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International Implications of Limitations on “Aggregate Concentration”

DAVID BOIES

Traditionally, antitrust laws have been concerned with competition and concentration within a single market. In the past few years, however, increasing attention has been given to economywide or *aggregate* concentration—especially when such concentration is accomplished by merger rather than by internal growth. In 1979 and 1980, Congress considered Senate Bill S. 600 which would limit mergers based on size criteria that are unrelated, at least directly, to proof of a lessening of competition within any given market.¹ The international implications of applying this principle are complex and difficult, and have yet to be fully addressed. It is the purpose of this article to articulate the contours of this area of emerging importance.

AGGREGATE CONCENTRATION

The term *concentration*, as it traditionally has been used in the antitrust area, has usually referred to concentration within a particular product or geographic market—concentration in the steel industry, the computer industry, the automobile industry, or the drug industry. Traditionally, that has been the sole focus of the antitrust laws with respect to concentration. Yet there is another sense in which economists and legislators (and to some extent, antitrust lawyers) talk about concentration—concentration in an economywide sense or *aggregate* concentration as it is referred to by some economists.² Aggregate concentration is not a measure of the extent to which a particular company or group of companies controls a specific market share of a given industry; rather it refers to the concentration of the entire economy in the hands of a limited number of corporations.³ When used in that sense, concentration of industry within the United States has increased significantly by most measures.

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RECENT INCREASES IN AGGREGATE CONCENTRATION

In 1955 the top 500 manufacturing corporations in the United States controlled approximately 65 percent of all the manufacturing and mining assets in the United States.⁴ Only ten years later, in 1965, the top 500 manufacturing and mining corporations controlled somewhat over 70 percent of those assets,⁵ and by 1977 the percentage of all manufacturing and mining assets controlled by the top 500 corporations had increased to over 80 percent⁶—an increase in concentration of nearly 34 percent in twenty-two years. This is a phenomenon with which the antitrust laws have not been traditionally concerned; it is, however, a phenomenon that many in Congress and elsewhere believe to be a serious economic, social, and political problem entirely apart from the incidence of concentration within particular markets.

If in this country 100 companies each had only 1 percent of each market but together controlled the entire manufacturing sector of the economy, most people would be viscerally troubled, even though, from a traditional antitrust standpoint, the markets might be said to be rather deconcentrated since 100 companies were actively competing in each of the markets.⁷ Though this exact scenario is improbable, the U.S. Chamber of Commerce estimates that by the year 2000 a few hundred international corporations will control 54 percent of the worldwide manufacturing, mining, and service income and assets.⁸ Thus there is a demonstrable trend toward very substantial aggregate concentration in the United States and, if the Chamber of Commerce's forecasts are correct, on a worldwide basis as well.⁹

EFFECTS OF INCREASED CONCENTRATION

As the economy becomes more concentrated, the number of independent businesses declines. This loss of diversity can limit the choices available to consumers and stunt the process of growth through innovation. Moreover, the loss of diversity has economic effects. As conglomerates acquire companies that were formerly independent, a new layer of business bureaucracy is imposed on the acquired companies, which results in a marked increase in intracorporate bureaucratic review, and the number of independent decision-making centers is reduced. Moreover, applying to economic affairs the principle of federalism that innovation and experimentation are promoted by the dispersion rather than the concentration of decision-making power, these characteristic objectives of the free enterprise system would be impeded. Further, a loss of corporate independence may adversely affect company-community and employer-employee relations as absentee management becomes increasingly distant and isolated from employee and community interests.¹⁰

Particularly in considering the scale on which mergers are taking place today, economic concentration and the loss of diversity can have significant social and political implications as well as economic effects. One of the per-

ceptible trends over the last five years, and in some respects a healthy trend, has been the increasing political activity of business political action committees, or PACs. Corporate executives may play a proper role in political and election activities by establishing and contributing to a PAC which then acts as effectively as the corporation's political arm.¹¹ There were about 700 corporate lobbies registered in 1978.¹² If the resources and activities of those 700 groups were suddenly concentrated in seventy, or in seven, the concomitant loss of diversity of political opinion and the concentration of political power is something that would be very troubling in any society, but particularly in the United States, which prides itself on diversity and political, social, and economic democracy.¹³

Apart from the effect on organized political activity, large corporations have profound effects on our society—the tastes we acquire, the activities that are encouraged or discouraged, the attitudes that are advertised or attacked, the products and services that are offered or discontinued, the charities and public activities that are supported or starved for funds. Only the most naive among us would suggest that in these areas large corporations are guided and controlled wholly by the “invisible hand” of the marketplace. How much discretion large corporations have in exercising their power is debatable—but there is no doubt that they have significant influence.¹⁴ It is an article of democratic faith that such discretionary power is best when it is dispersed and most troubling when it is concentrated in a few hands, however benign.

THE EFFECT OF MERGERS ON AGGREGATE CONCENTRATION

Mergers of large enterprises have contributed significantly to the level of industrial concentration. In 1975 there were fourteen mergers with a value in excess of 100 million dollars. In 1977 there were forty-one such mergers; in 1978 there were eighty such mergers; and in 1979 at least ninety such mergers were consummated.¹⁵

There are various ways to measure changes in the level of industrial concentration. Whether concentration is greater today than it was five years ago or ten years ago depends to some extent on what figures are used.¹⁶ It is nonetheless clear that U.S. enterprise is more highly concentrated than it would have been in the absence of the recent merger activity.

There may, of course, be economic and social benefits from the process that lead to increased industrial size. This is particularly so where the increases in size result from the internal growth of successful firms.¹⁷ Growth may encourage firms to reduce their prices, improve their product, and generally serve consumers more effectively. Tampering with such an incentive is particularly dubious in a time when a priority concern of the country is its apparent long-run inability to sustain increased productivity.

