

## RECENT DEVELOPMENTS

### OMNIBUS TRADE AND COMPETITIVENESS ACT OF 1988: PUTTING THE BRAKES ON FOREIGN INVESTMENT

The proposed \$225 million acquisition of Fairchild Semiconductors by Fujitsu, Ltd. in January 1981 created a wave of fear in the United States that key industrial sectors in this country were about to fall under foreign control.<sup>1</sup> The reflexive reaction of Congress came five months later in the form of a protectionist proposal to allow the President to ban direct foreign investment in the American economy.<sup>2</sup> This proposal contradicted 200 years of prior American policy towards direct foreign investment. It has always been the policy of the United States to freely admit foreign investment in this country and to treat foreign investors equally with domestic investors once they have entered the American market. Few special incentives have been offered, and with a few internationally recognized exceptions, barriers to investments have not been imposed.<sup>3</sup> Virtually all other countries in the world have adopted limitations on direct foreign investment. Through the General Agreement on Tariffs and Trade (GATT), the Organization for Economic Cooperation and Development (OECD), and bilateral treaties of friendship, commerce and navigation (FCNs), the United States has worked to reduce foreign barriers to investment, and to create an environment conducive to free and fair international trade.<sup>4</sup>

The large influx into the United States of Arab petrodollars in the mid-1970s spurred Congress to enact legislation that provided for the monitoring and reporting of the extent of foreign investment in the United States by industrial sector and nation of origin.<sup>5</sup> The

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<sup>1</sup> See S. REP. NO. 80, 100th Cong., 1st Sess. 5 (1987) [hereinafter *TECHNOLOGY ACT*].

<sup>2</sup> *Id.* at 6.

<sup>3</sup> See *Foreign Investment Act of 1975: Hearings on S. 425 Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing & Urban Affairs*, 94th Cong., 1st Sess. 71 (1975) [hereinafter *Hearings of 1975*].

<sup>4</sup> See *infra* notes 28-30.

<sup>5</sup> See *infra* note 42.

establishment of the Committee on Foreign Investment in the United States (CFIUS) to administer this new safeguard supplemented existing regulations protecting the aviation, banking, communications, defense, energy, mineral and shipping industries.<sup>6</sup>

Despite already-existing Presidential power to ban foreign takeovers in an emergency, Congress reacted to the attempted takeover of Fairchild by proposing broad new powers for the President.<sup>7</sup> These powers would have allowed the President to ban various forms of foreign investment if the investment affected "essential commerce" of the United States.<sup>8</sup> Reaction against such sweeping powers was strong and swift.<sup>9</sup> Critics of the restraints argued that currently available measures were sufficient to protect key industries from foreign takeovers.<sup>10</sup> Additionally, it was argued, such restraints would be counterproductive: first, a major chilling of direct foreign investment in the United States would occur;<sup>11</sup> second, retaliation against future American investment abroad and harassment of current American ventures overseas would result;<sup>12</sup> finally, the restraints would adversely affect efforts to reduce other nations' barriers to free investment and trade generally.<sup>13</sup>

Responding to this backlash, Congress scaled back<sup>14</sup> the proposed legislation to allow the President, where current regulations were insufficient, to suspend or prohibit any acquisition, merger or takeover by a foreign person or entity if such foreign control threatened

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<sup>6</sup> See *infra* notes 31-38.

<sup>7</sup> See TECHNOLOGY ACT, *supra* note 1, at 5.

<sup>8</sup> See *Acquisitions By Foreign Companies: Hearings on S. 907 Before the Senate Comm. on Commerce, Science, and Transportation*, 100th Cong., 1st Sess. 25 (1987) [hereinafter *Acquisitions*].

<sup>9</sup> *Id.* at 8.

<sup>10</sup> See *infra* notes 107-112.

<sup>11</sup> See *infra* notes 92-93.

<sup>12</sup> See *Foreign Investment in the United States: Hearings Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing & Urban Affairs*, 93rd Cong., 2nd Sess. 61 (1974) [hereinafter *Investment Hearings of 1974*]:

International investment is a seamless web. We can not block it in one direction without impeding its flow in all directions. We will not be able to establish significant barriers to foreign investment in the United States without risking the imposition of restrictions on our investments abroad and impairing our ability to contribute to development and resource creation and stability throughout the world. (Statement of William Casey, Undersecretary of State for Economic Affairs).

<sup>13</sup> See *Acquisitions*, *supra* note 8, at 3 (statement by Malcolm Baldrige, Secretary of Commerce).

<sup>14</sup> See *infra* notes 63-65.

to impair national security.<sup>15</sup> These reduced powers became law as section 5021 of the Omnibus Trade and Competitiveness Act of 1988.<sup>16</sup>

## I. LEGAL BACKGROUND

Throughout its history, the United States has consistently welcomed foreign investors into the U.S. economy.<sup>17</sup> The United States has achieved the most open investment policy in the world by following the premise that the lack of barriers and other distortive measures against foreign capital and investment allows the world economy to function best.<sup>18</sup> The policy of generally unrestricted capital flows has been defended as sound economic theory by the overwhelming number of American officials from Alexander Hamilton<sup>19</sup> to present-day government officials.<sup>20</sup> Proponents of

<sup>15</sup> See H.R. CONF. REP. NO. 576, 100th Cong., 2nd Sess. 338 (§ 721(c)).

<sup>16</sup> 50 U.S.C. § 721.

<sup>17</sup> See generally Vagts, *The Corporate Alien: Definitional Questions in Federal Restraints on Foreign Enterprise*, 74 HARV. L. REV. 1489, 1491-94 (1961). See also *Hearings of 1975*, *supra* note 3, at 25 (President Ford described discrimination towards foreign investment as "totally contrary to American tradition and repugnant to American principles").

<sup>18</sup> See *Acquisitions*, *supra* note 8, at 19:

International investment plays a vital role in the world economy, spurring growth, expanding employment, introducing new technology and improv[ing] productivity. Any country following an open policy, not just the United States, accrues these benefits.

