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Techniques and Antitrust Aspects Concerning Foreign Entry

Cover Page Footnote
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TECHNIQUES AND ANTITRUST ASPECTS
CONCERNING FOREIGN ENTRY

STEPHEN M. AXINN*

I. INTRODUCTION

I HAVE been asked to discuss the techniques and the antitrust aspects of the take-over of a United States company by a foreign company. As I understand that topic, it is really a consideration of a two-fold inquiry: first, the practical problems raised by the antitrust issues in such a transaction; and second, the substantive differences between a take-over of an American company by a foreign company and the take-over of one American company by another.

II. ANTITRUST ASPECTS—PRACTICAL CONSIDERATIONS AND PROCEDURES

Too often it seems that the bidding company fails to face up to the antitrust aspects of the take-over until the time arrives to announce the offer. In many cases the bidder makes the decision to go ahead with the take-over, lines up its financing, makes its initial subcritical purchase of target company shares, obtains any necessary government clearances and prepares its Schedule 13D.1 Only when the bidder is ready to place its ad in the Wall Street Journal, is counsel asked to explain the possible antitrust ramifications of the transaction. By that time, counsel’s assistance may be so limited as to be of little value.

Whether the contemplated transaction involves a take-over of an American firm or a take-over of a multinational company with some significant operations in the United States, it is necessary to review the American antitrust implications of the transaction at the first available opportunity.

Both the Sherman Act2 and section 7 of the Clayton Act3 apply to the acquisition of any company engaged in the interstate or foreign commerce of the United States.4 And although the bidder may be convinced that there is no antitrust problem, the chances are that if the

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The author wishes to thank Neal R. Stoll, Esq. for his careful efforts in assisting with the preparation of this paper.

company has a good reason for entering into the transaction, there may well be an antitrust issue somewhere within the transaction.

A. The Bidding Company’s Investigation

An initial consideration of the antitrust issues must be made, whether the transaction is hostile or friendly. Frequently, of course, in a friendly transaction, the bidder will have access to important information concerning the target company, which will not be available in a hostile situation.

Since an antitrust attack against the acquisition may move with amazing speed, in order to respond effectively, necessary information must be well organized and readily available to counsel. A basic list of items should be supplied to the bidder’s antitrust advisor at the initial conference in order to prepare for possible action against the transaction by the government, the target company, a competitor or a regulatory agency. The list would include all documents concerning the bidding corporation’s internal organization and operating procedures. The bidding corporation should also make a complete and thorough investigation of the company it seeks to acquire. At this

5. For example:
   a. Financial statements for the past 10 years, if available.
   b. All copies of annual, quarterly and other reports prepared by the company or its subsidiaries.
   c. Country of incorporation’s or domestication’s restrictions regarding acquisitions of and mergers with United States’ corporations.
   d. Identification of all subsidiaries whether partially or wholly owned.
   e. A description of all products produced by the company or its subsidiaries.
   f. Market shares and concentration statistics for all geographic markets where the company competes.
   g. All patents and licenses held by the company and its subsidiaries.
   h. Figures on all sales including exports to and imports from the United States for the last five years.
   i. All agreements with United States companies for the exchange of patents, technology and expertise.
   j. Any exchange agreements for products and services with domestic or foreign corporations.
   k. All previous efforts to acquire domestic corporations whether successful or not.
   l. All investments made by the company or its subsidiaries in United States’ corporations.
   m. A record of the company’s prior antitrust history, domestic or foreign.
   n. All joint venture agreements between the company, its subsidiaries and a United States or foreign corporation.
   o. Drafts of tender offer or merger documents and minutes related to the possible offer.

6 For example, the bidder should:
   a. Obtain copies of all public filings the target company has made for the last ten years.
   b. Be aware of the target company’s internal organization and operating procedures.
   c. Be aware of all products sold by the target company.
   d. Be aware of the target company’s market shares and geographic markets.
preliminary conference, antitrust counsel should probe the questions of timing, financing and any necessary pre-announcement steps which may be under consideration. Certain steps which require planning and time include the lining up of potential purchasers for assets or businesses which may have to be divested in order to comply with United States antitrust laws.7

B. Antitrust Aspects and Schedule 13D

Another preliminary problem which always faces the antitrust lawyer is what to say about the antitrust considerations in the Schedule 13D8 which is filed with the Securities and Exchange Commission (SEC) whenever an acquisition of more than five percent of the shares of a company is involved.9

In the case of a tender offer, the law is quite clear. It was held in *Gulf & Western Industries, Inc. v. Great Atlantic & Pacific Tea Co.*10

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9. Rule 13d-1 provides in part: “Any person who, after acquiring directly or indirectly the beneficial ownership of any security of a class which is registered pursuant to section 12 of the Act, or any equity security of an insurance company which would have been required to be so registered except for the exemption contained in section 12(g)(2)(G) of the Act, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940, is directly or indirectly the beneficial owner of more than 5 percentum of such class shall, within 10 days after such acquisition, send to the issuer of the security at its principal executive office, by registered or certified mail, send to each exchange where the security is traded, and file with the Commission, a statement containing the information required by Schedule 13D (§ 240.13d-101). Eight copies of the statement shall be filed with the Commission.” Id. § 240.13d-1 (1974).

10. 476 F.2d 687 (2d Cir. 1973).
that section 14(e) of the Exchange Act\textsuperscript{11} is violated whenever the bidder fails to disclose in his Schedule 13D and in his tender offer documents, those basic facts bearing upon the bidder's possible liability for antitrust violations which were of obvious concern to those target company (A&P) shareholders who retained part of their stock.\textsuperscript{12}

The basic facts that the court held should have been disclosed in the \textit{Gulf & Western} case were the ownership by Gulf & Western's chief executive of a controlling block in Bohack, a supermarket chain in competition with the target,\textsuperscript{13} and the control by Gulf & Western of a number of actual or potential A&P suppliers.\textsuperscript{14}

As a result of that case, a tender offer is rarely made today that does not include either a description of some of these "basic facts," or a statement such as the following:

Based on a preliminary review of the businesses of X and Y and the advice of counsel for X, X has no reason to believe that the acquisition by it of control of Y will violate the antitrust laws.