There are also important benefits that can be obtained from growth through merger—such as economies of scale, strengthening of competitors,

and transfer of technology.¹⁸ However, there are many mergers—including many of the largest mergers—where such justifications are weak, if they are pertinent at all. Many large mergers are more a product of tax planning,¹⁹ accounting and stock market considerations,²⁰ and corporate empire building²¹ than they are a product of economic rationales that serve consumer interests. This is particularly true of so-called conglomerate acquisitions that, by definition, involve companies in unrelated markets, and therefore are less likely to result in economies of scale or other efficiencies common to related market mergers.

PROBLEMS UNDER THE EXISTING LAW

Congress first started to address the issue of conglomerate acquisitions in the late 1960s and early 1970s. At the confirmation hearings for Assistant Attorney General McLaren, the Senate Judiciary Committee received a commitment that large conglomerate mergers would be attacked by the Justice Department under Section 7 of the Clayton Act.²² And a few months later, such a suit was commenced to bar the proposed merger of Ling-Temco-Vought and the Jones & Laughlin Steel Corporation.²³

The Justice Department's activity in this area, however, has met with little success. For example, from 1974 through 1978, twelve conglomerate mergers were challenged in court; the government lost all twelve cases.²⁴ The failure of the Justice Department to prevent such mergers under existing antitrust laws underscored the inadequacy of Section 7 of the Clayton Act; it focuses solely on concentration within a "line of commerce."²⁵ If the trend toward aggregate concentration is to be halted, new legislation must be enacted to constrain conglomerate merger activity.²⁶ Accordingly, throughout the last decade, Congress intensively studied this problem, holding hearings on conglomerate mergers, the related topic of multinational corporations,²⁷ and on specific concentrated industries, most notably the oil industry.²⁸

THE PROPOSED LEGISLATION: S. 600

One piece of legislation to come out of this congressional inquiry is the Small Business Protection Act of 1979 (the Act), Senate Bill S. 600, which was introduced in 1979 by Senator Edward Kennedy. The bill imposes limitations on mergers based on the size of the participating corporations, irrespective of the consequences of those mergers within a particular market. The basic purpose of the bill is to impose threshold size limitations on changes in concentration through mergers regardless of whether the increase in concentration is economywide or within a particular market.

The bill recognizes, however, that some mergers might enhance economic efficiency. Accordingly, except for the very largest mergers, in which

case it is presumed that further concentration of economic power cannot be justified on any grounds, the bill provides the acquiring companies with potential affirmative defenses.

The bill has three separate prohibitory sections. Section 2(a) completely prohibits the merger or consolidation of any two companies when each has assets or sales exceeding \$2 billion. No affirmative defenses are available when the merger or consolidation reaches these proportions. It is important to note, however, that this is not an absolute limitation on corporate size. It only limits industrial giants from making huge leaps in size by combining with another industrial giant. Expansion through internal growth is not hindered since the bill only addresses merger activity.

Section 2(b) prohibits mergers or consolidations between companies when each has assets or annual sales in excess of \$350 million. Section 2(c) is a combination of traditional antitrust principles and the new aggregate concentration concept. It prohibits mergers when one company has assets or sales exceeding \$250 million and the other company has 20 percent or more of the sales in any significant market during the calendar year immediately preceding the acquisition.

For mergers covered by Sections 2(b) and 2(c), the bill now provides three independent affirmative defenses. The acquisition may occur if: (1) its preponderant effect is to enhance competition substantially, or (2) substantial efficiencies will result,²⁹ or (3) the parties divest themselves, within one year, of assets equal to or greater than those acquired.

To discourage the sort of aggressive acquisition programs which ran rampant in the last decade, the bill provides that these affirmative defenses are not available if either party to the transaction has, within the past year, been a party to another transaction that was within Section 2(b) or 2(c).

The purpose of the legislation is to prohibit those mergers that have an undesirable impact on increasing industrial concentration, yet permit those mergers that either increase efficiencies or enhance competition. The provision allowing for the spin-off of comparable assets permits a company to acquire a particular corporation under circumstances that would otherwise be barred, as long as it does not increase concentration in the aggregate sense.

INTERNATIONAL IMPLICATIONS OF S. 600

Studying the international impact of the application of this legislation, one encounters the same difficulties that occur in other antitrust contexts.³⁰ Analytically, the international aspects of U.S. concentration regulation fall into two broad areas. First, to what extent should the application of those concentration principles be relaxed in favor of foreign corporations or foreign entities as a result of jurisdictional and comity issues or related concerns?³¹ Second, to what extent should the principles that we might otherwise want to apply in the United States be modified by recognizing the realities of the worldwide

market conditions in which our corporations must compete? In its present form, S. 600 addresses the first of these questions and concludes that there should be no lesser standard for foreign corporations.

A few examples will serve to illustrate the sort of problems that might arise. Suppose a large conglomerate acquisition is proposed in the United States: Mobil Oil Company seeks to acquire Marcor, a company with more than \$350 million but less than \$2 billion in assets or sales. Section 2(b) of S. 600 would limit, but not necessarily prohibit, this type of merger. If the corporations could demonstrate some economies of scale or substantial enhancement of competition resulting from the merger, the merger would be allowed; but given the circumstances of this hypothetical merger, it is probable neither can be demonstrated. Accordingly, we can assume that this merger would be precluded by the application of the anticonglomerate merger bill. Should or would the bill similarly prohibit a foreign giant, such as British Petroleum, from acquiring Marcor? The answer to that question lies in another question: To what extent does it make sense to impose this type of restriction on U.S. companies if it would be permissible for a foreign company with no U.S. assets to enter the United States and effect the otherwise prohibited purchase of Marcor? In other words, is it desirable to prevent U.S. companies that compete in the United States from acquiring other U.S. companies if the result is simply to have those U.S. companies available for sale to foreign corporations?³²

The authors of S. 600 concluded that if a U.S. company had assets or sales in excess of the \$350 million jurisdictional threshold amount, then the acquisition of that company ought to be subject to the constraints of the statute whether the acquiring company was inside or outside the United States. Therefore, if a foreign corporation, even one that has no assets in the United States, sought to acquire Marcor, that acquisition would be covered by the legislation whenever the foreign corporation had the requisite jurisdictional amount of assets anywhere in the world.