(Statement of Malcolm Baldrige, Secretary of Commerce).

See also *Hearings of 1975*, *supra* note 3, at 27 (statement of Charles W. Robinson, Undersecretary for Economic Affairs, Department of State).

<sup>19</sup> See Vagts, *The Corporate Alien: Definitional Questions in Federal Restraints of Foreign Enterprise*, 74 HARV. L. REV. at 1492 (quoting 3 ANNALS OF CONG. 994 (1791)):

It is not impossible that there may be persons disposed to look with a jealous eye on the introduction of foreign capital, as if it were an instrument to deprive our own citizens of the profits of our own industry; but, perhaps, there never could be a more unreasonable jealousy. Instead of being viewed as a rival, it ought to be considered as a most valuable auxiliary, conducive to put in motion a greater quantity of productive labor, and a greater portion of useful enterprise, than could exist without it.

<sup>20</sup> See *Foreign Investment in the United States: Hearings Before the Subcomm. on International Economic Policy and Trade of the House Comm. on Foreign Affairs*, 97th Cong., 2nd Sess. 46 (1982)[hereinafter *Foreign Investment in 1982*](statement of Marc E. Leland, Assistant Secretary of International Affairs, Department of Treasury). See also *Foreign Investment in the United States: Hearings Before the Subcomm. on Foreign Economic Policy of the House Comm. on Foreign Affairs*, 93rd Cong., 2nd Sess. 83 (1974)(statement of Peter M. Flanigan, Assistant to the President for International Economic Affairs) (quoting President Nixon's April 10, 1973 message con-

open investment argue that it has been in America's national security interest to attract foreign investment.<sup>21</sup>

Consistent with this domestic policy, the United States has worked internationally to remove barriers to U.S. investment abroad maintained by its trading partners.<sup>22</sup> Nearly all countries have more stringent investment regulations than the United States.<sup>23</sup> The United Kingdom and West Germany, countries with relatively open investment policies, may easily disapprove foreign investment in their domestic economies.<sup>24</sup> The country possessing some of the most stringent investment regulations was Canada, with its since revoked Foreign Investment Review Act of 1974 (FIRA).<sup>25</sup> To combat these

cerning the Trade Reform Act: "...an open system for investment, one which eliminates artificial incentives or impediments here and abroad, offers great promise for improved prosperity throughout the world.").

<sup>21</sup> See *Acquisitions*, *supra* note 8, at 58-59 (testimony of Richard Darman, then Deputy Secretary, now Secretary of the Treasury). (Keeping in line with prior administrations, Mr. Darman led the defense against restrictions on OPEC investment in the mid-1970s. While such investment was unpopular at the time, the United States was a net beneficiary of investment of the recycled dollars in the American economy.)

See also *id.* at 14 (statement of Malcolm Baldrige, Secretary of Commerce). (It is in America's self-interest to open other nations to American investment, rather than to take the lead in erecting barriers to foreign investment.)

<sup>22</sup> See *Acquisitions*, *supra* note 8, at 19. See also *Investment Hearings of 1974*, *supra* note 12, at 60.

<sup>23</sup> See *Acquisitions*, *supra* note 8, at 13:

Virtually every other nation has adopted explicit limitations on incoming foreign direct investment. In general, the host country attempts to maximize its national share of the benefits brought in by foreign firms and to minimize the costs to it.

See also *Investment Hearings of 1974*, *supra* note 12, at 92.

See generally E. Richardson, *United States Policy Towards Foreign Investment: We Can't Have It Both Ways*, 4 AM. U.J. INT'L L. & POL'Y 281, 300-07, (1989) (summary of screening practices of foreign direct investment).

<sup>24</sup> See *Foreign Investment in 1982*, *supra* note 20, at 6. See also *Acquisitions*, *supra* note 8, at 13. (The United States Trade Representative maintains a 100-page listing of trade restrictions imposed by countries from Argentina to Zimbabwe. Generally, the government reviews the investment on national security, cultural or economic grounds). But see *Investment Hearings of 1974*, *supra* note 12, at 26 (statement of John Niehuss, Assistant Director for Investment and Services, Council on International Economic Policy):

A study in England entitled "The Impact of Foreign Direct Investment in the United Kingdom" (the so-called Steuer Report) considered whether there were rational grounds for limiting foreign investment in certain industries in the U.K. . . .

The report concluded that: "We are not able to defend a list of special key industries where a restrictive policy should be applied. (Military considerations have not entered into our work)."

<sup>25</sup> See *Investment Hearings of 1974*, *supra* note 12, at 85 (statement of Sen. Stev-

foreign investment obstacles abroad the United States has requested, when negotiating with foreign governments, that American firms operating in their countries be accorded equal treatment with their domestic investors.<sup>26</sup>

Various means have been employed by the United States to effectuate its goal of global liberalization of investment regulation.<sup>27</sup> First, to secure and grant national treatment to foreign investment, the United States has entered into a network of bilateral treaties of friendship, commerce and navigation (FCNs).<sup>28</sup> Second, it has been a driving force behind the OECD's Code of Liberalization of Capital Movement.<sup>29</sup> Third, it has been a forceful proponent at the GATT Uruguay Round for the removal of investment restrictions.<sup>30</sup>

In accordance with accepted international practice, the United States restricts foreign investment in certain "sensitive" sectors of its economy.<sup>31</sup>

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The following factors were required by the FIRA to be considered in evaluating proposed foreign investments in Canada:

- 1) Effect of the proposed investment on the level and nature of economic activity in Canada.
- 2) Degree and significance of participation by Canadians in the business.
- 3) Effect of the proposed investment on productivity, industrial efficiency, and technological development in Canada.
- 4) Effect of the proposed investment on competition in Canada.
- 5) Compatibility of the proposed investment with national industrial and economic policy.

The recently approved Free Trade Agreement shifts Canada from one of the most restrictive markets to the economy most open to American investment.

