Denver Journal of International Law & Policy

Volume 18
Number 2 *Winter*

Article 4

January 1990

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Keywords

States, International Trade, National Security, National Defense

INTERNATIONAL CAPITAL MARKETS SECTION

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INTRODUCTION

> Instead of being viewed as a rival, [foreign investment] ought to be considered as a most valuable auxiliary, conducing to put into motion a greater quantity of productive labor, and a greater portion of useful enterprise than could exist without it.[1]
>
> Alexander Hamilton

The boundary lines of the world's primary financial markets are becoming ever blurred. No longer can we concern ourselves with the activities in corporate America alone. Today, it is rare when a major corporation does not do business in all of the major financial centers throughout the world.

A good example of this increasing internationalization can be seen in the world-wide debt market. Today it is common to find IBM commercial paper[2] being traded and held in Tokyo, Exxon Eurodollar notes[3] being

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1. 3 ANNALS OF CONG. 994 (1791).

2. Stigum, *Money Market Instruments*, in THE HANDBOOK OF FIXED INCOME SECURITIES 217, 232 (1983). This essay contains the following discussion on commercial paper:

> *Commercial paper*, whoever the issuer and whatever the precise form it takes, is an unsecured promissory note with a fixed maturity. In plain English, the issuer of commercial paper (the borrower) promises to pay the buyer (the lender) some fixed amount on some future date. But issuers pledge no assets — only liquidity and established earning power — to guarantee that they will make good on their promises to pay. Traditionally, commercial paper resembled in form a Treasury bill; it was a negotiable, non-interest-bearing note is-

sold in London[4] and sovereign debt being placed with large money center banks in New York.

The international bond market has undergone an explosive increase in size.[5] For example, in 1980, the total amount of bonds issued internationally was $38.3 billion.[6] By 1986 this figure had increased to $225.4 billion.[7] It appears that the world financial markets are in an era of unprecedented internationalization and growth.

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sued at a discount from face value and redeemed at maturity for full face value. Today, however, a lot of paper is interest bearing. For the investor the major difference between bills and paper is that paper carries some small risk of default because the issuer is a private firm, whereas the risk of default on bills is zero for all intents and purposes.

Firms selling commercial paper frequently expect to roll over their paper as it matures; that is, they plan to get money to pay off maturing paper by issuing new paper. Since there is always the danger that an adverse turn in the paper market might make doing so difficult or inordinately expensive, most paper issuers back their outstanding paper with *bank lines of credit*; they get a promise from a bank or banks to lend them at any time an amount equal to their outstanding paper. Issuers normally pay for this service in one of several ways: by holding at their line banks compensating deposit balances equal to some percentage of their total credit lines; by paying an annual fee equal to some small percentage of their outstanding lines; or through some mix of balances and fees.

3. *See*, STAFF OF THE U.S. SECURITIES AND EXCHANGE COMMISSION, REPORT TO THE SENATE COMMITTEE ON BANKING, HOUSING AND URBAN AFFAIRS AND THE HOUSE COMMITTEE ON ENERGY AND COMMERCE ON THE INTERNATIONALIZATION OF THE SECURITIES MARKETS G-3 (hereinafter "INTERNATIONALIZATION STUDY"). A generally accepted definition of a Eurodollar Security is a debt security issued multinationally through an international syndicate of banks or securities firms in a currency other than that of the country in which the bond is issued. According to the staff of the Securities and Exchange Commission, the all inclusive term Eurobond has several derivatives and variations such as Eurodollar bond, Euroyen bond, Euro-DM bond, etc. These names serve to indicate the currency in which the offering is denominated. Compare this to a foreign bond which is a debt security issued in a country other than that of the issuer and sold through a syndicate of banks or securities firms with the instrument being denominated in the currency of the country in which such bond is being sold.

4. The Eurodollar market was originally established by London banks in the early 1960's. This market was developed primarily because major multinational corporations needed to match cash needs with the currency inflows and expenditures caused by overseas expansion. Major corporations could offer a higher rate of return in London than in the United States and still have a lower total debt cost because London had no requirements for central bank insurance or participation. This market is primarily a debt market. The transactions involved were generally paper swaps between issuing corporations and large London banks. This market was a bombshell to the health of United States financial markets. As a result of the growth of this market, the Kennedy administration created the Fowler Task Force to examine what actions the United States could undertake to counteract the outflow of United States dollars to foreign investments.

5. *See* INTERNATIONALIZATION STUDY, *supra* note 3, at G-5. The staff of the Securities and Exchange Commission has defined an international bond as a debt security originally issued outside the country of the borrower. These securities generally take the form of Eurobonds or Foreign bonds.

6. *Id.* at II-1.

7. *Id.* at II-2.

Nowhere is this trend more evident than in the area of international mergers and acquisitions. As in other areas of internationalization of the financial markets, the United States is at the forefront of this activity. For example, in 1980, United States companies were involved in 116 deals where foreign companies were acquired with a total dollar value of over $1 billion.[8] By 1987 these numbers had increased to 190 deals valued at approximately $7.1 billion.[9] Although this represents an increase of over seven-fold, these numbers pale in comparison with the recent activity of foreign entities acquiring United States corporations. Many of our country's major multinational corporations have recently been the target of acquisitions by foreign entities and individuals.[10] In 1980, foreign acquirers participated in 167 deals valued at $6.7 billion.[11] By 1988 these numbers had risen to 447 deals valued at over $60.8 billion.[12] As the statistics illustrate, foreign investment in the United States has achieved a significant presence in corporate America.[13]

As a result of this activity, political pressure mounted resulting in the passage of an obscure amendment, section 5021, to the Omnibus Trade and Competitiveness Act of 1988,[14] commonly referred to as the Exon-Florio Amendment ("Exon-Florio"). This trade act is an amendment to the Defense Production Act of 1950, and in essence, gives the President the power to suspend, prohibit or dismantle mergers, acquisitions and takeovers of United States companies by foreign investment which threaten "national security."[15] On its face, this law does not appear to be problematic for corporate acquisitions that do not involve national security. However, given the broad discretionary power that has been granted, it is possible that this law will have far reaching and potentially onerous effects on the United States capital markets.

This article will explore the ramifications for and application to foreign acquirers of Exon-Florio. First, a historical framework will provide

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8. *1988 Profile*, MERGERS & ACQUISITIONS, May/Jun. 1989, at 60 (hereinafter "M & A"). This represents an increase of over 488%.

9. *Id.*

10. For a list of the twenty-five largest acquisitions made by foreign entities in the United States in 1988, see M & A, *supra* note 8. Companies such as Firestone Tire & Rubber Co., Federated Department Stores, CBS Records Group, Tropicana Products Inc., Brooks Brothers Inc., and Kidde Inc., were all acquired by foreign entities in 1988. As the names illustrate, many of the companies involved are ones that the American consumers deal with on a daily basis. As such, the recent flurry of international acquisitions affect all of us. Given the high profile of these companies, the stage was set for United States legislative action.

11. *See* M & A, *supra* note 8, at 60.

12. *Id.*

13. *See supra* notes 8-12 and accompanying text.

14. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107.

15. *See supra* notes 73-87 and accompanying text. This term has not been defined. Therein lies what may be the largest potential problem for foreign acquirers of United States companies.

an overview of the factors that led to the passage of Exon-Florio.[16] This is followed by a discussion of the coverage, scope and application of Exon-Florio.[17] Finally, the article will discuss the problems inherent in Exon-Florio, the proposed regulations and the burdens that may be placed on foreign acquirers.[18]

HISTORICAL FRAMEWORK

Historically, the United States has encouraged foreign investment in this country.[19] In its earliest years, the United States not only encouraged direct foreign investment, our fledgling nation was extremely dependent upon such funds.[20] Indeed, as Alexander Hamilton noted in 1791, foreign investment was a valuable addition to our capital hungry nation.[21] Thus, during the eighteenth and nineteenth centuries, foreign capital was a major factor in the economic development of this country. For example, it was a loan from England, France and the Netherlands that permitted the United States to complete the Louisiana Purchase in 1803.[22] Throughout the early part of the nineteenth century, European investment was the driving force behind the creation of our nation's infrastructure.[23] Between 1820 and 1840, investment in United States factories rose from $50 million to $250 million.[24] As with our nation's infrastructure, the bulk of these funds were provided by foreign investors. During the 1880's, it is estimated that nearly two-thirds of all new investment in railroads was

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16. *See supra* notes 19-71 and accompanying text.

17. *See supra* notes 72-81 and accompanying text.

18. *See supra* notes 82-114 and accompanying text.

19. *See* Berger, *Applying Uniform Margin Requirements to Foreign Entities Attempting to Acquire U.S. Corporations*, 24 VA. J. INT'L L. 543 (1984).

20. For a complete discussion of the historical development of Trade law and tariffs see Note, *The Trade Act of 1971: A Fundamental Change in United States Foreign Trade Policy*, 80 YALE L.J. 1418 (1971). Early American investment policy focused on international trade and primarily consisted of high tariffs to protect our nation's youthful industry. In the middle to late 1700's, this paternalistic approach was necessary because foreign products were frequently better made at a cheaper price. *See also* F. ROOT, R. KRAMER & M. D'ARLIN, INTERNATIONAL TRADE AND FINANCE (1966).