Two major concerns argue for this approach. First, it means that U.S. companies and foreign companies are to be treated similarly when they seek to acquire a U.S. concern except when jurisdictional or comity considerations are paramount. Second, the statute seeks to prevent the aggregation of assets by regulating the acquisition of U.S. corporations, irrespective of the identity of the acquirer. In this way, the purpose of the legislation is broader than the means. Since the principle underlying the legislation is to prevent the kind of loss of diversity and loss of independence that occurs with the conversion of an independent corporation into a subsidiary or a division of another corporation, both the purposes and the jurisdictional basis of the statute are met regardless of whether the acquiring corporation is a U.S. corporation or a foreign corporation.

A second, more difficult problem, is whether antitrust officials should regulate the acquisition of a foreign corporation by a U.S. corporation; that is, where a U.S. company acquires a foreign company with no assets in the

United States and both companies have the requisite jurisdictional asset value. As presently drafted, the legislation would apply to the acquisition abroad by a U.S. company even though the acquired foreign company does not have the requisite jurisdictional amount of assets in the United States, but does have sufficient assets in its worldwide operation.

This result is troubling to those persons concerned with the legislation. Yet it would be difficult to exempt such acquisitions as a practical matter and still be able to enforce the ban against the acquisition of U.S. companies by foreign companies. First, this sort of discrimination in favor of U.S. companies might cause serious diplomatic problems. Foreign governments have become increasingly sensitive about U.S. interference with the acquisition policies of their domestic firms.³³ Their attitude is understandable. For years other nations have watched U.S. firms profit by investment abroad. By acquiring existing firms in foreign markets, U.S. firms have increased their worldwide presence. In light of this, foreign governments would be offended by a statute that created restrictions on acquisitions of American firms by foreign companies, but had no restrictions on foreign acquisitions by U.S. firms.³⁴ Second, excluding acquisitions of foreign companies from the bill's coverage would tend to drive U.S. capital abroad, a result which certainly should be avoided.

A third and critical reason to include such transactions in the bill is the practical problem of making sure all domestic acquisitions are covered. If foreign acquisitions are exempted, it might permit companies to structure their acquisitions to avoid the clear intent of the bill. Corporate lawyers would simply arrange the transaction so that the acquired corporation was always a foreign entity; the intent of the bill would thus be nullified. It would be possible for the courts to attempt to make a factual determination of who is the acquirer and who is the acquired company, but that would be a difficult task and would still present the problems raised by the issue of discrimination.

Whether this legislation should apply to merger activity between two companies when neither company has the requisite jurisdictional amount of assets within the United States is one of the most difficult questions facing the Congress. The question remains open. It will be the focus of considerable discussion and debate during the markup sessions that will occur throughout 1980, and presumably during the next Congress, at which time this legislation will probably reach the floor of the Senate and the House.³⁵

A different, but equally difficult question is the extent to which foreign competitive effects can or should be taken into account in providing the affirmative defenses of enhancement of competition, economies of scale, or other efficiencies. On the one hand, it is desirable to have symmetry when applying the same principles in both foreign and domestic contexts. On the other hand, the bill is primarily a domestic statute with particular concerns about U.S. concentration and the benefits of competition and efficiencies within the United States. This too is an issue that remains unresolved.

LIMITATIONS ON LEGISLATIVE SOLUTIONS

These are areas in which it is much easier to raise questions than it is to formulate solutions. The same is true in the area referred to earlier—the extent to which U.S. antitrust authorities should take into account the effects of enforcing U.S. antitrust laws against U.S. corporations in the international market. One might conclude that the ideal of our antitrust laws is a competitive model that should be applied not only in the United States but outside the United States as well. Congress, however, lacks the power to impose that competitive model on the rest of the world,³⁶ and many nations have embraced monopoly rather than competition as a model for industrial growth.³⁷ Given the fact that this competitive model cannot be imposed on the rest of the world and that competition in the worldwide market continues to increase, to what extent should United States antitrust laws continue to be applied to the maximum extent possible in an attempt to bring this country closer to that competitive model? To put it differently, to what extent must United States antitrust and enforcement policies be modified in recognition of the kind of international conditions that face our domestic corporations?³⁸ A couple of illustrations will be helpful. The first relates to the concern of traditional antitrust laws with intramarket concentration; the second relates to aggregate concentration that would be regulated by Senate Bill S. 600. Consider first a U.S. company that seeks to acquire a foreign manufacturer in a related business—to take a specific fact situation, if Gillette in the United States wishes to acquire Braun, a German producer of electric shavers.³⁹ In making the decision whether this acquisition violates U.S. antitrust law,⁴⁰ should the inquiry be tempered by the probability that if the Gillette acquisition is prohibited, another foreign shaver producer will make the acquisition; or must the focus of scrutiny be limited to the particular transaction in question and its domestic economic effect?⁴¹ If attention is directed only to the particular transaction, it may be concluded that the merger would inhibit actual competition, at least in some broad market, or might prohibit potential competition since the two companies may enter into each other's more narrow markets. And if the world was controlled uniformly by the U.S. antitrust laws, it might very well be concluded that the hypothetical merger should be stopped (although in the facts of the proposed case this author has some doubt). Such a conclusion was in fact made by U.S. enforcement authorities⁴² (but tempered by the consent decree) in a case involving Gillette.