In those situations where no tender offer is involved, the case law seems to indicate that basic antitrust considerations need not be disclosed in the Schedule 13D.\textsuperscript{15} On September 9, 1974, however, the SEC issued a release announcing investigatory hearings concerning, \textit{inter alia}, whether to expressly require disclosure of antitrust considerations in all Schedule 13D filings.\textsuperscript{16} This recommendation is presently under review.

\textbf{C. Governmental Pre-Acquisition Clearance}

The next step that must be considered by antitrust counsel is the possibility of seeking the government's advance approval for the proposed transaction.

Both the Antitrust Division of the Department of Justice and the Federal Trade Commission (FTC) have procedures for the advance review of a proposed transaction. Although the Department of Justice is not authorized to give advisory opinions to private parties, the

\begin{itemize}
\item \textsuperscript{11} 15 U.S.C. § 78n(o) (1970).
\item \textsuperscript{13} 476 F.2d at 697.
\item \textsuperscript{14} Id.
\item \textsuperscript{15} Cf. id.
Antitrust Division has been willing to review proposed business conduct and to state its enforcement intentions through its "Business Review Procedure." Similarly, the FTC will advise the requesting party whether a proposed course of business activity would be likely to violate any of the laws subject to FTC administration. Requests for advice concerning proposed mergers and the accompanying supporting material will be placed on the public record except for information requested to be held confidential and which the FTC has determined not to make public. Any advice given is without prejudice to the right of the FTC to reconsider the questions involved and to rescind or revoke the advice.

1. Which Agency To Approach?

Antitrust counsel can generally judge which of the two agencies, on the basis of its prior experience and activities, is the appropriate one to approach with the transaction. Where no strong reason exists for either the FTC or the Antitrust Division to take the case, I have found that the choice counsel makes in the initial selection process is frequently honored by the liaison personnel of the two agencies and the agency selected will be the one that handles the entire transaction.

Many antitrust counsel argue as to their preferences between one agency and the other, and I certainly do not intend to enter that debate. However, many of the old reasons for selecting one agency over another no longer exist. For example, in the past the FTC had much more difficulty in moving swiftly against a take-over because, in order for it to obtain a temporary injunction, it was required to proceed under the All Writs Acts. However, legislation enacted in 1973 has removed that hurdle.

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17. 28 C.F.R. § 50.6 (1974). A request for a business review letter must be submitted in writing; the Division will consider only requests with respect to proposed business conduct; a business review letter will have no application to a party not joining in the request; the requesting parties are under an affirmative obligation to make full and true disclosures concerning the business conduct to be reviewed; the Division will ordinarily state a present intention not to bring a civil action only with respect to mergers, acquisitions or similar arrangements; a business review letter states only the enforcement intention of the Division as of the date of the letter, and the Division remains completely free to bring whatever action or proceeding it subsequently comes to believe is in the public interest; the business review request, the information supplied to support it and the Division's letter in response will be available to the public upon request (subject to certain exceptions). Id. The request for the business review letter should be filed well in advance of the proposed acquisition.


Co., the FTC had no more difficulty in obtaining an injunction in the district court than the Antitrust Division had in the past under the Clayton Act.22

I think it is fair to say that with respect to foreign take-overs both of our enforcement agencies have followed similar substantive approaches.23

2. Should the Bidder Seek Governmental Clearance?

Most often the obtaining of advance clearance from either agency is not the followed practice. Most government attorneys will freely admit that the government is relatively reluctant to give its advance approval to take-overs in any case where a legitimate antitrust issue is raised.24

However, there are instances where reasons will exist to negotiate with the government in advance. It may be, for example, that counsel for the bidder knows that there is an antitrust problem, and is involved in a transaction which is large enough so that there is no chance that it will escape the scrutiny of the government. By voluntarily approaching the government the bidder can avoid suspicion and uncertainty as to possible action the government may take concerning the proposed transaction. If the transaction is hostile and the target has already visited the enforcement agencies to try to persuade them to oppose the take-over, it may be essential for the bidder voluntarily to make its own presentation in order to ward off an attack which is based on misinformation.

In these cases it makes no sense to wait until the government sends out its letter of inquiry or commences some sort of formal or informal procedure to obtain the facts.26 Though it may be the exception and

21. 1974 Trade Cas. ¶ 75,003 (D. Del.).

22. 15 U.S.C. § 25 (1970). A district court can issue a preliminary or temporary injunction during the pendency of a government suit for injunctive relief if the government is able to show probability of success on the merits of its case. Id. The need to preserve the governmental policy stated in the antitrust law obviates any further showing of irreparable injury.


24. Some other disadvantages of pre-acquisition clearance procedures are: (a) once the government has expressed a negative opinion it is almost certain that the acquisition will be attacked if consummated; (b) the information the company provides the government may be used against it in a subsequent suit to prevent the acquisition by the government or a private litigant; (c) by the terms of both the FTC's and the Antitrust Division's review procedures, the information supplied by the foreign corporation will be made public unless the requesting party can justify non-disclosure of the information; and (d) the task of supplying the government with the required information will entail additional expense.


26. The informal procedures (see note 25 supra) recently were radically curtailed. 40 Fed. Reg. 15235 (Apr. 4, 1975).
not the rule, there definitely are occasions when it makes good practical sense for the bidder to approach the government before pursuing its take-over.

D. FTC Merger Notification Procedure

Another practical consideration that must be dealt with by antitrust counsel is the FTC's merger notification procedures. The revised procedures contain a number of significant changes, some of which were in direct response to the increasing number of foreign take-overs.

There are new dollar reporting criteria: for manufacturing companies, the target must have sales or assets of $10 million or more, and the combined sales or assets of the two companies taken together must comprise $250 million or more; for service or non-manufacturing companies, there is only the assets criterion. The previous requirements concerning the 60 day prior notice on certain asset and stock transactions have been eliminated.

The new procedures specifically include coverage of the tender offer situation. A tender offer bidder, in cases where the above-mentioned dollar criteria are met, must both notify the FTC of the proposed transaction and file a special report within ten days after making the offer, where he is bidding for ten percent or more of the target company shares. However, the target need not file unless the bidder first acquires 50 percent or more of the target company shares, in which case the target has ten days to file a special report.