21. *See* ANNALS OF CONG., *supra* note 1. Although Hamilton was a forceful advocate favoring direct foreign investment, he may have been promoting more than just national pride. In recent years, Hamilton's zealous support for foreign investment has been challenged as motivated by the potential for personal pecuniary gain as opposed to promoting the long term fiscal health of our nation. *See* K. CROWE, AMERICA FOR SALE 248 (1978).

22. *See* Boorstin, *Foreign Investments in America*, 2 EDITORIAL RES. REP. 571 (1974) (hereinafter "Boorstin"). An $11.25 million loan from England, France and the Netherlands provided Thomas Jefferson with the funds needed to complete the land purchase that was a dramatic step in the emergence of our young nation as a potential world power.

23. *Id.* at 572. Railroads, canals, bridges and roads were all financed primarily with European capital. For example, the Erie Canal was made possible by a sale of state bonds sold on the London Market. This was significant given that the Erie was the first American canal to be a commercial success. By proving a commercial success, the Erie was an excellent selling point for other infrastructure promoters.

24. *Id.*

being made by Europeans.[25]

This financing of America by the Europeans continued unabashedly until the beginning of World War I. The war was the primary cause of a dramatic change in capital flows into the United States. To pay for wartime needs, many of Europe's creditor countries liquidated a large portion of American investments that had been amassed in the prior century. Foreign investment in the United States went from $7.2 billion in 1914 to $4 billion at the end of 1919.[26]

Although America's growth for over two centuries had been made possible with the utilization of foreign investment, the infusion of this foreign capital was not always viewed as a welcome event. As early as 1791, legislation aimed at curbing foreign investment was enacted. In creating the first Bank of the United States, laws were enacted that prohibited the election of aliens as directors and also barred the giving of proxies by nonresidents of the United States.[27]

Again during the 1850's, attention was focused upon the large influx of foreign investment.[28] By 1887, public concern had again culminated in

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25. D. ADLER, BRITISH INVESTMENT IN AMERICAN RAILWAYS, 1834-1898 (1970); Boorstin, *supra* note 22, at 572. In discussing the importance of foreign investment to the development of our nation, Daniel Boorstin, librarian for the Library of Congress, noted:

> By 1854, foreign investors held approximately one-half of the federal and state and one-quarter of the municipal debts. Their interest in private enterprise was much smaller. The discovery of gold in California, however, sparked activity in trade, manufacturing, and railroad building which started a new flow of European capital to America. The regularity of such investment was sometimes interrupted by panics and the disclosures of the folly of American promoters; in 1869, for example, representatives of the Memphis, El Paso, and Pacific Railroad sold some $5 million worth of bonds on the Paris Bourse, having widely advertised their great transcontinental line which turned out to be just three miles long.
>
> After that fiasco French investments in American railroads were negligible, but the English and Dutch remained enthusiastic and for a long time held controlling interests in the Illinois Central, the New York and Erie, the Philadelphia and Reading, and others. For more than three-quarters of a century British investors were the principal buyers of American railway securities. By 1914, when securities and direct investments by Europeans in America totalled $7 billion, well over half of it was in railroads . . . .

See also North, *International Capital Flows and the Development of the American West*, 16 J. ECON. HIST. 493 (1956).

26. Boorstin, *supra* note 22, at 573.

27. Act of Feb. 25, 1791, Ch. X, §§ 7 (I), (III), 1 Stat. 193. This fear of foreign control was still present in 1816. In creating the second Bank of the United States, prohibitions similar to the ones attached to the first Bank were also included in the enacting legislation of the second Bank. Act of Apr. 10, 1816, Ch. XLIV, §§ 11(1), (16), 3 Stat. 271, 274. *But cf.* National Bank Act, Ch. CVI, §§ 9, 10, 13 Stat. 102 (1864). These prohibitions were not entirely successful. By 1841, 56% of the Bank of the United States was owned by foreign investors. For a better discussion of the foreign investment in the Bank of the United States during the 1800's see LEWIS, AMERICA'S STAKE IN INTERNATIONAL INVESTMENTS 14-15 (1938).

28. *See* Boorstin, *supra* note 22. The major investments in the railroads were the primary area of concern during this era. In response to this purchase of America by foreign

the passage of legislation that regulated foreign investment. The Alien Land Law of 1887 prohibited the purchase of land in federal territories by foreign investors.[29] Regulation of foreign investment was essentially ignored from the early 1900's through World War II. Legislation was enacted mainly in those industries the federal government considered important to national security.[30] After World War II, the United States again actively encouraged foreign investment. The United States policy during this era can best be understood by a review of the following excerpt from the Mutual Security Act of 1954:

> [This Act authorizes the President to] . . . accelerate a program of negotiating treaties for commerce and trade . . . which shall include provisions to encourage and facilitate the flow of private investment and its equitable treatment in nations participating in programs under this Act . . . .[31]

As a result of this encouragement, United States investors began making significant offshore investments. Although the United States was encouraging the inflow of foreign investment capital, we were experiencing a significant balance of payments deficit. Given this turn of events, additional legislation was promulgated to encourage investment in the United States by foreigners and by United States citizens and to limit the outflow of capital. The principal legislation at this time was the Interest Equalization Tax of 1964.[32] This tax imposed a penalty on the purchase

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investors, the Know-Nothing Party was supporting discriminatory taxation of foreign investment in the United States. Although unsuccessful in its efforts, the Know-Nothing Party nevertheless raised the general awareness of foreign investment in the United States. *See generally* ADLER, BRITISH INVESTMENT IN AMERICAN RAILWAYS: 1834-1898, 10-11 (1970).

29. Act of Mar. 3, 1887, Ch. 340, § 1, 24 Stat. 476. Other legislation during this period includes: Homestead Act of 1862, Ch. LXXV, § 1, 12 Stat. 392; Desert Land Act of 1877, Act of Mar. 3, 1877, Ch. 107, 19 Stat. 377, *amended by* 43 U.S.C. § 321 *et seq.* (1970); and Natural Resources Act of 1887, Act of Mar. 3, 1887, Ch. 340, § 1, 24 Stat. 476. Briefly, the Homestead Act allowed only citizens of the United States to enter public lands for the purpose of homesteading. The Desert Land Act was similar to the Homestead Act in that it authorized only United States citizens the right to reclaim public desert land. Finally, the Natural Resources Act was also directed to the prohibition of public land ownership and usage by non-citizens of the United States.

30. Industries where foreign investment was regulated, restricted or prohibited include: Atomic Energy, 42 U.S.C. § 2133(d) (1982); Air Transportation, 49 U.S.C. §§ 1301(13), 1302(13), 1378(a)(4), (f), 1401(b), 1508(b) (1982); Coastal Shipping and Trade Activities, 46 U.S.C. §§ 11, 252, 289, 8654, 883, 888 (1982); Ship Building, 49 U.S.C. §§ 808, 835 (1982); Leases on Federal Mineral Lands, 30 U.S.C. §§ 22, 24, 72, 181, 352 (1982); Radio and Television Industries, 47 U.S.C. § 310 (1982); and Military Aircraft Production, 10 U.S.C. § 2272(f) (1982). For a complete discussion of industries where foreign investment is regulated see FOREIGN INVESTMENT IN THE UNITED STATES 333-729 (Marans, Williams and Mirabito, eds. 1977). *See also* Andrews, *An Evaluation of the Need for Further Statutory Controls on Direct Foreign Investment in the United States*, 8 VAND. J. TRANSNAT'L L. 147 (1974).

31. Mutual Security Act of 1954, Pub. L. 665-937, 68 Stat. 832.

32. Act of Sept. 2, 1964, Pub. L. No. 88-563, 78 Stat. 809, *amended by* Pub. L. No. 90-59, 81 Stat. 145 (1967) (formerly codified at 26 U.S.C. §§ 4811 *et seq.*, *repealed by* Act of Oct. 4, 1976, Pub. L. No. 94-455, 90 Stat. 1814, Title XIX, § 1904(a)(21)(A)).

of foreign securities by United States citizens. Additionally, a Presidential Task Force was created to discuss and propose methods to increase foreign investment in the United States.[33]

In the early 1970's the amount of foreign investment in the United States increased tremendously. This increase was due to two key factors. First, the Organization of Petroleum Exporting Countries (OPEC) emerged during this period as a cohesive and dominant economic and political force. This event coupled with the implementation of a sustained oil embargo caused petroleum prices to soar. As a result, a significant pool of dollars became available for investment by the OPEC nations.[34] Second, the dollar suffered a significant devaluation compared to the currencies of our major trading partners.[35] Also, corporate securities prices were depressed in the early 1970's.[36]

Other factors making the United States an inviting target for foreign investment included attractive rates of return for foreign investors, a stable political climate and fair laws under which returns could be favorably achieved.[37] Overall, during the last twenty-five years, the United States has been a very inviting investment choice for well capitalized foreign investors.[38]

These international financial developments did not go unnoticed. By 1974, Congress began a major inquiry into the degree of foreign investment in the United States.[39] As a result of this attention, several pieces of

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33. *See* H.R. Doc. No. 141, 88th Cong., 1st Sess. 1 (1963) (Message from the President of the United States transmitting a special message on Balance of Payments).

