforce these restraints after expiration of the patents.<sup>152</sup> And, that ninety percent of float glass production worldwide is subject to Pilkington's licensing agreements demonstrates willful acquisition and maintenance of a monopoly for the design and construction of float glass plants in violation of the prohibition against monopolization set forth in section 2.<sup>153</sup>

The consent decree filed simultaneously with the Department's complaint seeks no monetary damages. Rather, it enjoins Pilkington from enforcing any of its technology licenses unless it can make a good faith showing that the specific licensing agreement in question

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<sup>147</sup> *International Shoe v. Washington*, 326 U.S. 310 (1945). Even where a foreign corporation may lack a physical U.S. presence, personal jurisdiction may nonetheless be established where "the foreign national has embarked upon an enterprise which involves the benefits and protection of the forum state's laws." Schmidt, *supra* note 80, at 339.

<sup>148</sup> *Pilkington plc.*, *supra* note 1, at 2.

<sup>149</sup> *Pilkington plc.*, *supra* note 1, at 11 - 14.

<sup>150</sup> *Pilkington plc.*, *supra* note 1, at 14.

<sup>151</sup> *United States v. Pilkington plc*, 6 Trade Reg. Rep. (CCH) ¶ 45, 094, at 44, 689 (D. Ariz. filed May 25, 1994).

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

protects a *bona fide* trade secret under applicable law.<sup>154</sup> Also prohibited is any future licensing with U.S. entities unless the same good faith representation could be made regarding the secrecy of the know-how.<sup>155</sup> Finally, the injunction prohibits Pilkington from enforcing licensing agreements even with non-U.S. licensees to the extent that those licenses have "the effect of prohibiting or limiting the manufacture of Float Glass in North America."<sup>156</sup>

Because the Government's action against Pilkington was never fully litigated, it is difficult to assess the merits of the action. It is nevertheless proper to question whether the job of the U.S. federal courts should be to impose U.S. rules of fair competition on an oligopolistic, cross-border product or technology market where the challenged competitive restraints do not immediately affect U.S. consumers. Several factors discussed in the Industry Overview Section indicate that the effect on U.S. consumers is likely to be minimal. First, flat glass cannot feasibly be exported in large quantity because of its bulk and, in any event, exports are a small proportion of the \$2.2 billion domestic market.<sup>157</sup> Second, Pilkington's licensing restrictions do not affect flat glass produced in the United States. Thus, in terms of protecting consumer welfare, the float glass market itself should not be at issue. The relevant product market at stake is really the one for construction of flat glass manufacturing facilities. However, with consumption decreasing in the domestic market, construction of new float glass facilities in the U.S. seems unlikely. Moreover, Guardian and PPG's recent success in winning overseas construction contracts provides at least anecdotal evidence that the export market is alive and competitive.

A subsidiary question is whether the U.S. taxpayer should be required to bank-roll Justice Department enforcement actions when the main beneficiaries are a small number of U.S. exporters. While there is little doubt that an attempt to enforce a U.S. patent after its expiration constitutes patent misuse and a violation of U.S. antitrust laws "as an assertion of monopoly power," it seems unlikely that, without the requisite effects upon U.S. commerce, patent misuse alone would justify extension of U.S. subject matter jurisdiction.<sup>158</sup> And as one com-

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<sup>154</sup> *United States v. Pilkington plc*, 1994-2 Trade Cas. (CCH) ¶ 70,842, at 73,669-70 (D. Ariz. 1994).

<sup>155</sup> *Id.* at 73,669.

<sup>156</sup> *Id.* at 73,670.

<sup>157</sup> See *supra* notes 133-137 and accompanying text.

<sup>158</sup> *Brulotte v. Thys Co.*, 379 U.S. 29, 33 (1964). Patent misuse has been defined as an attempt "without the sanction of law, to employ the patent to secure a limited monopoly of unpatented



mentator has noted, use of the consent decree raises the suspicion, at least, that the settlement enabled the government to avoid a troublesome case while allowing it to use the label of 'competition' to "divert the free market in a desired direction."<sup>159</sup> Regardless of whether Pilkington's licensing agreements actually violated U.S. antitrust law, the Justice Department's willingness to bring suit raises serious questions about the extent to which the U.S. should prosecute non-U.S. companies for antitrust violations occurring outside the territorial United States.