For the first time, the FTC has provided some limitations on filing by foreign companies. Notice and special reports need be filed only by companies conducting domestic operations, and then the company need file only on such domestic operations as it may have. The term domestic operations is not defined anywhere in the regulation, but in the report form that was distributed with the regulation the term "establishment" is used. Establishment is defined as "[a] single physical

29. "The dollar criteria is [sic] met if: (1) a company acquires a manufacturing company with sales or assets of $10 million or more and the combined sales or assets exceed $250 million; or (2) a company acquires a non-manufacturing company with assets of $10 million or more and the combined assets exceed $250 million." 39 Fed. Reg. at 35717.
30. Id.
31. Id. at 35717-18.
32. Id. at 35718.
33. Id.
34. Special Report Form OMB No. 56-R0026, 1 Trade Reg. Rep. 5450.05 (1974).
location within the United States and its territories where business is conducted or services or industrial operations are performed."

I suspect that the FTC will construe its own regulations to equate domestic operations and establishments, thus limiting the reporting obligations to companies with some physical plants or facilities in the United States. However, the FTC defines the reporting companies to include the "pre-transaction ultimate parent company," plus all "wholly or party [sic] owned subsidiaries or divisions" where the parent either owns a majority of the voting stock or has the power to formulate, determine or veto basic business decisions through stockholdings, contractual means, or otherwise. That broad definition could prove fruitful for litigation in the future.

Most antitrust lawyers would advise the company in doubt as to its obligation to notify the FTC to give notice and file the report. In most cases the notice is only a formality. If the acquisition or take-over has been reported in the major financial media, undoubtedly the government is aware of the transaction. The information required in the report is for the most part routine statistical data or published documents which antitrust counsel should already possess. The fact that the report is filed with the FTC in no way means that the FTC, rather than the Department of Justice, will get the final clearance to review the transaction. However, failure to file a report with the FTC where conceivably one may be required is likely to arouse natural suspicions.

III. SUBSTANTIVE APPLICATION OF THE ANTITRUST LAWS TO FOREIGN TAKE-OVERS

Having covered some of the practical questions which arise for the foreign bidder, I would now like to turn my attention to the following question: To what extent are our antitrust laws likely to be affected by recent economic and international developments regarding foreign capital spending in the United States?

35. Id. at 6933.
37. If the foreign corporation does not have any domestic operations in the United States it is possible that the foreign company need not file a special report. However, the foreign company may choose to file a special report in order to avoid antagonizing the FTC. As a compromise position, the foreign corporation could file a special report (answering the questions to the best of its ability) but stating that, even though it is filing a special report, it does not submit to the jurisdiction of the FTC.
38. There is even the remote possibility, never employed thus far, that the FTC might seek to enforce compliance with its regulation under § 10 of the Federal Trade Commission Act (15 U.S.C. § 50 (1970)), which provides for criminal penalties.
INTERNATIONAL ANTITRUST

A. Policy Considerations and the Application of the Antitrust Laws

This is one of the most interesting and important topics that has arisen in the antitrust field in recent times. Most sources predict that we have seen only the beginning of what will amount to an invasion of foreign capital. The factors accounting for this phenomenal increase in capital inflow are well known. For example, many American business firms are attractively-priced opportunities, both for the OPEC nations with their enormous new capital surpluses, and foreign industrialists in over-taxed and over-regulated sectors of the free world.

But unlike most other industrialized nations, the United States is not accustomed to being invaded, and the thought of foreign businessmen controlling important sectors of our economy is disturbing to many Americans. If the foreign take-over invasion arrives on schedule, it may be a test of the soundness of many of the philosophical premises on which our antitrust laws are based.

The present policy of the Antitrust Division, and the Administration, is to remain dispassionate toward foreign takeovers of domestic enterprises and to maintain a neutral attitude, uncluttered by the political context in which the transactions arise.39 Indeed, the view of the Antitrust Division basically is to welcome foreign entrants in such areas as banking, gasoline marketing, and other fundamental areas of our economy, as proper competitive developments.40 These attitudes are based on the Administration’s strong belief in the paramount importance of competition, and on its commitment to economic reciprocity with foreign business firms of other nations which have always permitted Americans freedom of investment abroad.

The Administration, however, does not operate alone in this area. Already federal statutes place substantial restrictions on foreign investments; for example, the Federal Aviation Act,41 the Federal Communications Act,42 and the Shipping Act,43 to name a few. In addition, the Justice Department and the antitrust bar must cope with other equally important forces in dealing with the foreign entrant.

40. "Often the most practical means of injecting meaningful new competition into a concentrated American industry is through the entry of substantial foreign companies." Address by R. W. McLaren, former Chief, Antitrust Division, Competition in the Foreign Commerce of the United States, William and Mary School of Law, Oct. 16, 1970.
Congress, for example, has already voiced very strong concern regarding foreign investment in the United States. Some evidence of this concern is found in the lopsided vote approving the Foreign Investment Study Act of 1974.\textsuperscript{4} This Act requires the Commerce Department and the Treasury Department to complete an interim report in one year and a final report in eighteen months on the impact of foreign investments on our national resources, national defense, employment and balance of payments. In signing the measure, President Ford took pains to point out that this Act did not signal a change in our historic open-door policy. But in a somewhat cryptic afterthought, he said, [M]y Administration will oppose any new restriction on foreign investment in the United States, except where absolutely necessary on national security grounds or to protect an essential national interest.\textsuperscript{45}

These national interests will in all likelihood be determined by the pressures of large scale foreign investments that occur in the near future.\textsuperscript{46}

A year ago Judge Seals, in \textit{Texasgulf, Inc. v. Canada Development Corp.},\textsuperscript{47} devoted a good portion of his opinion to the broad policy aspects which inhere in this area. In his opinion, he said:

\begin{quote}
It is an issue of public policy and national interest as to the role multinationals will play in the future, but this Court cannot decide generally in the context of this case what this role may be. . . . Remember, turn about is fair play.
\end{quote}

Especially is this true today in a time of declining and depleted national resources.\textsuperscript{48}

Judge Seals went on to say:

\begin{quote}
We are told we have an energy crisis. We know that most of the U.S. oil that is consumed here is from the Western Hemisphere. Suppose we begin to depend upon oil from the Middle East as many now predict. It is not too speculative to realize that in the near future when a super tanker from the Middle East discharges millions of barrels of oil on the East or Gulf Coast for our refineries there will be flying overhead a 747 loaded with an equal amount of American dollars that could be used to buy newspapers, TV and radio stations and public relations firms, to influence our foreign policy in the Middle East. No, this Court is inadequate to decide these far reaching problems that are presented by the exceedingly rapid increase in the multinationals and the consequences of their being.\textsuperscript{49}
\end{quote}


\textsuperscript{45} 10 Weekly Compilation of Presidential Documents No. 44, at 1375 (Oct. 28, 1974).