34. *See Arab Banks Grow*, BUS. WK., Oct. 6, 1980, at 70, 72. This trend continued unabated through the late 1970's. For example, in 1978 the estimated dollar surpluses held by Arab oil exporters equaled $5.3 billion. However, by 1980, estimates for the surpluses had ballooned to $120 billion. As a result of this surplus, the Arab oil nations became a potent force in the international financial markets. By 1980, Arabic members of OPEC had invested $340 billion worldwide. This amount was three times greater than their cumulative worldwide investment in 1975.

35. *See* E. FRY, FINANCIAL INVASION OF THE U.S.A.: A THREAT TO AMERICAN SOCIETY 36 (1980). From 1971 to 1978, the dollar declined 81% against the German mark and 63% against the Japanese yen.

36. For a complete discussion of the economic factors that led to an increase of foreign investment in the early 1970's, see ZAGARIS, FOREIGN INVESTMENT IN THE UNITED STATES 8-10 (1980).

37. *See supra* notes 8-13 and accompanying text. Many of these same factors are present today in the United States. Currency valuations are presently in favor of the United States trading partners, we are presently suffering a huge trade and balance of payment deficit and many investors still view the United States markets as the deepest and most liquid. As such, we are again seeing a large influx of foreign funds into our financial markets.

38. *See* SECURITIES AND EXCHANGE COMMISSION, REPORT OF SPECIAL STUDY OF SECURITIES MARKETS, H.R. Doc. No. 95, 88th Cong., 1st Sess. 30 (1963). In 1963, the Securities and Exchange Commission noted in a study that foreign funds were an important source of capital for large, unregulated borrowers.

39. *See generally Foreign Investment in the United States: Hearings Before the Subcommittee on Foreign Economic Policy of the House Committee on Foreign Affairs*, 93d Cong., 2d Sess. (1974). Other major hearings and legislative proposals include: *Hearings on*

legislation were debated before Congress in 1974. Although not enacted, perhaps the most significant in terms of potential effect was the Foreign Investors Limitation Act of 1974.[40] This proposed Act would have been an amendment to the Securities and Exchange Act of 1934.[41] Briefly, this proposal would have prohibited foreign investors from acquiring more than five percent of any voting securities, or thirty-five percent of non-voting securities of any company whose securities were registered under the Securities Exchange Act of 1934.[42] Although it restricted the foreign acquisition of United States companies, the bill was silent on the ability of a foreign entity to create a wholly owned subsidiary in the United States. Thus, it appears as if the Foreign Investors Limitation Act of 1974 wanted to maintain the historical encouragement of foreign investment while at the same time protect established United States industries. In fact, the stated purpose of this bill was to encourage diversification of foreign investments in domestic industries and avoid the pitfalls that would occur with the foreign control of United States industries.[43]

The legislation that was enacted has subsequently had a profound effect. Not in immediate results, but in laying the groundwork for the application of the Exon-Florio Amendment. Given the lack of any useful information concerning foreign investment in the United States, Congress directed the Commerce Department to study such investment and prepare a complete report. The enacting legislation for this survey was the

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Foreign Investment in the United States Before the Subcommittee on Foreign Economic Policy of the House Committee on Foreign Affairs, 93d Cong., 2d Sess. (1974)(the "Culver Subcommittee"); *Hearings on S. 2840 Before the Subcommittee on Foreign Commerce and Tourism of the Senate Committee on Commerce*, 93d Cong., 2d Sess. (1974)(the "Inouye Subcommittee"); *Hearings on S. 3955 Before the Subcommittee on Foreign Commerce and Tourism of the Senate Committee on Commerce*, 93d Cong., 2d Sess. (1974)(the "Metzenbaum Subcommittee"); *Hearings on S. 425 Before the Subcommittee on Securities of the Senate Committee on Banking, Housing and Urban Affairs*, 94th Cong., 1st Sess. (1975)(the "Williams Subcommittee"); *Hearings on S. 425, S. 953, S. 995 and S. 1303 Before the Subcommittee on Int'l Finance of the Senate Committee on Banking, Housing and Urban Affairs*, 94th Cong., 1st Sess. (1975)(the "Stevenson Subcommittee"); *Hearings on S. 329, S. 995, S. 1303 and Amendment No. 393 Before the Subcommittee on Foreign Commerce and Tourism of the Senate Committee on Commerce*, 94th Cong., 1st Sess. (1975)(the "Inouye Subcommittee"). A review of the Congressional hearings will illustrate the frequently vocalized concern over the lack of any usable data concerning the extent and effects of direct foreign investment in the United States.

40. H.R. 8951, 93d Cong., 1st Sess., 119 CONG. REC. H21,425 (1973). The other major legislation proposed was the Energy and Defense Industry Production Act, H.R. 12040, 93d Cong., 1st Sess., 119 CONG. REC. H42655 (1973)(hereinafter Production Act). This bill was less restrictive than the Foreign Investors Limitation Act. The focus of the Production Act was to regulate foreign investment in the energy or defense industries. The Production Act stated that it would be illegal for a non-citizen of the United States or a foreign controlled entity to control a United States company (the Production Act defines control as ownership of 10% or greater of a company's voting securities).

41. Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (codified as amended in 15 U.S.C. §§ 78a-78kk (1989)).

42. *See supra* note 40 and accompanying text.

43. *Id.*

Foreign Investment Study Act of 1974 ("1974 Act").[44] As a result of this directive, the Commerce Department compiled a nine volume treatise on direct foreign investment that was released in 1976.[45] As a direct result of the information contained in the 1976 study, Congress enacted the International Investment Survey Act of 1976 ("1976 Act").[46] This law authorized the ongoing collection of comprehensive data concerning foreign direct investment in the United States. Specifically, this act vested the authority in the President to, "conduct a regular data collection program to secure current information on international capital flows and other information related to international investment . . . ."[47]

In an Executive Order, the President subsequently delegated his authority to the Department of Commerce for the promulgation and implementation of regulations concerning such information gathering tasks.[48] In addition to the legislative activity surrounding the 1974 and 1976 Acts was the 1975 Presidential creation of the Committee on Foreign Investment in the United States (CFIUS).[49] CFIUS was formed principally to be an advisory and information gathering entity.[50] With the passage of

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44. Foreign Investment Study Act of 1974, Pub. L. No. 93-479, §§ 1-11, 88 Stat. 1450-60 (1974). The principal purpose of this act was to authorize the Secretary of Commerce to prepare a report for Congress that would focus on direct foreign investment in the United States. However, as a review of the subsequent law and its application shows, the Foreign Investment Study Act of 1974 was to be the first in a long chain of far reaching laws concerning foreign investment in the United States.

45. DEPARTMENT OF COMMERCE, FOREIGN DIRECT INVESTMENT IN THE U.S. (1976) (report of the Secretary of Commerce to the Congress in Compliance with Foreign Investment Study Act of 1974, Pub. L. No. 93-479, 88 Stat. 1450).

46. Internal Investment Survey Act of 1976, Pub. L. No. 94-472, § 2, 90 Stat. 2059-64 (codified as amended at 22 U.S.C. §§ 3101-3108 (1979 & Supp. 1983)). The principal purpose of the Survey Act was to require benchmark surveys of direct and portfolio foreign investment in the United States and of United States direct investments abroad. These surveys were to be completed at least once every five years and provide for the collection of data on an on-going basis. *See* 22 U.S.C. § 3103 (1979 & Supp. 1983).

47. 22 U.S.C. § 3103(a)(1) (1979 & Supp. 1983). The stated purpose of this legislation was to provide,

> clear and unambiguous authority for the President to collect information on international investment and to provide analyses of such information to the Congress, the executive agencies, and the general public.

22 U.S.C. § 3101(b) (1979 & Supp. 1983).
The language in this Act expressly stated that its purpose was not to, "restrain or deter foreign investment in the United States or United States investment abroad." 22 U.S.C. § 3101(c) (1979 & Supp. 1983).

48. Exec. Order No. 11,961, 3 C.F.R. 86 (1978), *amended by* Exec. Order No. 12,013, 3 C.F.R. 147 (1978).

49. Exec. Order No. 11,858, 40 Fed. Reg. 20,263 (1975), *amended by* Exec. Order No. 12,188, 45 Fed. Reg. 989 (1980).

50. *Id.* As originally created, CFIUS consisted of a representative, whose status shall not be below an Assistant Secretary, designated by the Secretaries of State, Treasury, Defense, Commerce, the Assistant to the President for Economic Affairs and the Executive Director of the Council on International Economic Policy. In 1980, the Assistant to the President for Economic Affairs and the Executive Director of the Council on International Economic Policy were replaced by the United States Trade Representative and the

the 1976 Act, Congress insured that there would be a steady flow of direct investment data to CFIUS. Thus, through the actions of Congress and President Ford, a permanent mechanism was created to monitor foreign investment in the United States.[51]

Although the events in the world oil and financial markets created a general increase in the concern about foreign investment in the United States, the historic support for foreign investment in the United States was left relatively unscathed. The Carter Administration in the late 1970's continued to espouse the international financial benefits of foreign investment. An indication of our country's policy during this era can be seen in the Declaration issued at the conclusion of the Bonn Economic Summit and signed by the President on July 17, 1978. The Declaration stated:

> We underline our willingness to increase our co-operation in the field of foreign private investment flows among industrialized countries and between them and developing countries. We will intensify work for further agreements in the OECD [Organization for Economic Co-operation and Development] and elsewhere.[52]

By 1980, the concern of the 1970's and the active governmental quest for more information about direct foreign investment in the United States had virtually evaporated.