<sup>26</sup> See *Hearings of 1975*, *supra* note 3, at 26 (testimony of Jack Bennett, Undersecretary for Monetary Affairs, Department of Treasury).

<sup>27</sup> See generally *Investment Hearings of 1974*, *supra* note 12.

<sup>28</sup> See *Hearings of 1975*, *supra* note 3, at 29-30.

FCN's are designed to establish a framework within which mutually beneficial economic relations between the two nations can take place. By ratification, the Senate has supported the executive's view that these treaties are an important element in promoting American interests and building a strong world economy.

FCN's protect American commerce and citizens abroad in the event of nationalization. Rights assured to Americans in foreign lands are also assured in equal measure to foreigners in the United States. These treaties do exempt certain areas from the national treatment standard in order to conform with domestic laws existing at the time the treaties were negotiated. *Id.*

<sup>29</sup> See *Acquisitions*, *supra* note 8, at 52; *Hearings of 1975*, *supra* note 3, at 28.

<sup>30</sup> See *Acquisitions*, *supra* note 8, at 8.

The United States is committed to keeping the pursuit of free access to investments on the "front burner" in the Uruguay Round of GATT negotiations. *Id.* at 19.

<sup>31</sup> See *Hearings of 1975*, *supra* note 3, at 25 (statement of Jack Bennett, Undersecretary for Monetary Affairs, Department of Treasury). (The presence of barriers

These include aviation,<sup>32</sup> banking,<sup>33</sup> communications,<sup>34</sup> defense,<sup>35</sup> energy,<sup>36</sup>

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in some sensitive industries is consistent with various international obligations of the United States under GATT.); *see generally* Rose, *Special U.S. Rules Directly Affecting Foreign Investment*, 1 DICK. INT'L L. ANN. 59 (1982).

<sup>32</sup> See 49 U.S.C. §§ 1301-1542 (Federal Aviation Act of 1958).

Domestic air transport is limited to aircraft registered in the United States. To register an aircraft, one must be a United States citizen, which is defined as an individual citizen, a partnership of which each member is a United States citizen, or a domestic corporation of which the president and 2/3 or more of the board are citizens and 75% of the stock of which is owned by United States citizens. Foreign air carriers cannot acquire more than 10% of an American air carrier.

<sup>33</sup> See, e.g., 12 U.S.C. § 72 (National Bank Act).

No restrictions exist on foreign ownership of national banks. However, such ownership is inhibited by the requirement that a national bank's director be an American citizen. See also 12 U.S.C. § 619 (Edge Act). Edge Act Corporations are organized for the purpose of engaging in international banking or foreign operations. A majority of the capital stock of an Edge Corporation must be held at all times by a citizen of the United States. The directors must also be United States citizens.

<sup>34</sup> See 47 U.S.C. §§ 301-310 (Federal Communications Act of 1934).

A foreign government cannot hold a radio or TV station license. § 310(a). Direct or indirect foreign holding of certain radio or TV station licenses is also prohibited. § 310(b). Exceptions to these prohibitions exist for foreign pilots (§ 303(L)(1)); amateur radio operators (§§ 301, 310(c)); and embassies (§ 305(d)).

See also 47 U.S.C. §§ 701-744 (Communications Satellite Act of 1962). Ownership by foreign individuals or corporations of more than 20% of a company authorized to develop commercial communication satellite systems is prohibited. § 734(d).

<sup>35</sup> See Executive Orders 10450 and 10865, and Department of Defense Regulation 5220.22-R § 2, part 2 (Industrial Security Program). Except for subsidiaries of Canadian and British firms, these regulations make it difficult for foreign-controlled corporations to obtain security clearances to carry out classified contractual work for the United States government.

<sup>36</sup> See 16 U.S.C. §§ 791(a)-829 (Federal Power Act).

This Act authorizes the Federal Energy Regulatory Commission to issue licenses for the construction, operation or maintenance of facilities for the development, transmission and utilization of power on land and water over which the Federal Government has control. § 797e (as amended Dec. 21, 1982, Pub. L. No. 97-375, Title II, § 212, 96 Stat. 1826 (1982)).

Licenses may be granted only to United States citizens and domestic corporations. Moreover, 42 U.S.C. §§ 2011-2133 (Atomic Energy Act of 1954) forbids foreigners or any foreign corporation or entity that the Commission knows of from owning a nuclear license. § 2133(d). Additionally, 15 U.S.C. § 717 (Natural Gas Act) prohibits the import or export of natural gas by non-Americans unless authorized.

Applications to import or export natural gas require information concerning the citizenship of a corporation's officers, but United States citizenship is not required. 18 C.F.R. § 153.11(1988).

mining<sup>37</sup> and shipping.<sup>38</sup> Additionally, the International Emergency Economic Powers Act (IEEPA)<sup>39</sup> permits the President to investigate and nullify any foreign acquisition.<sup>40</sup> To do so, an extraordinary foreign threat to American national or economic security must be present, and the President must declare a national emergency.<sup>41</sup>

Concern over the possibility of sizeable foreign investments in American firms by OPEC members in the early 1970s<sup>42</sup>, and the revelation of inadequacies in statistics and data-gathering procedures on foreign investment<sup>43</sup> led to calls by Congress for better reporting procedures and a comprehensive foreign investment policy.<sup>44</sup> Various Congressional plans appeared for two years<sup>45</sup> before the International

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<sup>37</sup> See, e.g., 30 U.S.C. §§ 181-263 (Mineral Leasing Act of 1920 and Mineral Lands Leasing Act). (Leases to explore and develop deposits of minerals on government land may be obtained only by United States citizens or corporations; 30 U.S.C. §§ 21-23 (Mining of mineral deposits on federal land may only be undertaken by United States citizens or those who have declared their intention to become citizens.); 43 U.S.C. §§ 1331-1343 (Outer Continental Shelf Lands Act) (Allows for the leasing of oil, natural gas and other mineral deposits in the submerged lands of the continental shelf only to United States citizens, resident aliens or domestic corporations); see also 30 C.F.R. § 256.35(1988), 30 U.S.C. §§ 1001-1025 (Geothermal Steam Act of 1970). (Leases for the development and utilization of geothermal steam and associated resources may be issued only to United States citizens and domestic corporations. 43 C.F.R. §§ 3260, 3280(1987)).