\textsuperscript{46} On November 13, 1974, the SEC scheduled a hastily conceived public investigatory hearing to determine the extent to which foreign investors are secretly acquiring interests in United States companies. 172 N.Y.L.J., Nov. 7, 1974, at 1, col. 8.


\textsuperscript{48} Id. at 419-20.

\textsuperscript{49} Id. at 420.
Much of what the judge prophesied has now come to pass. A story in the New York Times reported that the OPEC nations have already invested approximately $8 billion in the United States' economy in the past nine months, and that their surplus now exceeds $35 billion. In a related development, the same article pointed out that the Saudi Arabian government removed all its gold reserves from the United States Federal Reserve Bank because it had just completed its own gold vault in Saudi Arabia.

These developments give rise to a concern that Congress may respond by engrafting onto our existing antitrust laws new legislation designed to restrict, to some extent, foreign ownership or control of more and more sectors of the American business economy. An example of such legislation is the Canadian Foreign Investment Review Act, which was adopted last year.

Some years ago, American antitrust enforcement agencies were confronted with what, to me at least, was an analogous situation. In what seemed a wise move during the conglomerate merger boom in the mid-60s, the Antitrust Division and the FTC raised their sights and took aim at several merger transactions, where there was little legal precedent to support the attack. It is now fair to say that this tactic contributed to reducing improvident merger activity and at the same time quieted much of the concern then expressed by Congress. Such a tactic may be needed again if we are to avoid a hastily conceived and overly restrictive legislative solution.

B. Conventional Application of the Antitrust Laws

1. Government Attack

Aside from those policy considerations previously discussed, the question still remains whether the government will attack the foreign merger or take-over transaction, and whether that attack will be successful. The critical judgments on enforcement and the success of the attack will still depend upon the facts of each individual case and upon the skill of antitrust counsel in marshalling those facts.

At the outset of a government investigation, the bidder ordinarily will know considerably more facts than the government. As time passes, however, the government's use of compulsory process usually

51. Id. at 67, col. 6.
52. See, e.g., S. 425, 94th Cong., 1st Sess. (1975) which seeks to control foreign investment in United States companies. Recently, Senator Harrison Williams, the bill's sponsor, observed that "potential control of American Business by foreign interests raised 'chilling prospects.' " N.Y. Times, Feb. 27, 1975, at 54, col. 1.
54. In a criminal investigation the government may utilize the investigatory powers of a
eliminates that advantage. The bidder may be asked to allow the
government additional time to conduct its investigation, as happened
last year with the Burmah-Signal Oil take-over. How counsel han-
dles that request to delay the transaction may be critical to the outcome
of the deal. There are a number of factors counsel must consider,
including the government's readiness to mount a case in court for a
preliminary injunction, the company's ability to hold the deal together
during the additional time period, and the effect the company's refusal
to grant the government additional time will have on the attitude of
the court.

Burmah rejected the government's request last January and closed
the transaction, and the deal has not been attacked. However, it
must be borne in mind that the government has the right to attack the
transaction at any time in the future if it determines that a violation of
the law has occurred.

A final potential government tactic surfaced recently when Antitrust
Division officials indicated that the Division has been exploring certain
concentrated industries having a history of parallel pricing, with a
view toward bringing suits based on a theory of shared monopoly. A
bidder considering entry into an industry of this type should carefully
consider what effect possible restructuring enforcement might have
upon his investment.

2. Private Attack

The bidder must bear in mind that the target company is not the
only party who can attack the transaction on antitrust grounds. A
competitor of the bidding company, or of the target company, has
standing as well. A competing bidder in a tender offer situation may
also have standing, if both companies are bidding for control of the
target company.

federal grand jury. In a civil investigation the government will proceed pursuant to the Antitrust
56. Id. at A-3.
59. A similar case was brought by the FTC against cereal manufacturers last year.
60. "Any person, firm, corporation, or association shall be entitled to... injunctive relief... against threatened loss or damage by a violation of the antitrust laws..." resulting from a
Sept. 24, 1974); see Calnetics Corp. v. Volkswagen of America, Inc., 348 F. Supp. 606 (C.D.
Cal. 1972) (competitor of target company).
62. Chris-Craft Indus., Inc. v. Piper Aircraft Corp., 480 F.2d 341 (2d Cir.), cert. denied, 414
The Second Circuit's decision in Missouri Portland Cement Co. v. Cargill, Inc., effectively narrowed the circumstances under which a target company antitrust action will succeed. Cargill, a very large, privately held corporation with vast financial resources was not engaged in the production of cement at the time it attempted a "product extension merger" through the take-over of Missouri Portland. Resisting the tender offer, Missouri Portland brought suit alleging, inter alia, that Cargill's acquisition would violate section 7 of the Clayton Act. The district court granted a preliminary injunction.

On appeal the Second Circuit found the facts relating to the concentration of the cement industry and Cargill's potential entrance into that industry insufficient to warrant a preliminary injunction. Beginning with a denunciation of target companies which seek shelter under section 7 of the Clayton Act, the court indicated its belief that Cargill's entry into the cement industry through the acquisition of Missouri Portland might result in lower prices. This belief was predicated upon Cargill's proven aggressiveness in other businesses. Moreover, despite Cargill's wealth, the court felt that it was not prepared to enter the industry by building up a smaller, toehold position.

The court also found that Missouri Portland's claim of alleged danger of irreparable injury was insufficient to support the grant of a

64. See also GAF Corp. v. Milstein, 453 F.2d 709 (2d Cir. 1971), cert. denied, 406 U.S. 910 (1972).
65. Cargill dealt in bulk commodities including grain, sugar and salt, as well as certain ores, metals and industrial chemicals. 498 F.2d at 856.
66. Id. at 859.
67. The complaint also alleged violations of the disclosure and antifraud provisions of the Williams Act. Id. at 871.
68. 375 F. Supp. 249.
69. Missouri Portland established that in four geographic markets in which it competed, there was such concentration of business in a few firms that in the least concentrated of those markets, the top four firms accounted for 88 percent of all sales of cement. Missouri Portland had the largest percentage of the market in three of those geographical areas, and the second largest in the fourth. 498 F.2d at 856.
70. Nine months prior to announcing its tender offer for Missouri Portland, Cargill contacted, either personally or by letter, 31 cement companies inquiring whether they desired to be acquired by Cargill. Several of the smaller companies contacted by Cargill were anxious to be acquired. This fact established Cargill as a potential entrant into the cement industry market. See 375 F. Supp. at 257.
71. 498 F.2d at 859-60.
72. Id. at 854.
73. Id. at 860 & n.13.
74. Id. at 854.
preliminary injunction despite Cargill's tender offer for all outstanding shares of Missouri Portland. The court distinguished Gulf & Western, in which a preliminary injunction had been granted, noting that the relief in that case was based on a showing of a probable securities law violation. This seems to be a strained distinction, however, since courts ordinarily do not foreclose a tender offer, preliminarily or permanently, because of a violation of section 14(e) of the Exchange Act, but instead simply extend the offer and require corrective materials to be filed.