With the onset of the Reagan era, corporate America had begun to reassert itself. In 1982, American financial markets began what was to be the longest bull market in history. With prosperous times, less of a threat was seen coming from foreign investment in the United States. In September of 1983, President Reagan released what he described as a "major statement on international investment."[53] This statement, developed by the Senior Interdepartmental Group on International Economic Policy, contained a direct welcome to foreign investment in the United States. In that statement, the following policy was set forth concerning foreign investment in this country:

> The United States has consistently welcomed foreign direct invest-

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Chairperson of the Council of Economic Advisers. *See* Exec. Order No. 12,188, § 1-105. Prior Executive Orders and Determination, §§ (f)(1) and (2) at 992.

51. Another law promulgated during this era was the Agricultural Foreign Investment Disclosure Act of 1978, Pub. L. No. 95-460, 92 Stat. 1263 (codified at 7 U.S.C. § 3501-3508 (1988)). *See* 124 CONG. REC. 31,673-682 (1979) (hereinafter "AFIDA"). This legislation was enacted in response to the concerns voiced by rural constituencies that an increase of the foreign investment in United States agricultural land was causing a dramatic escalation in land prices. Like the International Investment Survey Act of 1976, AFIDA was promulgated for the purpose of establishing a nationwide monitoring program. This program was to provide statistical data covering the extent and impact of foreign investment in United States agricultural land. *See also* 44 Fed. Reg. 29,029 (1979); 44 Fed. Reg. 47,526 (1979); 45 Fed. Reg. 61,15 (1980); 45 Fed. Reg. 77,75 (1980); 49 Fed. Reg. 35,073 (1984).

52. 14 WEEKLY COMP. PRES. DOC. 1314 (July 24, 1978). In addition to President Carter, this Declaration was also signed by the leaders of England, France and West Germany.

53. 19 WEEKLY COMP. PRES. DOC. 1214 (Sept. 9, 1983).

> ment in this country. Such investment provides substantial benefits to the United States. Therefore, the United States fosters a domestic economic climate which is conducive to investment. We provide foreign investors fair, equitable, and nondiscriminatory treatment under our laws and regulations. We maintain exceptions to such treatment only as are necessary to protect our security and related interests and which are consistent with our international legal obligations.[54]

Thus, during the Reagan years, foreign investment was vigorously encouraged. As the merger and acquisition figures for 1980-1988 illustrate, foreign investment flowed into the United States at unprecedented rates.[55] This growing foreign presence in American industry again served to fuel the fires of alarm.

During this era, increased attention was again focused upon the magnitude of foreign investment in the United States.[56] Although the Reagan administration hailed foreign investment as a welcome tool in our quest for expansion, other economic pundits warned that the United States was becoming addicted to foreign capital.[57] There were fears that overdependence on foreign investment would actually weaken our country's fiscal health. Further, there were suggestions that such dependence could also cause the United States to be the subject of undue foreign political pressure which could undermine our political independence.[58] Coupled with these concerns were the questions about national security.

Recently, two proposed transactions arose that sparked extensive debate about the desirability of direct foreign investment in the United States. First was the proposed acquisition of eighty percent of Fairchild Semiconductor Corp. ("Fairchild") by Fujitsu, Ltd. ("Fujitsu") of Japan. This acquisition was potentially very problematic because if consummated, the deal would have provided the Japanese with advanced technology in an area previously dominated by the United States. There was concern that the Japanese would use this information in an attempt to dominate an industrial market. On October 24, 1986, Fujitsu and Fairchild announced the proposed transaction.[59] There was an immediate increase in the number of commentaries on the effect of foreign invest-

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54. *Id.* at 1216.

55. *See supra* notes 8-13 and accompanying text.

56. MARTIN & SUSAN TOLCHIN, BUYING INTO AMERICA: HOW FOREIGN MONEY IS CHANGING THE FACE OF OUR NATION 6 (1988) (hereinafter "Tolchin").

57. *Id.*

58. *Id.* An example of this potential problem was illustrated in April, 1987, when Paul Volcker disclosed that the Federal Reserve Board had decided to raise short-term interest rates. The rationale for this action was so the depreciation of the United States dollar would be slowed which would then make United States investments more attractive to foreign investors. In response to this action, Norman Robertson, Chief Economist at the Mellon Bank, stated: "Federal policy is increasingly influenced and even dictated by the needs of our foreign creditors." *See* Blustein, *Dollar Looms Bigger in Fed's Decision at Risk of Recession*, Wall St. J., May 19, 1987, at 1, col. 6.

59. Wash. Post, Oct. 25, 1986, at C1, col. 3.

ment in the United States. Most of the vocalized concerns were focused upon the potential effect the acquisition would have on our nation's national security.[60] Opponents of the Fujitsu purchase also noted that the proposed transaction would make Fujitsu the world leader in the production of semiconductors.[61] Finally, the fact that Fairchild's defense electronics subsidiary provided more than $100 million of high-speed circuitry annually to defense contractors spawned a wave of anti-foreign investment sentiment.[62]

Because Fairchild was in an industry where America held a perceived edge in technology over Japan, the proposed acquisition generated extensive debate and political attention. On November 8, 1986, the CFIUS Task Force announced that it would review the proposed merger.[63] Although many of the above-referenced factors were considered, the areas that were ultimately the primary focus of concern in the proposed Fujitsu transaction were trade and national policy. As attention was focused on the Fujitsu transaction, many commentators noted that America's traditional open door policy on foreign investment was seldom reciprocated.[64]

As a result of the negative publicity and political inquiry, Fujitsu ultimately decided to terminate negotiations and abort the acquisition of Fairchild.[65] Although this retreat by Fujitsu stemmed the flow of anti-Japanese investment sentiment, the problem was still on the front line of political agendas.

The second transaction was the proposed acquisition of the Goodyear Tire & Rubber Company by the British financier, Sir James Goldsmith. Goodyear is a well known industrial company headquartered in Akron, Ohio. Given Akron's and the entire midwest's quest for economic resurgence in the early to mid-1980's,[66] this proposed transaction was aggres-

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60. *See, e.g.*, Pollack, *Fujitsu Chip Deal Draws More Flak*, N.Y. Times, Jan. 3, 1987, at D1, col. 3.

61. Tolchin, *supra* note 57, at 10. At the time of the proposed acquisition, Fujitsu owned half of Amdahl, an American computer company.

62. *Id.* This concern is very interesting given that at the time of Fujitsu's proposed purchase, Fairchild was owned by the United States affiliate of Schlumberger, Ltd. (a large French oil services company.) Thus, it would appear as if foreign ownership of sensitive technology was not per se objectionable. Instead, the concerns were focused upon Japanese acquisition of sensitive technology. There were fears that if Fujitsu gained access to Fairchild's technological expertise, it would use such knowledge to eliminate United States competition in a key area of technology.

63. N.Y. Times, Nov. 8, 1986, at 39, col. 1.

64. Tolchin, *supra* note 57, at 12. Auerbach, *Cabinet to Weigh Sale of Chip Firm*, Wash. Post, March 12, 1987, at E1, col. 3. In announcing that the Department of Commerce would investigate the Fujitsu transaction and the public policy concerning America's open-door to foreign investment, Commerce Secretary Baldridge stated that Fujitsu's ownership of Fairchild would increase Japan's "ability to compete for United States supercomputer sales while blocking United States makers from a large share of Japan's market."

65. Daily Rep. for Executives (BNA) DER No. 67 (April 10, 1987).

66. The entire midwest was hit extremely hard by the recession of the early 1980's. Detroit was suffering due to its reliance on the automobile industry. Cleveland, Akron,

sively opposed by the residents of Akron, of Ohio, and by the federal government.[67]

In responding to this outpouring of public support for Goodyear, the House Subcommittee on Monopolies convened special public hearings to review the Goldsmith bid.[68] These meetings provided a public forum for the debate concerning the merits of an open door policy to direct foreign investment in the United States. Although the hearings were inconclusive, the proceedings were widely publicized and served to heighten America's awareness of the level of direct foreign investment and to fuel the fires of fear that foreigners were buying up America.[69]

Ultimately, Goldsmith withdrew his bid for Goodyear and sold his shares back to the company for a substantial profit. Thus, while Goldsmith was able to avoid public wrath and congressional action by selling out his Goodyear holdings, the public hearings spawned by his actions brought America's direct foreign investment policy to the forefront of legislative agendas.