<sup>38</sup> See, e.g., 46 U.S.C. §§ 861-889 (Merchant Marine Act of 1920), §§ 801-842 (Shipping Act of 1916), § 11 (Registry Act).

Ships used in domestic trade must be built in the United States and owned by United States citizens. § 883.

<sup>39</sup> 50 U.S.C. §§ 1701-1706 (1982).

<sup>40</sup> *Id.* § 1702(a)(1)(B). See also *Acquisitions*, *supra* note 8, at 5 (statement of Malcolm Baldrige, Secretary of Commerce); (IEEPA allows the President in unusual circumstances to deny any investment or compel the divestiture of foreign interest in an acquired domestic company).

<sup>41</sup> See 50 U.S.C. § 1701(a) (1982).

<sup>42</sup> See *Investment Hearings of 1974*, *supra* note 12, at 93-94.

<sup>43</sup> See S. REP. No. 910, 93rd Cong., 2nd Sess. 4 (1974). The Department of Commerce has not been able to develop methods to accurately measure real estate investments. Information provided by the Securities and Exchange Commission on investments by foreigners does not segregate data so as to identify foreign investors except as it relates to cash tender offers.

<sup>44</sup> *Id.* at 3-5.

<sup>45</sup> See, e.g., S. REP. 425, 94th Cong., 1st Sess. (1975)(Foreign Investment Act of 1975-Amends Securities Exchange Act of 1934 to require notification by foreign investors of proposed acquisitions of equity securities of United States companies); S. REP. 2840, 93rd Cong., 2nd Sess. (1974)(Foreign Investment Act of 1974-Requires the Secretaries of Commerce and Treasury to undertake a comprehensive study of foreign direct and portfolio investment in the United States and to report the results of the survey to Congress).

Investment Survey Act of 1976<sup>46</sup> became law. This act called for a survey on the feasibility of establishing a system to monitor foreign investment.<sup>47</sup>

Prior to the adoption of the Survey Act, a legal mechanism to review acquisitions in the United States by foreign companies was created in the form of the Committee on Foreign Investment in the United States (CFIUS).<sup>48</sup> The Committee was created solely as a monitoring body,<sup>49</sup> and had no legal power to block or modify investments by foreign governments that it might find objectionable.<sup>50</sup> Key areas examined in a CFIUS review include competition; national security, defense and related areas; national energy policy and impact; tax implications; and issues concerning the sensitivity and transfer of technology.<sup>51</sup>

Direct foreign investment in the United States soared 62% in 1987 to a record \$40.6 billion.<sup>52</sup> By the close of 1987, foreigners held over 5% of the capital stock in non-manufacturing industries and nearly 10% in manufacturing industries.<sup>53</sup> Congressional concern over such statistics became more serious after Fujitsu, Ltd. proposed

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<sup>46</sup> 22 U.S.C. § 3103 (1982).

<sup>47</sup> *Id.* § 3103(d). This provision, as amended by the Act of October 26, 1981, requires a new survey covering the years 1980-1987, and thereafter a survey every fifth year concerning direct investment abroad and foreign direct investment in the United States. In addition, regular data collection is to be conducted to secure current information on international capital flows. *See also* 15 C.F.R. § 806 (1988) and 31 C.F.R. § 129 (1988).

<sup>48</sup> Exec. Order No. 11858, 40 Fed. Reg. 20263 (1975). Members of the Committee include representatives from the Departments of Treasury, State, Commerce, and Defense, the Office of the U.S. Trade Representative, and the Council of Economic Advisors, with participants from the Departments of Justice, Energy, and the Interior, and the Securities and Exchange Commission. The Committee has the responsibility for coordinating the implementation of United States policy towards foreign investment in the United States. *See Foreign Investment in 1982*, *supra* note 20, at 47.

<sup>49</sup> *See Foreign Investment in 1982*, *supra* note 20, at 47.

<sup>50</sup> *See Acquisitions*, *supra* note 8, at 20. The Committee has no authority to block a deal, but it can quickly analyze the deal's potential effects, and, where appropriate, bring the deal to the attention of the Economic Policy Council; *Foreign Investment in 1982*, *supra* note 20, at 47. The Committee, in theory, could review any foreign investment in the United States, but in practice, it has limited its review to government-controlled investments. TECHNOLOGY ACT, *supra* note 1, at 5.

<sup>51</sup> *See Foreign Investment in 1982*, *supra* note 20, at 48.

<sup>52</sup> *See Koretz, The Buying of America: Should We Be Worried?*, BUS. WK., May 9, 1988, at 36.

<sup>53</sup> *Id.* Between 1984 and 1987, however, United States investment overseas increased \$84.4 billion, almost exactly the amount of the increase in foreign investment in the United States during the same three year period. *Id.*



purchasing an 80% share of Fairchild Semiconductors Corporation in January 1987.<sup>54</sup> This proposed purchase raised a number of national security concerns and also raised questions as to whether the federal government possessed adequate authority to prevent such an acquisition.<sup>55</sup>

Congressional response began with Senator Exon's National Security and Essential Commerce Amendment to Senate Bill 907, the Technology Competitiveness Act of 1987.<sup>56</sup> As reported,<sup>57</sup> the bill provided for investigation by the Secretary of Commerce of the effects on American national security and essential commerce of foreign mergers, acquisitions and takeovers.<sup>58</sup> Within 45 days of receiving a request to investigate<sup>59</sup>, the Secretary must report to the President, who may restrict, suspend or prohibit the acquisition.<sup>60</sup> The Senate adopted Bill 1420<sup>61</sup> as an amendment in the nature of a substitute to House Resolution 3, the Omnibus Trade and Competitiveness Act passed by the House.<sup>62</sup>