On the other hand, if the German shaving company is not acquired by Gillette, it may still be acquired by some large foreign shaver manufacturer with an equal effect on competition not only outside the United States but inside the United States as well. That acquisition is likely to be beyond the traditional reach of U.S. antitrust laws either for jurisdictional or comity reasons. In that case, it is not clear that U.S. antitrust laws should be applied to a foreign acquisition by a U.S. company (and therefore, within our jurisdiction), if the alternative is simply to have the acquisition occur between another

foreign company with equal or perhaps even greater impact on competition when compared with the impact of an acquisition by the U.S. company.⁴³

The second example is even more difficult. Consider U.S. companies that operate in a concentrated U.S. industry (such as the drug, steel, or automobile industry) but also compete against foreign companies in international markets. Does it make sense from the U.S. antitrust standpoint to enforce deconcentration laws against U.S. corporations without looking at the extent to which those rules affect companies as they compete outside of the United States, confront larger international markets and foreign corporations, and deal with foreign governments that appear to favor concentration within particular industries? Government policies that favor high levels of concentration are much more firmly established in Europe and Japan than they are in the United States. When formulating U.S. antitrust policy, such as S. 600, a serious issue is whether, and to what extent, the international or non-U.S. circumstances surrounding major U.S. industries (including the major industries that are most concentrated in the United States) can or should be ignored. That is, how does U.S. antitrust policy take into account the realization that U.S. corporations must compete in an international environment and compete against companies that have different incentives, different motivations, and different domestic controls in their home countries.

CONCLUSION

None of these problems can be easily or precisely resolved. Unfortunately, most of them seem to rest on factual circumstances that are peculiar to individual cases and result in ad hoc determinations, although that raises problems not only for foreign countries and corporations, but for U.S. companies as well. It is an area where a certain amount of vagueness is desirable, so as to allow the courts to operate flexibly within a broad framework of national policy, on a case by case basis, and flesh out the details of U.S. policy by implementing it in the most principled and reasonable fashion.⁴⁴ However, a certain amount of predictability, that would attend a more precise codification by statute, is also needed. Congress will be attempting to balance these two competing and to a large extent conflicting desires, both with respect to the conglomerate merger legislation, which is a new effort in the area of the control of concentration, and with respect to conventional antitrust laws as they affect international events or as international events and issues affect the application of those laws in the United States.

NOTES

1. S. 600, 95th Cong., 1st Sess., 125
CONG. REC. 2417 (1979). The bill is

reprinted as annex 1, *infra*. S. 600
does, however, provide that it shall be

an affirmative defense under the Act to show that the merger will result in a substantial enhancement of competition. The affirmative defenses are delineated more fully *infra*.

2. One commentator has explained the terms as follows:

"[A]ggregate concentration . . . refers to the centralization of productive resources in the economy as a whole rather than in a particular market . . ."

Fishbein, *Conglomerate Mergers and Economic Concentration*, 62 YALE REV. 507, 508 (1973).

See also, STAFF OF THE ANTITRUST SUBCOMM. OF THE HOUSE COMM. ON THE JUDICIARY, 92d CONG., 1st SESS., REPORT ON INVESTIGATION OF CONGLOMERATE CORPORATIONS 20 (Comm. Print 1971).

3. Whether aggregate concentration in itself inevitably leads to market concentration is an open question. See Bryan, *Conglomerate Mergers: Proposed Guidelines*, 11 HARV. J. LEGIS. 31, 33-35 (1973).

4. 125 CONG. REC. 2418 (1979) (statement of Senator Kennedy on S. 600).

5. *Id.*

6. *Id.*

7. See INVESTIGATION OF CONGLOMERATE CORPORATIONS, *supra* note 2, at 49:

Growth of these vast corporate structures, even though, at the same time, they are accompanied by an increase in number of the much smaller and less powerful corporate organizations that operate under the umbrella of the major companies in markets served by the major companies, presages imposition of a cartel-like structure to American business. Some observers foresee a situation where the American economy will be dominated by a few hundred business suzerainties, under whose influence a multitude of small, weak,

quasi-independent corporations will be permitted a subsidiary and supplemental role.

8. Kennedy, *supra* note 4.

9. Undoubtedly, as international trade increases the concept of market under the present law will be modified and expanded to reflect the broader context in which the existing statutes must be applied. Commentators have already suggested several alternative approaches to the question of the proper market in foreign commerce cases. See, e.g., W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS 254 (1958); K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 85 (1958).

If enacted into law, the concept of aggregate concentration should also be interpreted and reinterpreted in accordance with worldwide changes in industrial concentration.

10. Mueller, *The Merger's Impact on the Community*, AM. FEDERATIONIST, June 1971, at 14. See *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 541-43 (1973) (J. Douglas, concurring):

*"Preservation of a competitive system was seen as essential to avoid the concentration of economic power that was thought to be a threat to the Nation's political and social system." Control of American business is being transferred from local communities to distant cities where men . . . with only balance sheets and profit and loss statements before them decide the fate of communities with which they have little or no relationship. . . . The antitrust laws favored a wide diffusion of corporate control. . . . "[T]he desirability of retaining 'local control' over industry and the protection of small businesses" was our comment in *Brown Shoe Co. v. United States*. . . .*