The Fujitsu and Goodyear debates were important in several respects. First, it was the first time in recent memory that a major controversy erupted after a proposed foreign investment.[70] Second, before Fujitsu, foreign investment in the United States was essentially viewed as a welcome addition to our own sources of capital. Finally, the proposed Fujitsu and Goodyear transactions may have been the final events that led Congress to take action to assess and control the extent of direct foreign investment in the United States. In assessing what Congress faced in tackling this economic puzzle, one scholar noted:

> The challenge for American policy makers is to continue to reap the benefits of foreign investment while minimizing its risks. If they fail to meet this challenge, the threat of losing a measure of political and

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Pittsburgh, Youngstown, and other major cities in the great lakes region were also victimized due to their ancillary reliance on the automobile industry. Since the early 1980's, companies and cities located in this region have diversified themselves in order to lessen the short and long term effects of swings in the economic cycle. Goodyear was an example of this strategy. In addition to automobile tires, industry participation was extended to computer manufacturing, increased defense related production, natural gas exploration and production, and a myriad of other high technology areas where known technology could be utilized. All of this diversification was subsequently scrapped as a result of Goldsmith's bid. In order to finance the forced restructuring, Goodyear was required to sell off its non-tire subdivisions and concentrate on the rubber industry.

67. *See, e.g.*, L.A. Times, Nov. 19, 1986, at 1, col. 5.

68. *See* Wall St. J., Nov. 19, 1986, at 2, col. 3. Getting its fight to Capitol Hill appeared to be a last ditch effort on the part of Goodyear. Goodyear chairman Robert Mercer urged lawmakers to curtail the activities of corporate raiders and conceded that there is "very little we can do to stop [the British financier's threatened tender offer.] I haven't been optimistic since this started, I'm not sure where we go from here." *See, e.g.*, Wall St. J., Nov. 21, 1986, at 4, col. 1; L.A. Times, Nov. 19, 1986, at 1, col. 5.

69. *See supra* note 67 and accompanying text.

70. Tolchin, *supra* note 57, at 12.

economic sovereignty becomes a real possibility.[71]

In responding to this challenge, Congress passed the Exon-Florio Amendment.

EXON-FLORIO AMENDMENT

Essentially, Exon-Florio gives the President or his designee the ability to investigate any proposed merger, acquisition or takeover of a United States Company by foreign persons or entities that may have adverse effects on national security.[72] As allowed by Exon-Florio, the Presi-

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71. *Id.* at 13.

72. 50 U.S.C. App. 2158(a), *et seq.* Section 721 of the Defense Production Act of 1950, reads as follows:

> (a) Investigations. The President or the President's designee may make an investigation to determine the effects on national security of mergers, acquisitions, and takeovers proposed or pending on or after the date of enactment of this section by or with foreign persons which could result in foreign control of persons engaged in interstate commerce in the United States. If it is determined that an investigation should be undertaken, it shall commence no later than 30 days after receipt by the President or the President's designee of written notification of the proposed or pending merger, acquisition, or takeover as prescribed by regulations promulgated pursuant to this section. Such investigation shall be completed no later than 45 days after such determination.
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> (b) Confidentiality of information. Any information or documentary material filed with the President or the President's designee pursuant to this section shall be exempt from disclosure under section 552 of title 5, United States Code, and no such information or documentary material may be made public, except as may be relevant to any administrative or judicial action or proceeding. Nothing in this subsection shall be construed to prevent disclosure to either House of Congress or to any duly authorized committee or subcommittee of the Congress.
>
> (c) Action by the President. Subject to subsection (d), the President may take such action for such time as the President considers appropriate to suspend or prohibit any acquisition, merger, or takeover, of a person engaged in interstate commerce in the United States proposed or pending on or after the date of enactment of this section by or with foreign persons so that such control will not threaten to impair the national security. The President shall announce the decision to take action pursuant to this subsection not later than 15 days after the investigation described in subsection (a) is completed. The President may direct the Attorney General to seek appropriate relief, including divestment relief, in the district courts of the United States in order to implement and enforce this section.
>
> (d) Findings of the President. The President may exercise the authority conferred by subsection (c) only if the President finds that—
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> (1) there is credible evidence that leads the President to believe that the foreign interest exercising control might take action that threatens to impair the national security, and
>
> (2) provisions of law, other than this section and the International Emergency Economic Powers Act (50 U.S.C. 1701-1706), do not in the President's judgment provide adequate and appropriate authority for the President to protect the national security in the matter before the President.
>
> The Provisions of subsection (d) of this section shall not be subject to judicial review.

dent has delegated his authority to administer the law to the Committee on Foreign Investment in the United States (the "Committee" or "CFIUS").[73] This Committee consists of the Secretaries of the Treasury (the Chairperson of the Committee), Commerce, Defense and State, as well as the Attorney General, the chairperson of the Council of Economic Advisers, the director of the Office of Management and Budget and the United States Trade Representative.

On July 14, 1989, the Department of the Treasury's office of international investment released proposed regulations to implement Exon-Florio.[74] Pursuant to such regulations, any party involved in a transaction subject to Exon-Florio may submit a "voluntary notice" to the Committee to initiate an investigation to determine whether Presidential action should be taken.[75] Also, any committee member who has reason to believe a transaction may fall within the purview of Exon-Florio may submit an "agency notice" to review a proposed transaction.[76] However, although voluntary in nature, if an acquirer does not submit to the application of Exon-Florio, the acquirer could face a divestment action or other relief that the President deems necessary to enforce Exon-Florio.[77] Given the potentially onerous post-acquisition consequences of a Presidential ruling, it is doubtful that merger and acquisition professionals will view this

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(e) Factors to be considered. For the purposes of this section, the President or the President's designee may, taking into account the requirements of national security, consider among other factors—

(1) domestic production needed for projected national defense requirements,

(2) the capability and capacity of domestic industries to meet national defense requirements, including the availability of human resources, products, technology, materials, and other supplies and services, and

(3) the control of domestic industries and commercial activity by foreign citizens as it affects the capability and capacity of the United States to meet the requirements of national security.

(f) Report to the Congress. If the President determines to take action under subsection (c), the President shall immediately transmit to the Secretary of the Senate and the Clerk of the House of Representatives a written report of the action which the President intends to take, including a detailed explanation of the findings made under subsection (d).

(g) Regulations. The President shall direct the issuance of regulations to carry out this section. Such regulations shall, to the extent possible, minimize paperwork burdens and shall to the extent possible coordinate reporting requirements under this section with reporting requirements under any other provision of Federal law.

(h) Effect on other law. Nothing in this section shall be construed to alter or affect any existing power, process, regulation, investigation, enforcement measure, or review provided by any other provision of law.

73. Exec. Order No. 12,661, 3 C.F.R. 618 (1988).

74. Prop. Treas. Reg. § 800.103-800.702, 54 Fed. Reg. 29,744 (1989) (proposed July 14, 1989).

75. *Id.* at 29,753.

76. *Id.*

77. *Id.* at 29,755.

provision as voluntary.

Assuming notice is provided, any investigation subsequently undertaken must be commenced within thirty days of the notice[78] and must be completed within forty-five days.[79] Once the investigation is completed, the President has fifteen days to determine whether the transaction should be blocked.[80] Should the President decide to take action to enjoin the proposed transaction, he must submit a detailed written report of his findings to Congress.[81] It is interesting to note that the investigation and subsequent action by the President are not subject to judicial review.

POTENTIAL PROBLEMS

In addition to the "involuntary" nature in which Exon-Florio is applied,[82] one of the greatest potential problems in the application of the Exon-Florio Amendment is the determination of when a proposed transaction threatens national security.[83] A review of the statute illustrates that Presidential action will be predicated on a finding that a transaction will threaten national security.[84] The problem lies in the fact that the statute does not define national security. Moreover, Stephen J. Canner, the Staff Chairman of CFIUS, has stated: "[B]ecause each transaction is different, there can be no pre-determined comprehensive list of national security criteria."[85]

Therefore, it can be assumed that any final regulations promulgated to aid in the implementation of Exon-Florio will also be silent as to a definition of national security. However, a list of factors that should be

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78. Title VII of the Defense Production Act of 1950, 50 U.S.C. App. § 2170(a), *amended by* Omnibus Trade and Competitiveness Act of 1988, §5021, Pub. L. No. 100-418, 102 Stat. 1107 (1988).

79. 50 U.S.C. App. § 2170(a).

80. *Id.* at § (c).

81. *Id.* at § (f).

82. *See supra* notes 73-77 and accompanying text.

83. The language in the statute that places the emphasis upon national security reads as follows:

> (a) Investigations. The President or the President's designee may make an investigation to determine the effects on *national security* of mergers, acquisitions, and takeovers proposed or pending on or after the date of enactment of this section by or with foreign persons which could result in foreign control of persons engaged in interstate commerce in the United States. [emphasis added].

Defense Production Act of 1950, 50 U.S.C. App. § 2170 (a), § 721.