In short, the court's view on each of these issues was somewhat inconsistent with the prior approach followed in section 7 Clayton Act cases, which has always been to construe the statute in light of its well recognized purpose of nipping incipient antitrust violations in the bud. It is only fair to read the court's indifference to the arguments of Missouri Portland in light of its opening statement. The statement indicated the extent to which the court seems to have adopted the view that the antitrust claims of target companies are suspect because they have more to do with the price offered by the bidder, or lack of assurance of management job security, than with the merits of the case.

The court in Missouri Portland seemed overly swayed by the motivation of the party bringing the suit. Is the court suggesting that if the antitrust claims are serious the government should bring the action itself? Government inaction in these cases can be ascribed to any number of factors having nothing at all to do with the merits. First, the government is simply not prepared to move in time in many of these cases, through no fault of its own. What better evidence of this could one ask for than the fact that on October 31, 1974, more than four months after the decision in Missouri Portland, the FTC announced its complaint against Cargill belatedly raising precisely the same issues rejected by the Second Circuit.

75. 476 F.2d 687 (2d Cir. 1973).
76. 498 F.2d at 868 n.35. In contrast, the district court in Missouri Portland dismissed all the alleged securities law violations as without merit. 375 F. Supp. at 267-68.
79. See 498 F.2d at 854. Judge Friendly noted that management was usually guilty of "[d]rawing Excalibur from a scabbard where it would doubtless [otherwise] have remained sheathed in the face of a friendly offer." Id.
In addition, the government is usually at a disadvantage in assessing the true anticompetitive nature of the take-over since the target company is more familiar with the market, and thus is usually able to mount a more effective case for a preliminary injunction in a short period of time.

Whether or not the government chooses to bring its own case, it seems strange that antitrust claims should be rejected, by either the courts or government antitrust officials, because of the supposed motives of management in making those claims. It is sufficiently difficult in an antitrust case to deal with the relevant evidence, without the necessity of determining the motives of those making the claims; antitrust laws should be objectively construed and enforced.

Courts are justifiably annoyed by what they perceive to be the automatic reaction of target companies in raising antitrust issues, which are difficult to fathom and very time consuming to decide. But this role has been entrusted by Congress to our federal courts in enforcing section 7 of the Clayton Act and similar provisions. In the preliminary injunctive aspects of a case, the court frequently has the last opportunity to review the transaction before the threatened effects of section 7 violations actually occur.

The status of a target company's antitrust defense is now under considerable doubt. This situation is both unwarranted and counter-productive.

IV. Conclusion

It is too early to say whether our antitrust laws will need modification due to the influx of foreign capital in order to accommodate the

17, 1973). The court rejected the argument. Subsequently, the FTC brought a complaint that was sustained by Administrative Judge Barnes. British Oxygen Co., 3 Trade Reg. Rep. ¶ 20,746 (FTC 1974).

81. In Gulf & Western the Second Circuit stated: "Since it is impossible as a practical matter for the government to seek out and prosecute every important violation of laws designed to protect the public in the aggregate, private actions brought by members of the public in their capacities as investors or competitors, which incidentally benefit the general public interest, perform a vital public service." 476 F.2d at 699.

82. Rarely are the motives of treble damage plaintiffs questioned.

83. Interestingly, it was Judge Friendly in Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937, 947 (2d Cir. 1969), who noted that the preliminary injunction was best suited to provide the requisite relief.

conflicting interests of the protectionists on the one hand, and the proponents of pro-competitive unrestricted entry on the other. Much will depend on the nature and quantity of the specific transactions in the immediate future.

APPENDIX

FOREIGN ENTRY INTO THE UNITED STATES

Panel Discussion*

MR. LIFLAND: Messrs. Lever and Davidow have to leave us shortly, so I will ask them to comment on Mr. Axinn's presentation.

MR. LEVER: I can't, in all honesty, describe in colorful terms the antitrust laws of the United States as a barrier to entry to the United States by foreign corporations as a burning issue in London. There is, I think, a ready appreciation, at least in the United Kingdom, of the kind of issues that Mr. Axinn has discussed so very clearly in his paper, because we meet the same sort of problems ourselves under our own law, which prevents regulated take-overs where one or both of the companies concerned carries on business in the United Kingdom.

I would make only three points, and I hope they don't seem trite. The first is that the position in this country appears to me, on the basis of what I have read, to be a great deal more legalistic than it is in the United Kingdom. There seem to be many, many more legal pitfalls, or booby traps. This could affect the attitude of foreign businessmen who are less accustomed to a lawyer-ridden society than you are in this country and who tend to be reluctant to get too involved in litigious situations. If you really welcome entry of foreign firms into the United States market don't make it too technical, don't raise too many legal booby traps.

Now, the second piece of caution that I would put to you today is not to be too ready to think of foreign corporations as potential competitors who will be prepared to enter the United States market without making some acquisition in the United States. This is, of course, a very live issue in light of the *British Oxygen* decision at

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* The panel was moderated by William T. Lifland, Member, Cahill, Gordon & Reindel, New York City. Panelists included Stephen M. Axinn, Member, Skadden, Arps, Slate, Meagher & Flom, New York City; Joel Davidow, Chief, Foreign Commerce Section of the Antitrust Division, Department of Justice, Washington; Jeremy F. Lever, Q.C., Fellow, All Souls College, Oxford; Gray's Inn Chambers, London; and Sigmund Timberg, Washington; Special Lecturer of Foreign and Comparative Law, Columbia University, New York City.