A Congressional conference committee met to resolve the conflicts between provisions of H.R. 3 and S. 1420.<sup>63</sup> The compromise reached<sup>64</sup>

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<sup>54</sup> See TECHNOLOGY ACT, *supra* note 1, at 5.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 6. S. Res. 907 was introduced by Senators Hollings and Riegle on April 3, 1987. Senator Exon's Amendment was reported favorably with S. Res. 907 on June 16, 1987. *Id.*

<sup>57</sup> See *Acquisitions*, *supra* note 8, at 2. As originally drafted, the Amendment granted the President discretionary authority to review and act upon foreign takeovers, mergers, acquisitions, joint ventures and licensing agreements that threaten the national security or essential commerce of the United States. The President was to consider the economic welfare of the individual industry, the impact of the proposed business activity upon employment, and the likelihood of resulting loss of skills or governmental revenues. *Id.* at 11. The legislation was attacked as being overly broad because it covered joint ventures and licensing agreements. *Id.* at 51.

<sup>58</sup> See TECHNOLOGY ACT, *supra* note 1, at 24-25 (§ 603(a)).

<sup>59</sup> *Id.* at 25 (§ 603(c)).

<sup>60</sup> *Id.* (§ 603(d)).

<sup>61</sup> See 134 Cong. Rec. S10,595 (daily ed. August 2, 1988). S. Res. 1420 was the vehicle for Senate debate on nine trade and competitiveness bills, including S. Res. 907. S. Res. 1420 was adopted by the Senate on July 21, 1987. Section 603 remained in the same form as when it was reported from the Committee on Commerce, Science and Transportation. *Id.*

<sup>62</sup> *Id.* See H.R. CONF. REP. NO. 576, 100th Cong., 2nd Sess. 924 (1988). (The Omnibus Trade and Competitiveness Act, H.R. Res. 3, contained § 905 which resembled the Exon Amendment as originally offered in the Committee of Commerce, Science and Transportation. It similarly encompassed mergers, acquisitions, joint ventures, licensing and takeovers.)

<sup>63</sup> See Rockwell, *Trade Conferees Reach Accord On a Key Item*, J. of Com. and

applies only to mergers, acquisitions and takeovers. Under this compromise, the President may suspend or prohibit foreign investment so that such investment would not threaten to impair national security.<sup>65</sup> The President may only exercise this authority if evidence suggests that such foreign control would impair national security or if current law does not provide adequate protection.<sup>66</sup> Factors to be considered by the President in making this determination include domestic production needs for defense requirements; availability of products, technology, materials and services to meet defense requirements; and control of domestic industries by foreigners as it affects the United States' capabilities to meet the requirements of national security.<sup>67</sup> Both houses quickly adopted the conference committee's version<sup>68</sup> and the bill became law on August 23, 1988.<sup>69</sup> To fully implement section 5021, the Department of Treasury released proposed regulations on July 5, 1989.<sup>70</sup>

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Comm'l., March 28, 1988, at 1A.

The final version agreed upon by the conference committee was shaped by a compromise between the conferees and the Reagan Administration. In return for support of a more narrow final version of the Exon Amendment, the conferees deleted from the bill a highly controversial disclosure proposal, known as the Bryant Alternative, from the bill. The Bryant Alternative called for requiring foreign firms to register with the federal government if they held 5% or more of any United States property worth \$5 million or more. If holdings were over 25% and the enterprise had at least \$20 million in assets, a provision requiring disclosure of financial data such as sales and assets would have been triggered.

<sup>64</sup> See H.R. CONF. REP. NO. 576, 100th Cong., 2nd Sess., at 338(§ 721(a)).

<sup>65</sup> *Id.* (§ 721(c)).

<sup>66</sup> *Id.* (§ 721(d)).

<sup>67</sup> *Id.* at 338-39 (§ 721(e)). Despite this list of factors, both the statute and the Conference Report lacked a definition of "national security." 54 Fed. Reg. 29,746 (July 14, 1989).

<sup>68</sup> See 134 Cong. Rec. S10,595 (daily ed. August 2, 1988). The conference committee's version of H.R. Res. 3 passed the House on April 21, 1988 and the Senate on April 27, 1988. President Reagan vetoed H.R. Res. 3 on May 24, 1988 with the House overriding the President's veto the same day. The Senate failed to override the Presidential veto on June 8, 1988. A revised form of the bill, H.R. 4848, was adopted by the House on July 13, 1988 and the Senate on August 2, 1988. H.R. 4848 contained identical language to that of the conference committee's final version of the Exon Amendment. *Id.*; 134 Cong. Rec. H5,525 (daily ed. July 13, 1988)(statement by Rep. Roukema). (H.R. 4848 is identical to H.R. 3 except for the elimination of the plant closing notification requirement and the export of Alaskan oil provisions).

<sup>69</sup> Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, Title V § 5021, 102 Stat. 1107, 1425-26(1988).

<sup>70</sup> See 54 Fed. Reg. 29,744 (July 14, 1989) (to be codified at 31 C.F.R. § 800); see generally Skitol & Nash, 'National Security' and Foreign Takeovers in the United States, Fin. Times, Aug. 31, 1989, at 27 (general description of the proposed regulations);

## II. ANALYSIS

The policy justification behind section 5021 is the belief that the federal government needs more explicit authority to review acquisitions of American companies by foreign entities, in order to ensure that United States national security is not threatened.<sup>71</sup> However, the scope of section 5021 is limited to mergers, acquisitions and takeovers which would result in foreign control of an American company.<sup>72</sup> A threshold of 10% ownership by a foreign individual or institution determines the existence of "control" over a company,<sup>73</sup> thus distinguishing foreign "direct investment" from a mere "portfolio investment".<sup>74</sup> The importance of this distinction lies in

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Bellow & Holmer, *Exon-Florio Regs Give President Authority to Block Takeovers*, Nat'l L.J., Aug. 28, 1989, at 22; but see Riddell, *The Task of Matching Sense and Sensibility*, Fin. Times, Sept. 15, 1989, at 18 (arguing that the rules are so discretionary and indefinite that there can be no clear title to property acquired by foreign investors); U.S. *Warning to Foreign Investors*, Fin. Times, July 19, 1989, at 3 (criticizing the vagueness of the regulation).