84. *Id.* The following excerpt from the statute highlights when Presidential action would be appropriate:

> (c) Action by the President. Subject to subsection (d), the President may take such action for such time as the President considers appropriate to suspend or prohibit any acquisition, merger, or takeover, of a person engaged in interstate commerce in the United States proposed or pending on or after the date of enactment of this section by or with foreign persons so that such control will not threaten to impair the national security.

85. Daily Rep. for Executives (BNA) DER No. 67 (April 10, 1989).

considered in determining whether a proposed acquisition could impact national security was provided. These factors are:

> 1. Domestic production needed for projected national defense requirements;
> 2. the capability and capacity of domestic industries to meet national defense requirements, including the availability of human resources, products, technology, material, and other supplies and services; and
> 3. the control of domestic industries and commercial activity by foreign citizens as it affects the capability and capacity of the United States to meet the requirements of national security.[86]

Although helpful, the list will still allow the President or his designee unbridled discretion in applying Exon-Florio. Therein lies the potential for a major problem. Through February 1, 1990, CFIUS had received 243 written notices of transactions. Of these notices, the committee sent only six to the President for a determination as to whether an investigation should be commenced. Of this number, only four transactions were subsequently subjected to a review.

On February 7, 1989, Marlin Fitzwater, Assistant to the President and Press Secretary, announced that the President had decided against intervening in the proposed acquisition of Monsanto Electronic Material Company (MEMC) by Huels AG of West Germany.[87] The decision by the President not to intervene in this transaction was significant because the MEMC-Huels investigation was the first formal investigation by CFIUS under Exon-Florio.[88] MEMC is the largest United States producer of

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86. Defense Production Act, §§ 2170(e)(1-3).

87. Press Release, The White House, Office of the Press Secretary, Feb. 7, 1989.

88. *Id.* Although the Huels-MEMC transaction was the first to generate a formal investigation by CFIUS, Exon-Florio was first sought to be applied in the fall of 1988. Consolidated Gold Fields PLC was the target of a hostile takeover attempt by Minorco S.A. Gold Fields is a U.K. company and Minorco is headquartered in Luxembourg. Gold Fields owned a forty-nine percent interest in Newmont Mining Corp. Newmont, a Delaware corporation, owned a controlling interest in Peabody Coal and held other significant minority stakes in several United States mining and natural resource companies.

Gold Fields asserted that Minorco's takeover attempt was a threat to United States national security for three reasons:

> 1) Newmont and its affiliates were involved in the mining and production of minerals that were vital to national security.
> 2) Gold Field's other subsidiaries were involved in mining and processing minerals outside the United States that were of equal importance to national security.
> 3) Gold Fields was a major refiner of gold. The claimed importance of this was two-fold. First, gold was used in critical defense related electronic components. Second, maintaining stability in the international gold market was a primary consideration in maintaining the underlying value of western currencies, including the United States dollar.

Gold Fields alleged that Minorco was controlled by South African Harry Oppenheimer . Given the political tensions between South Africa and the United States, national security would be compromised if South African interests could gain influence over western currencies and trading relationships. The argument was made that if Oppenheimer gained this

silicon wafers. In December 1988, the Department of Defense, the Department of Commerce and the General Accounting Office all notified CFIUS that the proposed transaction should be investigated as the consummation of such transaction could impact the integrity of United States national security.[89] In addition, on February 2, 1989, twenty-nine members of Congress wrote to President Bush and urged him to prevent the proposed MEMC acquisition.[90]

Although the MEMC-Huels transaction was the subject of extensive public, administrative and legislative scrutiny, the President refused to block the transaction. In making the announcement that the President would not take any action, Mr. Fitzwater provided the following two criteria that must be met before the President would suspend or prohibit a transaction:

> 1. Credible evidence to believe that the foreign investor might take actions that threaten to impair the national security, and
> 2. that existing laws, other than the International Emergency Economic Powers Act and the Exon-Florio provision, are inadequate and inappropriate to deal with the national security threat.[91]

In making this pronouncement, Mr. Fitzwater disclosed that the President based his decision on the "reliability of supply, technology transfer, and the relationship of the transaction to the semiconductor industry research consortium SEMATECH."[92]

The second transaction that was the subject of a review was the acquisition of Westinghouse Electric Corporation's interest in a joint ven-

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control, the strength of the United States economy would be affected.

Ultimately, CFIUS determined that a full scale investigation was not warranted. On March 23, 1989, CFIUS announced that the proposed Gold Fields acquisition by Minorco posed no threat to United States national security. In a rare public statement, CFIUS stated that even in a worst case scenario, the Gold Fields acquisition by Minorco would pose no threat to mineral supplies to the United States.

As a general rule, CFIUS activity is confidential. As such, the basis for any CFIUS ruling under Exon-Florio is not made public and is in fact exempt from Freedom of Information Act requests. The release of a public statement by CFIUS was unexpected and is not likely to be frequently repeated.

89. Tolchin, *Monsanto Unit Sale Faces Inquiry*, N.Y. Times, Dec. 21, 1988, at D3, col. 1 (citing Defense News, Dec. 20, 1988). *See also* N.Y. Times, Jan. 18, 1989, at D5, col. 4.

90. *Congressmen Ask Bush to Block Sale of Wafer Maker to West German Firm*, Daily Rep. for Executives (BNA) DER No. 23 (Feb. 6, 1989). Concern was focused on the manufacture of silicon wafers. The assertion was made that if the proposed transaction were consummated, the United States share of the silicon wafer world-wide chip market would fall from fourteen percent to two percent. The congressmen stated this was unacceptable and noted that " . . . the United States is lagging severely behind its competitors in its ability to produce computer chips, the virtual sell-off of the wafer industry will help seal the fate of our weakening high-technology infrastructure . . . ."

91. Press Release, The White House, Office of the Press Secretary, Feb. 7, 1989.

92. *Id. See also* Farnsworth, *Bush Won't Block Chip Unit's Sale*, N.Y. Times, Feb. 8, 1989, at D1, col. 4. SEMATECH is an industry-government consortium that was formed to jump-start the United States semiconductor industry.

ture by its joint venture partner ASEA Brown Boveri Ltd. (ABB).[93] The ABB-Westinghouse joint venture was involved in the manufacture, distribution, sale and servicing of electrical transmission and distribution equipment in the United States. In an effort to decrease CFIUS concerns about the future of the United States' electrical transmission capabilities, ABB notified CFIUS that it intended to "continue the manufacture, servicing, repair, research and design in the United States of these high voltage transformers."[94] In asserting the same criteria for Presidential action as was outlined in the MEMC-Huels investigation, President Bush again refused to take action.

The third investigation was concluded on August 18, 1989. The transaction in question involved the acquisition of three Fairchild Industries divisions by Matra S.A., a French firm. The three Fairchild divisions were: Fairchild Communications & Electronics Company, Fairchild Control Systems Company, and Fairchild Space Company. All three of the Fairchild divisions and Matra were engaged in the manufacture of hardware and software for aerospace systems and spacecraft. This transaction did not involve an investigation as much as a negotiation. During the course of its "investigation," CFIUS sought concessions from Matra to prevent the export of sensitive computer technologies. Working in concert with the Department of Commerce, Matra developed and pledged to institute a comprehensive export control management system that was viewed as sufficient.[95] The President, in making his determination that intervention was unnecessary, determined that the safeguards developed by Matra and the Department of Commerce were sufficient to protect sensitive technologies from unauthorized transfer outside the United States.[96]

A quick review of the three above referenced transactions, and Presidential inaction, would seem to indicate that Exon-Florio is little more than a paper tiger.[97] However, this perception changed with the CFIUS investigation of the proposed acquisition of General Ceramics, Inc. by Tokuyama Soda Co. Ltd. of Japan. General Ceramics receives seven percent of its total sales from the sale of beryllium ceramics for military equipment. Although the proposed transaction was never referred to the President for official action, CFIUS intervention ultimately caused the

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93. Press Release, The White House, Office of the Press Secretary, May 17, 1989.

94. *Id.*

95. Press Release, The White House, Office of the Press Secretary, August 18, 1989.

96. *Id.* The President weighed the proposed safeguards against that criteria first outlined in the MEMC transaction and reiterated in the Westinghouse sale.

97. Tolchin, *supra* note 56. In assessing the impact of CFIUS on international capital flows into the United States:

> CFIUS is known around government circles as a "paper tiger": It rarely meets and has never to anyone's knowledge, blocked a foreign investment. Considering that CFIUS is the only foreign-investment review mechanism in the executive branch, its inactivity speaks volumes about government complacency toward foreign investment.

parties to shelve the deal.[98] CFIUS unofficially notified Tokuyama that it intended to recommend that President Bush block the proposed acquisition. As a result of this "unofficial" notice, Tokuyama withdrew its CFIUS notification and agreed to restructure the deal to exclude the General Ceramics division that produces military equipment.[99]

The CFIUS action with respect to the Tokuyama acquisition elicited praise from Congressmen Exon and Florio. In lauding the aggressive posture taken by CFIUS, Rep. Florio stated: "[Exon-Florio] is working almost exactly as we envisioned it would."[100] If Rep. Florio is accurately portraying the intent of Congress in passing Exon-Florio, the intended scope of government intervention is extreme. Such "unofficial" government intervention could become a sanctioned form of economic blackmail. Critics of the CFIUS action have noted that in reviewing proposed transactions, CFIUS has acted without regard for the potential effect on national security. In outlining the CFIUS posture on making investigation recommendations, one opponent noted: "In most cases, it comes down to a popularity contest . . . . The focus should be on the technology and whether we want to see it in foreign hands."[101] Thus, it appears as if the threat of intrusive action by CFIUS has already been realized.