1. FTC v. British Oxygen Co., 1974 Trade Cas. ¶ 75,003 (D. Del.).
this moment, and nothing that I say is intended to comment on the facts of that case.

But certainly the British businessman perceives that the establishment of a business from scratch in the United States or elsewhere is a very difficult operation indeed. The acquisition of some corporate presence in the country where he is going to start business is an enormous advantage, even if the corporate presence is not in the very same field that he intends eventually to enter. Although it needn't be a very large presence, it must be sufficient to be real, and to give him the kind of personnel and experience in the new country that he needs to get going. I think it would be illusory, however, for you to suppose that a lot of foreign businessmen are going to fall over themselves to start from scratch in this country. Therefore, they may not be the potential competitors that you perceive them to be unless they are allowed to make some take-over.

Thirdly, I would suggest that collaborative ventures with United States corporations in the United States can be immensely valuable to foreign corporations. For example, an arrangement under which a British businessman allows a United States corporation to handle the marketing of his goods in the United States may be the best way for him to enter that market. While there may be technical restrictions on both parties as part of such an agreement, the alternative in many cases will not be an unrestricted relationship, but no relationship at all. From what I've heard Mr. Davidow say earlier, this is the kind of point which I feel that he will be sure to appreciate in looking at joint ventures—cooperation agreements between overseas' companies and United States' corporations.

MR. LIFLAND: Jeremy, before you go, and without delving into the facts of the British Oxygen case, would you care to express a view on the general question whether the fact that a foreign company has established businesses in Canada and Mexico from scratch, tends to prove or not prove that it could establish a business in the United States from scratch?

MR. LEVER: I was very careful to say I wouldn't comment on British Oxygen at all.

MR. LIFLAND: I am just posing the question hypothetically.

MR. LEVER: It's obviously going to be a question of fact in each particular case. In general terms I would caution that the United States market is not a market that British businessmen will be enthusiastic nowadays to enter from scratch.

MR. LIFLAND: Do we have any other questions for Mr. Lever?

MR. TIMBERG: I have just one comment for Jeremy, which is that
Canada and the United States are considered to be a common market. Therefore, once a British company is able to establish itself in Canada, there's always a question why that Canadian operation cannot further expand into the United States, because of comparable trading conditions, language similarities, and the like.

MR. DAVIDOW: Certain issues were raised about the attitude of the Antitrust Division and the extent to which it reflects the general tenor of United States policy. I think that we are in a very difficult period of changing world attitudes and balances of power, and financial strain all of which raise the danger of cartels and many other things that could return the world to the "beggar thy neighbor" policies of the 1930s.

It is my feeling that ever since World War II, the United States has moved in the General Agreement on Tariffs and Trade,\(^\text{2}\) and is still moving in the Organization for Economic Cooperation and Development\(^\text{3}\) and elsewhere, with proposed codes for equal treatment of foreign investment. This is part of an effort to preserve the basic open market concept that all nations of the world ought to be open to all companies who want to make any kind of investment that does not involve an improper elimination of competition or monopolization. Therefore, I think we certainly intend, for the foreseeable future, to continue to view any demands for anti-foreign enforcement, or legislation, with a very critical eye. For instance, I don't think the amount of dollars invested in the United States is terribly relevant, either competitively or politically, because we have very many large, widely held corporations, in which foreign investors buy shares and put them in Swiss banks. Thus it is probably largely irrelevant, whether it's a Swiss millionaire or an Arab millionaire, who owns this or that investment block of General Motors.

Focusing on enforcement, I think Mr. Axinn covered the issues very well in his paper, including a number of comments about the government's problems. A tender offer raises a particular problem with respect to time. Usually a merger is a difficult thing to analyze. It may involve world markets, as did the *Burmah-Signal*\(^\text{4}\) case, and other conflicting factors and positions. The Department of Justice is not likely to be forced to take a position in court on a hundred million or two hundred million dollar transaction on the basis of three days' research. We have, on occasion, asked the companies simply to hold

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2. 61 Stat., pts. 5-6 (1947), T.I.A.S. No. 1700, as amended, 62 Stat., pt. 3, 3680 (1948), T.I.A.S. No. 1890 (popularly known as "GATT").


off. If we don't ask the companies, we are in a position of having to go to court with very little to say to the judge. Since typically the standard for preliminary injunction has included the probability of success, with little information on the merits, we have a particular problem.

Now, of course, where it is a hostile take-over, we may have additional information from the acquired company, or the company being threatened. We do have to take what they say with a grain of salt. First, they have their own management interests to protect, and we would not want to go to court solely on what they said without verifying it.

Secondly, there have been a few instances where a firm, in what Mr. Flom called a shotgun marriage, came to us and said, "We don't want a merger with this firm outside our industry, but wouldn't it be fine to merge with a firm in the very fine industry we are used to?" That makes us skeptical, particularly where the target is close in product line to the person making the take-over bid.

So we have to make a somewhat complex decision about whether it's worth going forward early. The advantage very simply, is to avoid a divestiture problem later. An added advantage of a tender offer is that usually it does not involve integration of the assets and personnel of the company in the immediate future. Quite often it's simply the acquisition of a large block of stock. Obviously, it is still a financial problem to sell 200 million dollars worth of stock on the New York Stock Exchange, and if we finally win the case, all kinds of complex problems arise concerning how to dribble it back. At least we don't have the problem of recreating the acquired company in quite the way we do in some bank merger cases. Still we have to balance the financial and divestiture problems against the quality of our information to determine whether to proceed early.

There is one point that I have no simple answer for, and that is whether to bring our own suit or rely on a private suit already in progress. I'll say this: there is both a lawyer's curiosity to know how the private case comes out and some desire to save resources, but in general, I think it's not a major factor. If we are truly interested in the case, we would bring our own action for two reasons. The first is that we never know at what moment the private suit is going to collapse and be settled amicably; we can't rely on it to be carried out. The second one, which I think is illustrated by the Volkswagen-Calnetics\(^5\) case, is that we don't know what kind of relief a private party is going

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to want. Calnetics sued Volkswagen for having legally acquired a maker of Volkswagen air conditioners. In order to regain the market to sell air conditioners for Volkswagen, it induced the judge to include a provision that no Volkswagen could be brought from Germany to the United States with an air conditioner in it. The German government protested this matter.