The regulations state that parties to a section 5021 acquisition may submit "voluntary notice" of the proposed or completed acquisition to the CFIUS. A preliminary decision may then be rendered as to whether a full investigation is required. See 54 Fed. Reg. 29,753 (to be codified at 31 C.F.R. § 800.401).

The scope of section 5021 has been expanded by the proposals to include joint ventures acquiring businesses. *Id.* at 29,752 (to be codified at 31 C.F.R. § 800.301).

However, the regulations did not include a definition of "national security." They did provide some guidance as to what the term encompasses. Companies providing "products or key technologies essential to the U.S. defense industrial base" do receive section 5021 protection, whereas companies providing products or services, such as toys and games, food products, hotels and restaurants, and legal services, do not. *Id.* at 29,746.

Additionally, the proposed regulations did not include provisions designed to limit the potential for abuse of section 5021 as a defensive mechanism to hostile takeovers. See Eizenstat & Fullerton, *Crying 'Wolf' on Takeovers*, Nat'l L. J. July 24, 1989, at 13 (arguing for the inclusion of such provisions).

<sup>71</sup> See *Acquisitions*, *supra* note 8, at 12; TECHNOLOGY ACT, *supra* note 1, at 6.

<sup>72</sup> 50 U.S.C. app. § 2170; but see 54 Fed. Reg. 29,752 (1989) (to be codified at 31 C.F.R. § 800.301) (proposed July 5, 1989). (Joint ventures would be considered an acquisition if the joint venture involved the acquisition of a business.)

<sup>73</sup> See 22 U.S.C. § 3102(10); 15 C.F.R. § 806.15 (1988). ("Foreign Direct Investment in the United States" means the ownership or control, directly or indirectly, by one foreign person of 10% or more of the voting securities of an incorporated United States business enterprise or an equivalent interest in an unincorporated United States business enterprise, including a branch.); see also 54 Fed. Reg. 29,752 (1989) (to be codified at 31 C.F.R. § 800.302) (proposed July 5, 1989). (Purchasing 10% or less of a company's outstanding voting securities is not considered an acquisition.)

<sup>74</sup> See 22 U.S.C. § 3102(11) ("Portfolio investment" is defined as any investment which is not a direct investment); Int'l Trade Admin., Dep't. of Commerce, *United States Trade: Performance in 1987*, at 54 (1988) (portfolio investments include stocks, bonds, bank deposits, loans and annuities).

the fact that only 16% of all foreign-owned assets in the United States qualify under this test as direct investments.<sup>75</sup> Section 5021's inapplicability to portfolio investment review by the President is a continuation of the nation's longstanding policy of open investment. The section's mechanism for intervention into foreign direct investment, however, is nothing more than a xenophobic reaction. The new statute will chill both inbound and outbound foreign investment, will adversely affect American efforts to reduce other nations' investment barriers, and will overshadow current, internationally accepted, protective legislation.

This congressional xenophobia was a prime reason for Fujitsu, Ltd. withdrawing its offer for Fairchild Semiconductors. Fairchild's parent company, Schlumberger, and Pentagon officials both agreed that the real motivation behind section 5021 was concern over Japan's growing edge in the semiconductor field.<sup>76</sup> Ironically, Fairchild was already under foreign ownership,<sup>77</sup> as Schlumberger is a Paris-based corporation.<sup>78</sup>

The post-World War II suspicion in the United States of foreign direct investment in key American national security industries by Japanese investors was exacerbated by Toshiba's 1987 sale of defense secrets to the Soviets.<sup>79</sup> In contrast to its position regarding the Japanese, the Pentagon has undertaken no efforts recently to stop British and French firms from investing in defense-related companies.<sup>80</sup>

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<sup>75</sup> See Int'l. Trade Admin., Dep't. of Commerce, *United States Trade: Performance in 1987*, at 59 (The total breakdown of foreign assets in the United States: foreign private assets in U.S. banks-36%, foreign private holdings of U.S. stocks and bonds-23%, foreign official and private holdings of U.S. Government securities-25%, and foreign direct investment-16%); see also *Hearings of 1975*, *supra* note 3, at 22 (statement of Jack Bennett, Undersecretary for Monetary Affairs, Department of Treasury). (The 16% foreign direct investment figure would be less if the old FDI threshold of 25% ownership was not reduced on January 1, 1975).

<sup>76</sup> See Mitchell, *Pentagon Eases Stand Against Foreign Stakes in U.S. Defense Firms*, Wall St. J., April 28, 1988, at 1, 20, col. 2 (Eastern ed.) [hereinafter *Pentagon Eases Stand*]. (A few months after Fujitsu's \$200 to \$225 million offer was withdrawn, the government allowed Fairchild's sale to National Semiconductor Corp., of Santa Clara, California, for just \$120 million.); see also Bogdanich, *Schlumberger Posts \$2.18 Billion Loss for Fourth Quarter, Maintains Dividend*, Wall St. J., Feb. 13, 1987, at 3, col. 1 (Eastern ed.). (Fairchild was accounted as a discontinued operation because of the then pending sale to Fujitsu. Schlumberger announced an extraordinary loss of \$363 million in the fourth quarter due to Fairchild's discontinued operations.)