The final investigation undertaken by CFIUS fully illustrates the scope of presidential power conferred by Exon-Florio. The parties involved in this investigation were MAMCO Manufacturing, Inc. ("MAMCO") and the China National Aero-Technology Import and Export Corporation ("CATIC"). MAMCO is a company incorporated in the State of Washington whose principal business is machining and fabricating metal parts for civilian aircraft. A large proportion of MAMCO's production is sold to a single manufacturer. Although MAMCO has no contracts with the U.S. government involving classified information, some of the machinery it uses during production is subject to U.S. export controls. CATIC is an export-import company operating under the direct control of the Ministry of Aerospace Industry of the People's Republic of China (the "Ministry"). The Ministry engages in research and development, design, and manufacture of military and commercial aircraft, missiles, and aircraft engines. CATIC has sectors, including commercial aircraft.

In accordance with the "voluntary" nature of CFIUS notification, MAMCO notified CFIUS of CATIC's intention to acquire MAMCO. On November 30, 1989, CATIC completed its purchase of all outstanding voting stock of MAMCO. CATIC completed this acquisition before

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98. Pine, *Security Factors Delay Sale of Ceramics Firm*, L.A. Times, April 19, 1989, at § 4, at 5, col. 1.

99. *Id.* The General Ceramics unit in question was involved in the manufacture of parts for nuclear weapons as part of a classified contract with the Department of Energy.

100. N.Y. Times, Apr. 24, 1989, at D6, col. 5.

101. *See supra* note 99 and accompanying text.

CFIUS had completed its review.[102] On December 4, 1989, CFIUS determined to undertake a formal investigation to determine MAMCO's present and potential production capabilities and technology. Specifically, the investigation focused upon the national security implications of CATIC's purchase. To gather information relevant to the CFIUS request, officials from the Departments of Commerce and Defense, representing CFIUS, visited MAMCO to conduct an on site investigation. In accordance with the statutory requirements imposed by Exon-Florio, the CFIUS representatives focused on the presence of any credible evidence that CATIC might take action which could impair national security. In addition, CFIUS also focused on the adequacy of any other laws that were appropriate to deal with the threat presented by CATIC's acquisition of MAMCO.

After a review of the CFIUS investigation and a consideration of its recommendations, President Bush ultimately chose to order CATIC to divest its acquisition of MAMCO. In ordering divestment, the President ordered and authorized three specific actions:

> 1. CATIC will have three months in which to divest itself of MAMCO.
> 2. During the pendency of CATIC's divestment, CFIUS will monitor the divestment process. The President also authorized CFIUS to take measures necessary to ensure protection of the national security.
> 3. This decision by the President will not have any impact on CATIC's other business arrangements in the United States.[103]

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102. Although completion of a proposed acquisition potentially subject to an Exon-Florio review is not politically astute, nothing in the statute prohibits such action. Further, nothing in the statute requires the participants in a transaction to notify CFIUS before consummating any deal. However, given the highly politicized nature of deal making with respect to CFIUS investigations, it appears that the prudent course would be complete disclosure of the change in status of any deal being reviewed by CFIUS.

103. Order Pursuant to § 721 of the Defense Production Act of 1950. Released by the White House, Office of the Press Secretary, February 2, 1990. The exact text of the order reads as follows:

> By the authority vested in me as President by the Constitution and statutes of the United States of America, including § 721 of the Defense Production Act of 1950 ("§ 721"), 50 U.S.C. App. 1270,
>
> *Section 1. Findings.* I hereby make the following findings:
>
> (1) There is credible evidence that leads me to believe that in exercising its control of MAMCO Manufacturing, Inc. ("MAMCO"), a corporation incorporated under the laws of the State of Washington, the China National Aero-Technology Import and Export Corporation ("CATIC") might take action that threatens to impair the national security of the United States of America; and
>
> (2) provisions of law, other than § 721 and the International Emergency Economic Powers Act (50 U.S.C. 1701-1706), do not in my judgment provide adequate and appropriate authority for me to protect the national security in this matter.
>
> *Section 2. Actions Ordered and Authorized.* On the basis of the findings set forth in § 1 of this Order, I hereby order that:
>
> (1) CATIC's acquisition of control of MAMCO and its assets, whether directly or through subsidiaries or affiliates, is prohibited.
>
> (2) CATIC and its subsidiaries and affiliates shall divest all of their inter-

Although the impact of Exon-Florio on CATIC was very burdensome and economically draconic, the President was effusive in distinguishing the CATIC acquisition from other direct foreign investment. In espousing the benefit to the United States of an open policy toward foreign investment, President Bush set forth the following position:

> The United States welcomes foreign direct investment in this country; it provides foreign investors fair, equitable, and nondiscriminatory treatment. This Administration is committed to maintaining that policy. There are circumstances in which the United States maintains limited exception to such treatment. Generally these exceptions are necessary to protect national security. Of those foreign mergers, acquisitions, and takeovers which have been reviewed under the Exon-Florio provision to determine effects on national security, this is the first time I have invoked § 721 authority. My action in this case is in response to circumstances of this particular transaction. It does not change our open investment policy and is not a precedent for the future with regard to direct investment in the United States from the People's Republic of China or any other country.[104]

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est in MAMCO and its assets by May 1, 1990, 3 months from the date of this Order, unless such date is extended for a period not to exceed 3 months, on such written conditions as the committee of Foreign Investment in the United States ("CFIUS") may require. Immediately upon divestment, CATIC shall certify in writing to CFIUS that such divestment has been effected in accordance with this Order.

(3) Without limitation on the exercise of authority by any agency under other provisions of law, and until such time as the divestment is completed, CFIUS is authorized to implement measures it deems necessary and appropriate to verify that operations of MAMCO are carried out in such manner as to ensure protection of the national security interests of the United States. Such measures may include but are not limited to the following: On reasonable notice to MAMCO, CATIC, or CATIC's subsidiaries or affiliates (collectively "the Parties"), employees of the United States Government, as designated by CFIUS, shall be permitted access to all facilities of the Parties located in the United States —

(a) to inspect and copy any books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of the Parties that concern any matter relating to this Order;

(b) to inspect any equipment, containers, packages, and technical data (including software) in the possession or under the control of the Parties; and

(c) to interview officers, employees, or agents of the Parties concerning any matter relating to this Order.

(4) The Attorney General is authorized to take any steps he deems necessary to enforce this Order.

Section 3. Reservations. I hereby reserve my authority, until such time as the divestment required by this Order has been completed, to issue further orders with respect to the Parties as shall in my judgment be necessary to protect the national security.

Section 4. Publication. This Order shall be published in the *Federal Register.*

[signed and dated: George Bush, February 1, 1990]

104. Release to the Congress of the United States, The White House, Office of the Press Secretary, February 2, 1990. Although this was the first "official" action taken under

Summarizing the 243 transactions referred to CFIUS through February 2, 1990, only three, Tokuyama, MATRA and CATIC were required to restructure proposed transactions. As such, it would appear as if CFIUS has acted with restraint in determining the transactions that pose a threat to "national security."

Unfortunately, there are no assurances that future administrations will act with similar restraint. Because much of CFIUS activity is conducted under a shroud of secrecy, the potential for abuse appears boundless. As such, CFIUS could use its authority to insist that a proposed deal be restructured or face cancellation.[105] Further, concessions could be demanded from foreign investors that in the long run would hamper the economic viability of an entity. This is troublesome given the latitude in defining national security. A future administration may decide that national security is synonymous with economic security or that promotion of a national industrial policy is a tenant of national security. Given the breadth of the statute, the silence of the regulations, and the latitude given CFIUS in fashioning "unofficial" solution, such a scenario is well within the realm of possibilities. Further, after the recent action taken to thwart the CATIC acquisition of MAMCO, CFIUS has put foreign acquirers on notice that no one can ignore the potential impact of Exon-Florio when planning the acquisition of a United States company.

Another area of potential abuse is in the area of confidential and sensitive business information and trade secrets. Presently, under Exon-Florio, Congress and members of their staff have access to the confidential information filed in connection with a Presidential request.[106] Although the statute asserts that any information provided in connection with a request will remain confidential, the potential for disclosure is great. Congress must by its very nature serve its constituents. Frequently, members of Congress will be asked by their constituents to address and intervene in local corporate affairs.[107] As such, this situation presents a member of Congress with a dilemma. Should information given to the President or CFIUS remain confidential, or should we provide a target company that happens to be a "constituent" with the foreign company's

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the guise of Exon-Florio, as a review of previous cases reveals, CFIUS has been able to get concessions from foreign investors before consummating a transaction. *See supra* notes 99-102 and accompanying text. It is this unofficial inquiry and action which presents foreign acquirers with the greatest potential hurdle in consummating the acquisition of a United States company when members of CFIUS determine that such an acquisition may impact national security.