11. See Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431–55 (1976).
12. Kennedy, *supra* note 4, at S. 2419.
13. “It is fundamental to the American creed that political democracy cannot coexist with economic oligarchy.” Mueller, *supra* note 10, at 18.
14. See, e.g., Ehrbar, “Bigness” Becomes the Target of the Trustbuster, *FORTUNE*, March 26, 1979, at 34, 38.
15. See Kennedy, *supra* note 4.
16. See *Hearings on the Small and Independent Business Protection Act*, S. 600, Before the Senate Comm. on the Judiciary, 96th Cong., 1st Sess. 7 (1979) (statement of John H. Shenefield) (forthcoming).
17. Conglomerate acquisitions are often made in industries that are already highly concentrated. See FTC, ECONOMIC REPORT ON CORPORATE MERGER §§ 123–26 (1969). When a conglomerate acquires a company that has a large market share in a concentrated industry, the opportunities for interdependent behavior are multiplied; such acquisitions do not revitalize competition within the industry, they only entrench the status quo. Accord, Areeda & Turner, *Conglomerate Mergers: Extended Interdependence and Effects on Interindustry Competition as Grounds for Condemnation*, 127 U. PA. L. REV. 1082 (1979). Internal expansion, on the other hand, often does result in a return to the competitive model: *One of the best prospects for deconcentrating concentrated industries—in fact, perhaps the only one of any significance—is new entry. And, by and large, those companies who are most capable of new entry into most other industries are the very large companies. Therefore, I think, if over a period of ten or fifteen years, these companies had to go the internal expansion route or the route of relatively minor acquisitions to get a foothold in an industry and then build up, that over the economy as a whole, fifteen years from now, you would have less concentration in a good many markets than you would otherwise have.*
An Interview with the Honorable Donald F. Turner, 37 ANTITRUST L.J. 290, 299–300 (1968).
18. Bryan, *supra* note 3, at 36.
19. See generally Sinrich, *Tax Incentives and the Conglomerate Merger: An Introduction*, 44 ST. JOHN’S L. REV. 1009 (spec. ed. 1970).
20. See generally Briloff, *Financial Motives for Conglomerate Growth*, 44 ST. JOHN’S L. REV. 872 (spec. ed. 1970); H. LYNCH, FINANCIAL PERFORMANCE OF CONGLOMERATES 280 (1971).
21. Cf. W. BAUMOL, BUSINESS BEHAVIOR, VALUE AND GROWTH (rev. ed. 1967). (A study of oligopolistic decision making and objectives, and of the forces behind economic growth in modern capitalist economies).
22. *Hearings on the Nomination of Richard W. McLaren Before the Senate Comm. on the Judiciary* 91st Cong. 1st Sess. 36 (1969) (statement of Richard W. McLaren).
23. *United States v. Ling-Temco-Vought*, 315 F. Supp. 1301 (W.D. Pa. 1970) (consent decree).
24. REPORT OF THE ATTORNEY GENERAL PURSUANT TO SECTION 10(e) OF THE SMALL BUSINESS ACT, AS AMENDED, CONGLOMERATE MERGERS, SMALL BUSINESS, AND THE SCOPE OF EXISTING ANTIMERGER STATUTES 16 (1979). See also Bauer, *Challenging Conglomerate Mergers Under Section 7 of the Clayton Act: Today’s Law and Tomorrow’s Legislation* 58 B. U. L. REV. 199–201 (1978).
25. 15 U.S.C. § 18 (1976).
26. See Interview with Donald F. Turner, *supra* note 17, at 298.

27. *International Aspects of Antitrust Hearings on S. Res. 191 Before Subcomm. on Antitrust and Monopoly of the Senate Comm. of the Judiciary 89th Cong. 2d Sess. (1966).*
28. *Competition and Public Policy in the Petroleum Refining Industry, Hearing before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary. 95th Cong. 2d Sess. (1978)*
29. Because the facts in each case will vary and cannot be anticipated, the task of developing standards for applying these defenses on a case-by-case basis has been left to the courts.
30. See generally Donovan, *The Legality of Acquisitions and Mergers Involving American and Foreign Corporations Under the United States Antitrust Laws*, 39 S. CALIF. L. REV 526 (pt 1), 40 S. CALIF. L. REV. 38 (pt 2) (1966-67).
31. The general principles of international comity were summarized by James R. Atwood, Acting Legal Adviser, Department of State:
Even where there is a basis in international law for exercising jurisdiction, principles of comity often suggest that forbearance is appropriate. Under those principles, states should consider and weigh the legitimate interests of other states when taking action that could affect those interests, and should leave the regulation of conduct to the state with the primary interest. Thus, our foreign partners expect that in general they have the right to regulate the climate for investment within their territories and to establish energy and competition policies for their own economies and firms. By refraining from intruding upon these spheres more than is necessary, we can avoid many unnecessary foreign relations frictions. . . .

*Where the rules two states prescribe may require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderation in the exercise of its enforcement jurisdiction. Each state should take into account relevant factors such as the vital national interests of the states involved, the extent and nature of the hardship created by inconsistent enforcement actions, the extent to which the conduct takes place in another state's territory, the nationality of the persons involved, the relative significance of the effects in each territory, the extent to which adverse effects on the enforcing state are explicitly intended or reasonably foreseeable, and the extent to which enforcement action can reasonably be expected to achieve compliance. This jurisdictional rule of reason, or balancing test, is a commonsense rule and, of course, states may differ in their judgments of how it should be applied in a given instance. The international legal obligation is . . . to consider these interests in good faith and, where appropriate in light of all circumstances, to temper the exercise of enforcement jurisdiction. Hearings on the Energy Antimonopoly Act of 1979, H.R. 4295 Before the Senate Comm. on the Judiciary, 96th Cong., 1st Sess. 5-7 (1979) (Department of State Print). Cf. Hansen, *The Enforcement of the United States Antitrust Laws by the Department of Justice to Protect Freedom of United States Foreign Trade*, 11 ABA ANTITRUST SECTION 75 (1957).*

32. See, e.g., *United States v. Standard Oil Co.*, 1970 TRADE CASES, ¶ 72,988 (N.D. Ohio 1969) (consent decree).
33. The Antitrust Division concluded early on that acquisitions of American firms should be treated no differently when the acquiring firm is a