In an amicus curiae brief to the Ninth Circuit, the Antitrust Division lent weight to the German position by suggesting that the relief would be a worse restraint on American foreign commerce than the original antitrust violation if there were one. We recommended that it be remanded for further thought about that issue.

But that merely illustrates the point in the context of an international merger, that when private parties fashion the relief, it may not be what the Justice Department would have sought.

I think that's all I'll say on this point.

MR. AXINN: Bill, I wonder if I could respond briefly to some of Joel's remarks.

I recognize, and I'm sure that the government recognizes, that if the invasion of foreign capital reaches serious proportions in this country, the legislation that will be proposed may not be the most carefully considered legislation. As Jeremy Lever pointed out, there are few foreign governments who would be annoyed if the United States adopted restrictive legislation, with reference to foreign corporations acquiring control over natural resource companies or other companies connected with a national interest. They already have similar legislation on their own books.

By referring to the dollar amount of surpluses invested in this country by the OPEC nations, I certainly did not mean to suggest that those investments are not helpful to our economy at this time. I suggest only that there are tremendous surpluses available for investment, and that some of these monies may be invested unwisely in efforts to take over leading American industrial corporations which are viewed by Congress as being connected with some substantial national interest. If the government continues a laissez-faire policy with respect to foreign investment, we may find ourselves in a position where we must reach out for a legislative solution.

That is why I called your attention to the reaction of the government under Assistant Attorney General McClaren in the late 1960s, when the conglomerate merger phenomenon was upon us. By accelerating the enforcement of existing statutes, rather than waiting for the Congress to propose new concentrated industry solutions, the government avoided a potentially overly restrictive reaction.
Joel also points out that time is a substantial factor for the government in the preliminary injunction cases. It is also a very substantial factor for the target company and for the court. However, there are many cases where substantive relief, after the fact, is difficult, if not totally unavailable. Hearings are now taking place in Connecticut with respect to how ITT will divest certain assets which it agreed to divest. It is not an easy matter and there is no real solution to a take-over which violates section 7. Under the circumstances the preliminary injunction, as Judge Friendly said, is the time when relief can best be granted. The "hold separate order" that was entered by Judge Latchum in the British Oxygen case will make it much easier for the government to achieve the ultimate relief that it is seeking, which is the resale of that stock.

Mr. Lifland: Steve, before you begin on your questions, I wonder if Sig Timberg has any comment to make.

Mr. Timberg: Yes. I would like to make a few observations. It was only a few years ago that I was called up by the representative of a British newspaper who said: "What about this government investigation of Sotheby"—the famous British art and book auctioneer—"taking over Parke-Bernet?" This was amusing because there had already been hundreds of acquisitions by American firms of European and English firms by that time. Now, the notion that there is going to be a general economic invasion of the United States raises another tantalizing possibility.

I had wanted to ask Joel the question whether, in the ordinary tender situation where you are not tendering for 100 percent of the stock, there is any real danger that the enterprises can merge. As long as there are minority stockholders, it would seem to me that the facts themselves create a situation whereby the acquired operation remains separate. Thus from the government's standpoint, there isn't as much need for a temporary restraining order as there is from the standpoint of the target company itself. If the tender offer succeeds, the target company's management may well be replaced; and it is difficult to work for an employer whom you are fighting in court. Therefore, I attach no antitrust significance to Judge Friendly's intimation in Cargill that if it had been a serious case, the government would have sued on it. As far as the government is concerned, it can afford to

7. See 1974 Trade Cas. ¶ 75,003, at 96,446.
take its time in the majority of tender situations; certainly that shouldn't be a determinant of court action. I would read Judge Friendly's comments in the Cargill case simply in terms of his general dissatisfaction with issuing temporary restraining orders. I wouldn't extend it too far beyond that.

The one thing the acquiring company ought to be serious about, particularly if it is a foreign company, is that the acquirer is the only person who runs an antitrust risk in a take-over situation. The acquired company's stockholders have their money in hand; they are free and clear of the situation. The main remaining risk, that of divestiture, falls on the acquiring company.

Reference was made to the fact that sometimes only a partial divestiture might satisfy the governmental antitrust enforcing agency, and that therefore the acquisition might be worthwhile, as far as the acquiring company is concerned, even if it had to sell off certain of the acquired assets. It is clear, however, that the one requirement on which both the Justice Department and the FTC insist, is that what is divested be a viable going concern, i.e., a separate business. Suppose, however, that nobody wants to buy the separate business because it has not been doing as well as the rest of the acquired company; or suppose that the business separated from all supporting services formerly provided by the main company, is unprofitable? In either case, the acquiring company may be asked to give up more than just the special business that is in the unduly concentrated market which might have been the original target for the government's divestiture request. Moreover, there may be cases where the acquiring company is forced to give up the whole transaction. This, of course, can result in a substantial loss, since doubtless an inflated market price was paid for the business and there is no guarantee that it can be sold for anything like the purchase price.

So there are great potential risks that may befall a foreign acquirer. He should not rely on any statements that the acquiring organization makes with respect to the antitrust legality of the acquisition, either pro or con. He must have someone who is devoted to his own interests wholly and simply, making an antitrust analysis of where he stands.

The other point that I want to emphasize is that, whether it be a merger or whether it be a take-over bid, once the antitrust agency starts asking questions, those questions are both multitudinous and complicated. They will cover every market where the acquiring and acquired companies may have overlaps. The government agency will ask questions about customers and sources of supply. It will inquire into geographic markets other than the United States. It will ask about
world-wide positions in various product markets. The first thing you will have to invest in is a publication by the Bureau of the Census containing standard industrial classifications. This will enable you to answer questions relating to four-digit census classification industries and seven-digit census classification industries—the higher the number of digits, the smaller the relevant product market.

In short, in any case where you are taking over an enterprise that is in a great number of markets, or where the acquiring company is in a great number of markets, the government is going to look at the acquisition sideways, to see whether there are horizontal overlaps both on the actual and potential competition front; and up and down, to see whether there is vertical integration, that is, the acquisition of sources of supply or of acquisition of buyers. Also be prepared for a far-reaching inquiry designed to see whether there are possibilities of reciprocity that may render the acquisition illegal. In addition, where you contemplate a conglomerate type of merger or a product-extension merger, there will be quite an effort to see whether a company that has a strong position in, say, the pharmaceutical business, might not be a potential competitor in other areas where the technology or the distribution system might be similar.