<sup>77</sup> See *Pentagon Eases Stand*, *supra* note 76, at 20, col. 2.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 1, col. 6. For example, in 1987, British Aerospace bought a 41% stake in

An examination of the first four instances in which section 5021 was applied affirms this theory of an American paranoia of the Japanese. Only the third CFIUS investigation, involving an agreement by Japan's Tokuyama Soda Co. to acquire General Ceramics, Inc. of New Jersey, resulted in an adverse determination.<sup>81</sup> The remaining investigations, involving German,<sup>82</sup> Luxembourg<sup>83</sup> and Swedish-Swiss<sup>84</sup> companies, received favorable CFIUS recommendations.<sup>85</sup>

Alarmingly, a recent poll suggests that the American public is worried about foreign investment. Seventy-eight percent of the res-

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Reflectone, Inc., a Tampa, Florida maker of flight simulators and information systems. Plessey recently bought Sippican Inc., a Marion, Massachusetts maker of ocean-research and scientific instruments. Other foreign companies seeking United States defense stakes include Paris-based Thomson CSF, Ferranti PLC, General Electric PLC and United Scientific Holdings PLC of the United Kingdom.

<sup>81</sup> See *U.S. Blocks Japanese from Buying N.J. Firm; Nuclear Contract Cited*, Atlanta J. and Const., April 18, 1989, at B6. The Energy Department objected because of classified work by General Ceramics at the Y-12 nuclear weapons plant.

Beryllium ceramics, among the products produced by General Ceramics at the nuclear plant, are a component in electronic circuits used within nuclear weapons. *Id.* A revised offer, excluding the sensitive unit, was later approved by the CFIUS. See Riddell, *The Task of Matching Sense and Sensibilities*, Fin. Times, Sept. 15, 1989, at 18.

<sup>82</sup> See Reid & Priest International Business Transaction Newsletter, June 1989, at 1. (The investigation involved the acquisition by Huels A.G., of West Germany, of Monsanto Electronic Materials Co., a United States manufacturer of silicon wafers.)

The CFIUS investigated the silicon wafer industry and examined how Monsanto's sale would affect the reliability of supply, technology transfer and the relationship Monsanto possesses with SEMATEC, the semiconductor industry research consortium. *Id.*

<sup>83</sup> *Id.* This involved the Luxembourg investment company Minorco's bid to purchase Consolidated Gold Fields, a British firm owning 49% of a leading U.S. gold mining firm.

The investigation resulted from initial concerns relating to Minorco's South African control and the possibility of a concentration of strategic materials in South African hands. The CFIUS determined that U.S. strategic stockpiles, production capabilities and current inventories of these minerals would be sufficient to meet U.S. needs. *Id.*

<sup>84</sup> See *Bush Lets Swiss Firm Buy Westinghouse's Joint-Venture Stake*, Wall St. J., May 18, 1989, at B2 col. 2 (Eastern ed.). The Swedish-Swiss electrical engineering firm Asea Brown Boveri Ltd. sought to acquire Westinghouse's 55% interest in the two companies' joint venture Westinghouse-ABB Power T&D Co..

Certain governmental agencies voiced concern that the sale could result in a reduction in the availability of high-powered electrical transmission equipment, the very equipment produced by Westinghouse-ABB Power. Asea Brown Boveri's confirmation of its intention to continue manufacturing the equipment in the U.S. after the sale resulted in the CFIUS favorable determination. *Id.*

<sup>85</sup> But see Riddell, *The Task of Matching Sense and Sensibilities*, Fin. Times, Sept. 15, 1989, at 18.

pondents favored laws to curb such investment,<sup>86</sup> and a hefty 40% of those sampled wanted the government to ban further foreign investment altogether.<sup>87</sup> In terms of nationality, British investors were considered the most trustworthy business partners for the United States.<sup>88</sup> Despite recent fears that the Japanese are buying up the United States, Commerce Department statistics show that the Japanese are not the largest nor even the second largest investors in the United States in total dollar value of investments. Until 1988, both the British (\$102 billion) and the Dutch (\$49 billion) have consistently undertaken more total direct investment in the United States than have the Japanese (\$53 billion).<sup>89</sup>

The issue of foreign investment in the United States was hotly contested in the recent 1988 presidential campaign. Representative Richard A. Gephardt, a major proponent during his bid for the Democratic presidential nomination of protectionism against the Japanese, recently called for a free-trade agreement between the United States and the European Economic Community,<sup>90</sup> while still adhering to his earlier views regarding the Japanese.<sup>91</sup> In the last

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<sup>86</sup> See Mossberg, *Most Americans Favor Laws to Limit Foreign Investment in U.S., Poll Finds*, Wall St. J., March 8, 1988, at 60, col. 6 (Eastern ed.). (Seventy-eight percent of the Americans polled said they favor a law to limit the extent of foreign investment in the United States.) *World News Tonight* (ABC television broadcast, Oct. 31, 1988) (transcript on file at University of Georgia Law School Library).

<sup>87</sup> See Mossberg, *Most Americans Favor Laws to Limit Foreign Investment in U.S., Poll Finds*, Wall St. J., March 8, 1988, at 60, col. 6 (Eastern ed.). (While 40% supported a ban, 54% opposed any such action).

<sup>88</sup> *Id.* (Thirty-five percent chose the British as opposed to twenty-seven percent for the Japanese. A poll of 100 top public officials and Wall Street and business leaders chose the British thirty-four percent to eighteen percent over the Japanese); see also *And Never the Twain Shall Meet*, THE ECONOMIST, Aug. 19, 1989, at 15 (By 3 to 1, Americans say they now see Japan as a greater threat than the Soviet Union).

<sup>89</sup> See Dep't. of Commerce, 69 *Survey of Current Business* 48 (June 1989). (All figures are as of the end of 1988. Other major investors in the United States include Canada with \$27 billion, West Germany with \$24 billion and Switzerland with \$16 billion).