- foreign national. See Wall St. J., Nov. 18, 1969, at 3, col. 1 (quoting Richard McLaren, then Asst. Att'y Gen'l, Antitrust Div.).
34. E. KINTNER & M. JOELSON, AN INTERNATIONAL ANTITRUST PRIMER 119 (1974).
 35. Analogous problems are raised by the proposed Energy Antimonopoly Act of 1979, S. 1246, 96th Cong., 1st Sess., 125 CONG. REC. S. 6703 (1979). See, e.g., Amendment to S. 1246 Proposed by the Department of Justice, Letter to Senator Edward M. Kennedy from John H. Shenefield, Assistant Attorney General, Antitrust Division (September 18, 1979). Reprinted in Annex 2, *infra*.
 36. *Limitations on the power, size and structure of the supranational firm may ultimately be imposed through worldwide uniform standards developed by the United Nations or a similar multinational body, but until agreement is reached on the nature or desirability of such control, the burden of regulation will continue to fall on those states that assert domestic jurisdiction over the firms involved.* Graham, Hermann & Marcus, *Section 7 of the Clayton Act and Mergers Involving Foreign Interests*, 23 STAN. L. REV. 205 (1971); See Stockmann, *Reflections on Recent OECD Activities: Regulation of Multinational Corporate Conduct and Structure, post*; Kurek, *Supranational Regulation of Transnational Corporations: The UNCTAD and CTC Efforts, post*.
 37. Scott & Yablonski, *Transnational Mergers and Joint Ventures Affecting American Exports* 14 ANTITRUST BULL. 1 (1969).
 38. *The whole economic structure of other countries may be dependent on cartel or joint efforts—as in vital industries where the foreign government is reluctant to allow prices and profits to fluctuate through the forces of competition.* [*Id.* at 7.]
 39. See, e.g., Baker, *Antitrust and World Trade: Tempest in an International Teapot*, 8 CORNELL INT'L L.J. 16, 27 (1974).
 40. Cf. ANTITRUST DIVISION, U.S. DEP'T OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS 15 (1977), with Griffin, *A Critique of the Justice Department's Antitrust Guide for International Operations*, 11 CORNELL INT'L L.J. 215, 230–33 (1978).
 41. This possibility is becoming a reality with increasing frequency: [*A*] *growing merger trend within Western Europe's own business organizations may be preempting the investment opportunities available to United States firms desirous of establishing or enlarging beachheads overseas.* Scott & Yablonski, *supra* note 37, at 2.
 42. *United States v. Gillette Co.*, 406 F. Supp. 713 (D. Mass. 1975) (consent decree).
 43. When the antitrust laws are applied to foreign transactions, two distinct domestic concerns must be considered: The first is American industries' interest in competitive access to world markets. The second is the American consumer's interest in having access to foreign goods and the competitive forces they engender. Both of these interests would be jeopardized if enforcement authorities in the United States ignored this possibility.
 44. A case-by-case approach may help ensure fairness in individual cases, see note 30, *supra*, but codification of easily understood standards affords certainty to business transactions and reduces problems of enforcement.

ANNEX 1: SENATE BILL S. 600

96TH CONGRESS
1ST SESSION

S. 600

To preserve the diversity and independence of American business.

IN THE SENATE OF THE UNITED STATES

March 8 (legislative day, February 22), 1979

Mr. Kennedy (for himself, Mr. Metzenbaum, Mr. Pressler, Mr. Melcher, and Mr. McGovern) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To preserve the diversity and independence of American business.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Small and Independent Business Protection Act of 1979".

SEC. 2. Notwithstanding any other provision of law, no person shall merge or consolidate with any other person engaged in commerce, or acquire, directly or indirectly, such amount of the stock or other share capital of such other person as to enable such person to control such other person, or acquire, directly or indirectly, a majority of the assets of such other person, if—

- (a) each person has assets or sales exceeding \$2,000,000,000;
- (b) each person has assets or sales exceeding \$350,000,000; or
- (c) one person has assets or sales exceeding \$350,000,000 and the other person has 20 per centum or more of the sales during the calendar year immediately preceding the acquisition in any significant market.

SEC. 3. (a) Except as provided in subsection (b), it shall be an affirmative defense to an offense under sections 2(b) and 2(c) that—

- (1) the transaction will have the preponderant effect of substantially enhancing competition;
- (2) the transaction will result in substantial efficiencies; or
- (3) within one year before or after the consummation of the transaction, the parties thereto shall have divested one or more viable business units, the assets and revenues of which are equal to or greater than the assets and revenues of the smaller party to the transaction.

(b) Such affirmative defense shall not be available if one of the parties to the transaction has within one year previous to the transaction been a party to a prior transaction coming within the provisions of section 2(b) or 2(c).

SEC. 4. (a) Authority to enforce compliance with section 2 is vested in the Attorney General of the United States and the Federal Trade Commission.

(b) The Attorney General and the Federal Trade Commission shall adopt procedures by which parties to a transaction within the terms of sections 2(b) and 2(c) can ascertain the determination of the Attorney General or the Federal Trade Commission as to whether or not the transaction is within the terms of any of the affirmative defenses set forth in section 3. If the Attorney General or Commission, pursuant to such procedures, advises a party that a transaction is within the terms of any of the affirmative defenses set forth in section 3, the Attorney General and the Federal Trade Commission shall be barred by such advice in the absence of proof that the determination was based in whole or substantial part on an intentional misstatement by the party requesting such advice.

SEC. 5. Injunctive relief for private parties may be granted under the same terms and conditions as prescribed by section 16 of the Clayton Act.

Definitions

SEC. 6. (a) As used herein, "efficiencies" shall include economies of scale in manufacturing, marketing, distribution, and research and development.

(b) As used herein, "significant market" means any line of commerce in any section of the country which has annual sales of more than \$100,000,000.