Thus in talking about the issues and the questions that you have to satisfy, I may underscore the point that making an acquisition which will pass muster under section 7 of the Clayton Act calls for extensive research—so extensive, that the necessary research should be commenced the moment the idea of an acquisition enters your mind. As a matter of fact, if the acquirer has several target companies in mind, it ought to be considering them in terms of their relative antitrust feasibility.

Mr. Lifland: Steve would like to deal with the questions you have?

Mr. Axinn: Yes. Let me just comment. I thoroughly agree with what Mr. Timberg has said. I do not recall a tender offer in the last five years where a bidder consented not to place members on the target company's board of directors. As the Second Circuit pointed out in *Gulf & Western Industries, Inc. v. Great Atlantic & Pacific Tea Co.*, the representatives on the board had access to all of the target's trade secrets and had, for antitrust purposes, combined the two companies.

The government as well as the private plaintiff always has proceeded on the premise that two companies are considered to be combined for purposes of antitrust analysis when more than a token

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investment is made by one in the other. I agree that the government has as strong an interest as does the target company in mounting an antitrust attack, when the perceived effects of the combination may be a violation of section 7 of the Clayton Act.

Unfortunately, for all of the reasons that Mr. Timberg points out, timing makes it very difficult to mount a solid attack within forty-eight or seventy-two hours. The appropriate way to proceed, and the way that we do proceed now, is for the target company to mount the initial attack, and for the government to join that attack when it is convinced that a violation of section 7 has occurred. Joel indicated that he was not too sure what the posture of the government should be in such cases, and indeed it has varied from sitting back and looking over the shoulder of the plaintiff, to going in and mounting a parallel case. It seems that the government is protecting interests other than the target company, although the court's role is still to determine whether a substantial lessening of competition may occur through the merger.

Here is another question which was put to me that is quite interesting: what advice do I have for the dissenting minority shareholders of the target company, other than going to the government?

Certainly one simple thing they can do, if they do not like the way a transaction is developing, is to sell their stock. In the acquisition by ITT of the Hartford Fire Insurance Company, a shareholder, who was quite anxious to see that transaction completed, brought a suit alleging that the board was not acting promptly enough to close the transaction.\textsuperscript{10} I do not recommend that. I do not know that the standing question was ever resolved in that case, and I think there is a serious question with respect to standing. Of course, this example is the direct opposite of the question posed. I think as a practical matter that a dissenting shareholder—one who doesn't want to see the target company acquired—has no judicial remedy beyond going to the government.

The question has a second part to it. May shareholders of target companies present a foreign government with competitive arguments in opposition to an acquisition?

In many cases the approval of the foreign government is necessary for monetary purposes, prior to the transaction being mounted. However, you would have quite a difficult time convincing one branch of the foreign government to tell the other branch of the government that it had made a mistake in granting the clearance.

Ordinarily, where the monetary clearance problems have been sol-
ved, I see no reason why the foreign government would be interested in entering the antitrust thicket to try to assist the target company in defending against the acquisition; quite the contrary, in fact.

MR. LIFLAND: I might mention that I discussed such a situation, on a hypothetical basis, with Jeremy Lever, and asked him what the view of the Bank of England would be if, having granted approval to a British company to spend the foreign exchange necessary to make an investment in a United States company the Department of Justice should sue, and the district court should issue an injunction, but the acquiring company wished to proceed with the matter. Jeremy was very doubtful that the Bank of England would withdraw its approval absent some very unusual circumstances affecting the balance of payments.

MR. TIMBERG: I know of one situation, and there must be others, where the ambassador of a foreign country indicated the interest of the foreign country in seeing that the acquisition went through.

MR. LIFLAND: One question that has been raised, and perhaps we ought to devote a little bit of our thinking to it, is the toehold theory of potential competition. This was something which was argued in the British Oxygen case, and with which Steve is very familiar, having represented Curtiss-Wright in that case. The facts of British Oxygen are rather complicated, so we won't try to go into them. Suppose, however, a case in which a foreign company wishes to make an investment in the United States, and the only objection to its acquiring a particular United States company is that there are smaller United States companies available for acquisition. Applying the toehold doctrine of potential competition, it seems to me, poses a rather acute problem for a foreign company.

I think it has been the general experience of American companies acquiring foreign companies that they run into more problems with the smaller ones than with the larger ones. The reason, of course, is that a small company may not have the depth of management necessary to deal with a crisis. The American company goes over to help out and may make the situation a lot worse than it was before. Foreign companies investing in the United States may have much the same problem.

Therefore, one might expect to find the toehold theory applied a good deal more liberally with respect to foreign acquiring companies. I might mention in passing that the toehold theory, as I've stated it, has not yet been accepted by the Supreme Court in the absence of what is called a "wings effect," or what I like to call "a Marley's ghost effect."
These terms relate to the situation where the fact that the acquiring company is standing at the edge of a concentrated industry and not entering it is considered to make those in the industry behave in a more competitive fashion.

In other words, they are a little less greedy because they know that if they charge the highest price they can, there will be an unpleasant knock on the door in the form of a new entrant to the industry. The "wings effect" is accepted as a basis for the application of the doctrine of potential competition. In the *Falstaff Brewing*\textsuperscript{11} case the Supreme Court explicitly endorsed it and reserved the question of whether the ability to enter the market by making a smaller acquisition makes a larger acquisition illegal. On this reserved question we might conceivably see some differentiation between foreign and domestic acquiring companies.

In conclusion, I would like to repeat that this is a very timely occasion to be discussing this subject, as Joe Flom and Steve have said. Investment in the United States may be relatively attractive now for foreign investors, perhaps because our inflation has proceeded somewhat more slowly than in some foreign countries. We have a tradition of nonexpropriation, and relatively few restrictions on foreign entry, as compared to many other countries.

The question, of course, that confronts such investors is whether this will change. The Treasury and other government agencies are studying the extent of foreign ownership of American industry. Perhaps this is a prelude to a Canadian type of statute, subjecting foreign investment to some type of advance administrative approval.\textsuperscript{12} Perhaps this may be a reaction to the oil price increases of the last several months. Perhaps it may be part of an international negotiation, hopefully to reach a government accord. We have a long tradition in this country of adopting embargo-type legislation in order to achieve international goals.

So it is a good time to review just what the current regime is as to foreign investment. I think Steve has done that admirably for you. And I hope the comments of the rest of us have added to your interest in the situation.