## V. CONCLUSION

The case against Pilkington reveals an antitrust enforcement policy built on an aggressive strategic trade policy<sup>160</sup> rather than a careful approach to antitrust jurisprudence. While it is expected that trade policy will fluctuate with changing political winds, antitrust law falls into the realm of public regulatory law and therefore must be "compliant."<sup>161</sup> That is, U.S. antitrust laws "must have a degree of clarity which makes counseling reliable. . .so that counsellors can in fact enforce the law through the advice they give."<sup>162</sup> Compliant is even more important when the Federal Government proceeds against a foreign corporation whose home country's antitrust regime may differ greatly from that of the U.S.<sup>163</sup>

Rather than reasoned legal advice, the nation's top antitrust officials' recent public utterances on the subject of international antitrust enforcement sound like a call to arms in the battle for global economic domination.<sup>164</sup> That kind of talk fits with a spate of trade policy

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material in applying the invention." *Carbice Corp. of America v. Patents Dev. Corp.*, 283 U.S. 27, 33-34 (1971).

<sup>159</sup> *Toughness of Clinton's Antitrust Policy is Questioned and Defended at Conference*, *Antitrust & Trade Reg. Daily (BNA)*, at d3 (Oct. 25, 1994)(comments of Donald G. Kempf, Jr.).

<sup>160</sup> See generally Charles Wolf, Jr., *The New Mercantilism*, 116 *THE PUBLIC INTEREST* 96, 97 (Summer 1994) ("Strategic trade policy focuses on international trade, on promoting specific exports. . .[and includes]. . .the use of threats and the imposition of penalties to pry open foreign markets.").

<sup>161</sup> KINGMAN BREWSTER, JR., *Current Issues in Foreign Commerce Antitrust*, in *CURRENT ISSUES IN INTERNATIONAL ANTITRUST* 23, 30 (Joseph P. Griffin ed., 1981).

<sup>162</sup> *Id.*

<sup>163</sup> For example, most countries, unlike the U.S., do not criminalize antitrust violations nor do other nations share the U.S.'s view on *per se* treatment of certain offenses or the U.S. view on market power definition. *Starek Examines Pitfalls in International Enforcement*, 67 *Antitrust & Trade Reg. Rep. (BNA)* No. 1674, at 136 (July 28, 1994).

<sup>164</sup> See Bingaman, *supra* note 7, at 13 (discussing U.S. high definition television technology as "winning the race" against rival Japanese and European systems and making a sports analogy to the poor performance of the Boston Red Sox in the 1994 baseball season).

books by Clinton administration officials urging the American public to take heed of international economic competition lest America's competitiveness be seriously undermined.<sup>165</sup> The unmistakable message of the 1995 Guidelines' approach to subject matter jurisdiction and the Department of Justice's action against Pilkington is that U.S. antitrust policy will be employed whenever U.S. exporters need a helping hand to combat a foreign country's restrictive practices. It would appear that the Clinton administration would rather challenge foreign anticompetitive practices in U.S. courtrooms, than through the multilateral dispute resolution mechanisms of the GATT or WTO which were expressly established for such purposes.

Equating antitrust policy with trade policy has both jurisprudential weaknesses and big-picture policy weaknesses. On the judicial side, the new policy runs the risk of stretching beyond its limits the traditional notion of subject matter jurisdiction that was laid down through nearly fifty years of antitrust jurisprudence. Additionally, it makes U.S. courts the regulatory watchdog of any foreign market closed to U.S. exporters. The rule on subject matter jurisdiction should be that, where extraterritorial conduct and export foreclosure is concerned, there must be an intent to reduce U.S. exports *and* a clear demonstration of direct spillover in the U.S. economy: either reduced supply or increased prices. Anything less puts Justice Department officials in the role of trade negotiators whenever a U.S. exporters' toes are trampled on overseas. *U.S. v. Pilkington plc.* is the natural outcome of the 1995 Guidelines' attitude to subject matter jurisdiction; it is an instance of the U.S. Department of Justice policing the worldwide oligopolistic flat glass market on behalf of two U.S. manufacturers.

Furthermore, an antitrust policy fixated on bolstering U.S. export in a particular industry is just the sort of "bad public policy" that Paul Krugman, a well known M.I.T. economist, warned about when he denounced the national obsession with winning the international economic war.<sup>166</sup> An obsession with "winning" misconstrues the benefits of free trade and undermines the liberal international trading regime upon which postwar prosperity has been built. The long-term interests

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<sup>165</sup> See LAURA D'ANDREA TYSON, WHO'S BASHING WHOM?: TRADE CONFLICT IN HIGH-TECHNOLOGY INDUSTRIES (1992); IRA C. MAGAZINER and ROBERT B. REICH, MINDING AMERICA'S BUSINESS: THE DECLINE AND RISE OF THE AMERICAN ECONOMY (1983); JEFFREY E. GARTEN, A COLD PEACE: AMERICA, JAPAN, GERMANY, AND THE STRUGGLE FOR SUPREMACY (1992).

<sup>166</sup> Paul Krugman, *Competitiveness: A Dangerous Obsession*, FOREIGN AFFAIRS, March/April 1994, at 28.

of the United States are best served by free trade, and free trade is enhanced when our trading partners believe that U.S. public regulatory law, including antitrust law, is compliable.