SEC. 7. (a) The provisions of this Act are in addition to and not in lieu of other provisions of the antitrust laws and nothing in this Act shall be deemed to authorize or make lawful anything heretofore prohibited or made illegal by other antitrust laws.

(b) This Act shall apply to all mergers or consolidations occurring after March 11, 1979.

ANNEX 2: SHENEFIELD LETTER RE INTERNATIONAL IMPLICATIONS OF
SENATE BILL S. 1246

September 18, 1979; letter from John H. Shenefield, assistant attorney general, Antitrust Division, Department of Justice to Senator Edward M. Kennedy, chairman, U.S. Senate Judiciary Committee, re: International Implications of S. 1246, the Energy Antimonopoly Act of 1979.

Honorable Edward M. Kennedy
Chairman
Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

As you know, the Administration has indicated its support for S. 1246, the Energy Antimonopoly Act of 1979, as it would be amended by proposals forwarded to the Committee under cover of my letter to you of July 31, 1979. As thus amended, S. 1246 would restrict large acquisitions by major American petroleum producers and their "affiliates", the latter being defined to include all companies controlling, controlled by, or under common control with, major producers. Restrictions on acquisitions by affiliates are intended to eliminate the possibility that revenues of major producers might be channeled through such companies to make acquisitions, resulting in evasion of the purposes of the statute. Channeling major producers' revenues away from acquisitions of unrelated firms toward investment in energy production and development is a major goal of the bill.

Concern has arisen, however, over the possible international ramifications of legislation that at least on its face would restrict acquisitions by all foreign companies affiliated in some way with major American producers. This concern is amplified by the fact that the bill as amended by the Administration's proposals would restrict acquisitions by major producers and their affiliates of foreign, as well as domestic, companies. It is argued that national jurisdictional limits would be exceeded by such legislation, principles of international comity would be violated, and foreign sovereigns offended, perhaps resulting in retaliatory action to the detriment of energy production abroad. While these concerns might be somewhat ameliorated by clear legislative history to the effect that invocation of the statute would be tempered by jurisdictional and comity considerations, we believe that further amendments clarifying its proper scope would be desirable.

The "foreign affiliate" question may be divided into two issues: (1) coverage of acquisitions by foreign firms that control major American producers, and the other subsidiaries of such foreign firms, and (2) coverage of acqui-

tions by foreign firms which are themselves controlled by major American producers.

(1) Acquisitions by Foreign Firms Controlling Major American Producers And Other Subsidiaries of Such Foreign Firms

Applying the restrictions of S. 1246 to foreign firms that control major American producers, and the other subsidiaries of those foreign firms, appears to raise the more difficult issues. The problems are not merely theoretical; two of the 18 major American producers covered by S. 1246 as it would be amended by the Administration's proposals, Standard Oil of Ohio and Shell, are controlled by foreign firms. Asserting jurisdiction over foreign firms involves considerations not encountered in wholly domestic contexts. Differing national interests and policies must be accommodated in both legislative and judicial processes, and connections with American interests identified. Here, covering acquisitions by foreign parents and sister subsidiaries would not appear to be appropriate if acquisitions by such firms would not be likely as a general matter to adversely affect legitimate American interests that the bill is designed to protect. We are unable to conclude—with the confidence desirable to assert jurisdiction over foreign firms—that foreign parents would be likely to use major producers' revenues to make acquisitions to such an extent as to seriously undercut a major goal of the bill. Thus, from both the jurisdictional and comity standpoints, coverage of such foreign company acquisitions is of doubtful propriety, and the Administration's proposal was not intended to be applied in such situations.

Foreign parents and sister subsidiaries of major American producers (as well as foreign governments) may, however, reasonably argue that technical coverage of their acquisitions by S. 1246 is objectionable. They may argue that international jurisdictional or comity precedent is not adequate to protect against assertion of U.S. jurisdiction in excess of its proper bounds. They may also fear the development of a cloud on the legality of proposed acquisitions despite general assurances to the contrary in legislative history or from enforcement authorities.

These considerations have led us to conclude that it probably would be wise to further amend S. 1246 to eliminate coverage of foreign firms that control major American producers, and the other subsidiaries of such foreign firms. Practically speaking, eliminating coverage of such firms would not appear to interfere with the goals of the legislation. Wholesale transfer of funds to foreign parents (other than transfers in the ordinary course of business such as normal dividend and interest payments) seems unlikely in view of the fact that only two of the producers covered by the bill presently have foreign parents and there is significant minority ownership of the American producer in each instance. Evasion through such use of a foreign parent as an acquiring medium seems unlikely; should a foreign parent acquire a firm that could not be acquired by a major American producer, and then attempt to convey such firm to the American producer—perhaps arguing the applica-

bility of the intraenterprise exception in the bill—the entire series of transactions would rightly be viewed as an indirect acquisition by the American producer. Creation of whole cloth foreign parents by other American producers to evade the statute also would be unavailing; acquisitions through such schemes clearly would be indirect acquisitions by the producer, and fully subject to the new law.

In light of these considerations, we are submitting herewith minor modifications to the Administration's proposed amendments to S. 1246 that would eliminate coverage of foreign firms that control major American producers, and the other subsidiaries of such firms. The definition of "affiliate" would be altered to include only firms that are "controlled by" such major producers. Attached is an appropriately altered draft of S. 1246 as it would be amended by the Administration's proposals.

(2) Acquisitions by Foreign Firms Controlled by American Producers

With perhaps less force, it has been argued that acquisitions by domiciliaries of other countries should not be covered by the proposed legislation regardless of their control by major American producers. The argument is most forcefully advanced in hypothetical contexts in which foreign law or policy arguably prompts, if not mandates, acquisitions otherwise within the technical proscriptions of the bill.