105. A review of the Tokuyama and MATRA proposals confirm this assertion. Given the pressure exerted by CFIUS in getting the two acquirers to restructure the proposed deals, it is probable that if concessions were not agreed upon, that CFIUS would have recommended to the President that the transactions be blocked.

106. *See* Title VII of the Defense Production Act of 1950, *supra* note 79 at § 2170(c).

107. An excellent example of this scenario was exhibited in the Goodyear offer by Goldsmith. As the text implies, Goldsmith may have abandoned his bid to avoid the specter of legislative intervention.

takeover plans for the target. It would seem beneficial for members of Congress to provide their constituents with such information.

Another problem is that any material provided in connection with an Exon-Florio request may be made available to parties in any "administrative or judicial action or proceeding."[108] Given this availability, any time a company is threatened with a takeover from a foreign investor, the target could file suit under a myriad of claims, send a notice to CFIUS, and subsequently make a request to have all information provided to CFIUS made public for purposes of trial preparation. Thus, it would seem that the veil of confidentiality is one that is extremely transparent. In practice, there is no guarantee whatsoever of confidentiality. This factor alone may be enough to drive well intentioned foreign investment out of the United States.

Confidentiality aside, disclosure of the information to Congress carries the threat that the entire review process will be politicized. In form, CFIUS should be a non-partisan review process that only addresses the merits of a transaction as they affect "national security." However, by giving Congress broad latitude in access to CFIUS data, Congress may be tempted to use such information as ammunition in attempts to derail a CFIUS decision. Certainly a member of Congress would have much to gain by publicly second-guessing an unpopular decision by CFIUS.

Exon-Florio may also be misused as an anti-takeover device.[109] Given the minimal scrutiny required for a member of CFIUS to call for an investigation, Exon-Florio could very possibly be used as a deal buster.[110] Should a United States company find itself facing a hostile tender offer, it will surely seek to invoke Exon-Florio. If defensive management is successful in getting CFIUS to initiate an investigation, they could buy themselves up to ninety days to plot their defensive strategy.[111] Given the speed and exactitude under which the majority of hostile tender offers

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108. Title VII of the Defense Production Act of 1950, *supra* note 79, at § (c).

109. Exon-Florio may also come into play in friendly transactions. It is clear that third parties cannot file notices under Exon-Florio. However, there is nothing in the law that prevents interested third parties from communicating with the members of CFIUS about any transaction involving a foreign investor. Further, these interested parties could also bring their political might to bear on the backs of their members of Congress who could ultimately influence CFIUS to commence an investigation. The potential list of "interested" third parties is virtually boundless. Shareholders, institutional investors, employees, major competitors, labor unions, state and local governments and many other individuals and interest groups possess significant political power. It is very easy to envision the situation where powerful local constituents of a member of Congress pressures that member to influence CFIUS to take action. As in the case of disclosing confidential information, it is certain that at some time, CFIUS and the application of Exon-Florio will become politicized.

110. It only requires the affirmative vote of one member of CFIUS to initiate the review process. As such, the potential for abuse is staggering. Target management will certainly seek to maintain close contact with a member of CFIUS during times of siege. By doing so, the target could provide the CFIUS member with sufficient ammunition to invoke Exon-Florio and indirectly derail a foreign hostile takeover bid.

111. *See generally supra* notes 79-82 and accompanying text.

commence, ninety days in plotting your takeover defense is tantamount to years of corporate strategy. Thus, it is almost assured that a target, given ninety days to formulate a defense, could easily find a white knight or big brother,[112] undertake a restructuring defense,[113] or complete some other action that would eliminate the threat of a hostile takeover.[114]

CONCLUSION

Direct foreign investment in the United States provides significant economic benefits. Frequently, foreign investment will serve as a stimulant to a depressed area or a company in financial hardship. A recent example of this impact is Bridgestone's purchase of Firestone Tire and Rubber Company. Prior to Bridgestone's acquisition, Firestone had con-

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112. *See* Gearhart Industries, Inc. v. Smith International, Inc., 741 F.2d 707 (5th Cir. 1984); *but see*, Unocal v. Mesa Petroleum Co., 493 A.2d 946 (Del. Super. Ct. 1985). In a typical white knight/big brother situation, a target's management has made the determination that the only way they can remain independent is to sell a large block of their stock to a friendly suitor. Frequently, to entice a friendly suitor, target management may enter into a "standstill" agreement that limits the white knight's ability to vote its shares and giving the knight the right to acquire additional shares. Although these agreements may not be in the best interests of shareholders, the target management can assert the business judgement rule and claim the takeover bid is not in the best interest of shareholders. Generally, if the standstill agreement does not consolidate voting power in the hands of management, courts will allow this defensive measure.

113. *See* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. Super. Ct. 1986); *but see* AC Acquisition Corp. v. Anderson, Clayton & Co., 519 A.2d (Del. Ch. Ct. 1986); Robert M. Bass Group, Inc. v. Edward P. Evans, 552 A.2d 1227 (Del. Ch. Ct. 1988); Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261 (Del. Super. Ct. 1989). Restructuring defenses have in the past been very effective in deflecting junk bond and two-tier takeovers. In theory, a target company that undertakes a corporate restructuring should be able to provide its shareholders with a better value than is being offered by the suitor. Arguably, a suitor or raider is proposing the deal to enrich themselves where a restructuring should inure to the benefit of current shareholders. Further, in a restructuring, it is possible for current shareholders to maintain an ownership position in the company. As such, this is frequently viewed as a more palatable alternative than being cashed by a raider. However, as a practical matter, a restructuring defense may also be used by incumbent management to enrich themselves.

Another advantage to a restructuring is that a company does not necessarily open itself up to outside offers when implementing its plan. In this respect, a restructuring is superior to a white knight strategy. Should it be determined that the directors have offered to sell the company, and they receive (legitimate) unsolicited offers, the company may subsequently be thrust into an auction.

Restructuring defenses may include self tenders, crown jewel sales or sales of attractive assets, corporate divestitures, and recapitalizations.

114. A complete review of all the defensive measures and tactics available is beyond the scope of this article. This is an area of the law that undergoes daily permutations. Attempting to summarize such an area is virtually impossible. However, it is important to know that problems exist within the structure of Exon-Florio that may enhance the position of target management in hostile battles for corporate control.

Given this disclaimer, for a complete discussion of the law and strategies that impact corporate control battles see HOSTILE BATTLES FOR CORPORATE CONTROL 1989 (P.L.I. Nos. 632, 633) (prepared for distribution at the Hostile Battles for Corporate Control Program, Co-Chairmen Dennis J. Block and Harvey L. Pitt, Feb. 23-24, 1989).

sidered closing its truck radial tire plant located in La Vergne, Tennessee. Fortunately for the 1400 workers employed in this location, Bridgestone was able to keep the plant open. Additionally, the region was spared almost certain financial devastation.[115] Granted, foreign investment is not without its drawbacks.[116] However, Exon-Florio is not the proper mechanism in its present form to deal with the concerns being generated over foreign investment. As written, the law suffers from a severe case of overbreadth. The potential for abuse is great. The lack of clarity provides CFIUS with excessive discretion. Finally, there are too many questions that have been left unanswered by the proposed regulations.

To cure these problems, several solutions have been proposed. One such proposal was to provide a streamlined no-action procedure that would allow counsel for the interested parties to seek the equivalent of a Securities and Exchange Commission no-action position to the effect that the President would take no enforcement action under Exon-Florio.[117] Another workable proposal called for the inclusion of explicit regulatory exemptions for transactions involving specified types of industries.[118] The argument for this proposal is that the damage Exon-Florio could wreak on the economy would be minimized without compromising the integrity of national security.[119] Thus, it is clear there are solutions to the problems posed by Exon-Florio. Additionally, if action is not taken to eliminate the potential draconian impact of Exon-Florio, United States companies may see the international demand for their securities drastically reduced. Not only would this affect the long term market value of a company's securities, American shareholders would also suffer adverse economic consequences. As such, we should all think twice before jumping on the bandwagon in support of Exon-Florio.

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115. For a complete discussion of Bridgestone's efforts, see Tolchin, *supra* note 56, at 63, 81-93, 269.

116. *Id.* at 16-32, 259-274. *See also* Note, *An Evaluation of the Need for Further Statutory Controls on Foreign Direct Investment in the United States*, 8 VAND. J. TRANSNAT'L L. 147, 182-187; Little, *The Impact of Acquisition by Foreigners on the Financial Health of the U.S.*, NEW ENG. ECON. REV., Jul./Aug. 1982, at 40; Roberts, *A Minefield of Myths*, BUS. WK., Jan. 28, 1985, at 18; Reich & Mankin, *Joint Ventures with Japan Give Away our Future*, 64 HARV. BUS. REV., Mar./Apr. 1986, at 78.

117. *See* Wall St. J., August 30, 1989, at A10, col. 3. This suggestion was put forth by Susan W. Liebeler, former chairperson of the United States International Trade Commission, 1986-88.

118. *Id.*

119. *Id.*