Wholesale exemption of acquisitions by foreign subsidiaries of major American producers clearly appears inappropriate. First, a broad statutory exemption could seriously undercut the goals of the legislation by opening avenues of foreign acquisition opportunities which could divert significant major producer revenues from increased energy production. A direct connection between acquisitions by foreign subsidiaries of major American producers and the legitimate interests of this country is thus reasonably likely, and supports the exercise of jurisdiction over the activities of such foreign firms in many circumstances.*

Second, a broad statutory exemption is unnecessary, since principles of international law and comity may lead to the conclusion that a particular acquisition by a foreign firm which is controlled by a major American producer is not proscribed, notwithstanding its technical coverage by the bill. Foreign laws and policies would be taken into full account in applying the statute, as would the extent to which the particular acquisition in question would be inconsistent with the purposes of the legislation. For example, where an acquisition by a foreign subsidiary of a major producer of another

* It should be noted here that under the terms of the draft statute, challenges to acquisitions by foreign subsidiaries of major American producers may be made through suit against the foreign firm itself, where grounds for the exercise of jurisdiction over the foreign firm exist, or through suit against the major American producer which is making the acquisition indirectly, or both. Effective enforcement of the bill will not necessarily require naming as a defendant a foreign affiliate through which an acquisition is being made.

foreign firm is in full accord with expressed public interests of the foreign nation (perhaps including interests in increased energy production), even though the acquisition is not mandated in the strict legal sense, comity may compel deference to those interests. By way of further example, it may be possible in some circumstances to be confident that a merger of a foreign subsidiary of a major producer with another foreign firm does not entail any drain on the producer's revenues, is instead supported entirely by the resources of the foreign firms involved, and would enhance the competitiveness of the resulting firm to the clear benefit of foreign public policies. Since application of the statute in the international context depends in part on the extent to which an acquisition would interfere with the goals of the bill, here too, principles of international law and comity—that will be applied by the courts and in the exercise of prosecutorial discretion as well—may render application of the new statute inappropriate. If further assurance is needed that the principles of international law and comity are to be applied by the courts and prosecutors alike, we would have no objection to the statute, on its face, providing that “This section’s applicability to foreign acquisitions shall be interpreted in accordance with the principles of international law and comity.”

Thus, there does not appear to be sufficient reason to create any broad statutory exemption for acquisitions by foreign subsidiaries of major American producers. Reasoned decision-making with regard to application of the statute to such acquisitions should provide safeguards against international friction on the one hand and evasion of the statute’s goals on the other. . . .

Sincerely yours,

John H. Shenefield
Assistant Attorney General
Antitrust Division

*Proposed Amendment to S. 1246, Acquisitions by Major Oil Companies—
Proposed New Section 7B of the Clayton Act*

(a) No major producer engaged in commerce, or affiliate thereof, shall, directly or indirectly, through merger, consolidation or acquisition, acquire control or a majority of the assets of any other person if

(1) such other person has total assets of \$100 million or more, and

(2) in the case of an acquisition of a majority of the assets, \$100 million or more of assets would be acquired.

(b) No acquisition shall be prohibited by this section if the likely effect of the acquisition would be substantially to enhance competition in the domestic or foreign commerce of the United States.

(c) For purposes of this section—

(1) A "major producer" is any person incorporated in the United States who, together with the persons it controls, produced an average of 150,000 barrels or more per day world-wide of crude oil and natural gas liquids in the immediately preceding calendar year. Production of crude oil and natural gas liquids shall include interests in such production.

(2) An "affiliate" of a major producer is a person who ~~controls, is controlled by, or is under common control with,~~ such major producer.

(3) The total assets of a person shall include those of all persons controlled by such person.

(4) Assets acquired within a period of three years shall be presumed to be the subject of a single acquisition.

(5) Control means having the power, directly or indirectly, to direct or cause the direction of the management and policies of a person through the ownership of voting securities or otherwise; provided, however, that control shall not arise solely out of a bona fide credit transaction. Ownership of, or the power to vote, 15 percent or more of the outstanding voting securities of a person creates a rebuttable presumption of control. Ownership of, or the power to vote, less than 15 percent of the outstanding voting securities of a person does not create a presumption of control or lack of control.

(6) "United States" includes the several States, the territories, possessions and commonwealths of the United States and the District of Columbia.

(7) (A) Except as provided in subparagraph (B) of this paragraph, the value of assets is the amount at which such assets are carried on the books used as the basis for reports filed by a person pursuant to Section 13 or Section 15(d) of the Securities Exchange Act of 1934 or which would be used if Section 13 or Section 15(d) of the Securities Exchange Act of 1934 were applicable to require reporting by such person.

(B) In the case of acquisition of less than all of the assets of a person, in determining whether a majority of person's assets would be acquired, the value of assets is the fair market value.

(d) (1) Nothing contained herein shall be construed to prohibit any acquisition involving solely persons controlling, controlled by, or under common control with one another.

(2) Nothing contained herein shall be construed to render unlawful any acquisition on the basis of increases in production or assets after consummation.

(e) (1) For purposes of sections 4 and 16 of this Act, this section shall not be considered part of the antitrust laws.

(2) In any action to enforce this section, whenever a challenged acquisition has been or may be consummated, the court shall, upon petition, issue an order appropriate to ensure that the assets and operations of the parties to the acquisition are kept intact and held separate and that the parties do not interfere with or participate in the management or internal affairs of one another pending final adjudication. This paragraph shall not be construed to affect in any way any determination as to the need for or propriety of a temporary restraining order or preliminary injunction enjoining consummation of any acquisition which may be prohibited by the section.

(f) Nothing contained herein shall be construed to provide any defense or immunity to any acquisition which would violate Section 7 of this Act or otherwise be unlawful.

(g) This section shall apply to acquisitions consummated after June 1, 1979 and prior to January 1, 1991.