<sup>90</sup> See Farnsworth, *U.S. Explores Another '92 European Expansion*, N. Y. Times, Nov. 4, 1988, at A22 (another sign of the new focus on Europe was the call last month by Rep. Gephardt for a free-trade arrangement between the U.S. and the E.E.C.); Address by Rep. Richard A. Gephardt, George Washington University International Law Society 8 (Oct. 12, 1988). (Transcript on file at University of Georgia Law School Library). (Best chance for successful bilateral negotiations are with countries culturally, socially and economically like the U.S. Therefore, it would make some sense to start the next bilateral negotiations with the E.E.C..)

<sup>91</sup> Address by Rep. Richard A. Gephardt, George Washington University International Law Society, at 2 (Oct. 12, 1988).

weeks before the November election, then-Vice President Bush criticized Governor Dukakis for trying to "incite fear of foreigners as a cheap means of winning a few votes."<sup>92</sup> Xenophobia, moreover, is not solely an American problem;<sup>93</sup> scholars have lamented the recurrence of this phenomenon both in the United States and abroad.<sup>94</sup>

The effect of section 5021 of the Omnibus Trade and Competitiveness Act of 1988 will be a significant chilling of both foreign direct investment into the United States and of American efforts to invest abroad. In this sense, the Act may be compared to Canada's now-abandoned Foreign Investment Review Act (FIRA).<sup>95</sup> Enactment of the FIRA did not just chill foreign investment into Canada, it put direct investment into a "deep freeze".<sup>96</sup> This negative result occurred despite the FIRA's "optional" applicability, a status much like that argued for section 5021 by its proponents.<sup>97</sup> An investigation or possible ban on foreign investment authorized under section 5021 would substantially affect investments both at the time of the investigation<sup>98</sup> and in the future.<sup>99</sup> Equally significant is the possibility of foreign retaliation against American direct investment abroad.<sup>100</sup> United States holdings of assets abroad totals \$1.07 tril-

<sup>92</sup> See *ABC World News Tonight* television broadcast, Oct. 31, 1988.

<sup>93</sup> See *Investment Hearings of 1974*, *supra* note 12, at 113 (statement of Charles P. Kindleberger, Ford Professor of Economics, Mass. Institute of Technology).

<sup>94</sup> *Id.* at 115; see also *Hearings of 1975*, *supra* note 3, at 247 (statement of Ian MacGregor, Chairman of American Express Inc.).

<sup>95</sup> See *Acquisitions*, *supra* note 8, at 7 (statement of Malcolm Baldrige, Secretary of Commerce).

<sup>96</sup> *Id.* (after seeing the results of FIRA, the Canadians repealed much of it).

<sup>97</sup> Compare *Acquisitions*, *supra* note 8, at 16 (statement of Malcolm Baldrige, Secretary of Commerce; the Canadians argued that they would keep the Act, but would not use it, or would only use it in certain cases.) with *Id.* at 10 (statement of Senator Exon)(the Exon Amendment is not mandatory, it is strictly discretionary).

<sup>98</sup> *Id.* at 50 (statement of Robert McNeill, Executive Vice Chairman, Emergency Committee for American Trade). (The fact that an investigation was made could have a substantial chilling effect on foreign direct investment).

<sup>99</sup> *Id.* at 55 (statement of Richard Darman, former Deputy Secretary of Treasury): Once it becomes a pattern that investments are turned down by a government, a whole host of investment ideas that are in the germination stage in the investing community that might be potential investments in a given country are shut off, because it is not worth the time to invest in the effort to put the deal together for that country.

See also *Id.* at 47 (such barriers would have an adverse effect on United States interest rates and growth, to the extent that they discourage further investment); *Id.* at 48. (It is counterproductive, from the standpoint of an interest in the U.S. balance-of-payments problem, to be closing the international investment regime in exactly the historical context where the United States may have most to gain by opening it).

<sup>100</sup> See *supra* note 12.

lion, \$260 billion of which is in the form of direct investment.<sup>101</sup> The United States is much more exposed to, and has more to lose from, barriers and penalties on investment than any other country.<sup>102</sup> Two-thirds of the United States' economy is now comprised of service industries.<sup>103</sup> A service economy must rely increasingly on receipts from royalties and investments abroad.<sup>104</sup> Numerous United States multinational companies and organizations whose investments and royalty repatriations would be affected by foreign retaliation vigorously opposed section 5021.<sup>105</sup>

A second substantial effect of section 5021 is its adverse effect on efforts to reduce other nations' already-existing investment bar-

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<sup>101</sup> See Int'l Trade Admin., Dep't. of Commerce, *United States Trade: Performance in 1987*, at 58-59. Almost one half of the \$1.07 trillion invested abroad is in the form of loans and other investments by U.S. banks; direct investment totalled one fourth and U.S. Government assets like official reserves, stocks and bonds constitute the remaining quarter. The official \$260 billion book value figure for U.S. direct investment abroad may substantially understate its actual market value. A large portion of this investment consists of investments made 20 or 30 years ago and is recorded at the transaction costs of that time. This is in contrast to much of the foreign direct investment made in the United States which has occurred primarily in the recent past. Real appreciation in the value of American investments abroad and significant inflation during the 1970's make the actual market value of U.S. investments abroad much higher than the recorded historical costs reflected in official statistics.

<sup>102</sup> See Riddell, *The Task of Matching Sense and Sensibility*, *Fin. Times*, Sept. 15, 1989, at 18. (Morgan Guaranty estimates that the current market value of American foreign direct investment abroad is probably three times its book value); see also *Acquisitions*, *supra* note 8, at 7 (statement of Malcolm Baldrige, Secretary of Commerce)(three million Americans are working today as a result of foreign investment); *Investment Hearings of 1974*, *supra* note 12, at 61 (statement of William Casey, Undersecretary of State for Economic Affairs).

<sup>103</sup> See *Acquisitions*, *supra* note 8, at 60 (statement of Richard Darman, former Deputy Secretary, now Secretary of the Treasury).

<sup>104</sup> See *Investment Hearings of 1974*, *supra* note 12, at 61 (statement of William Casey, Undersecretary of State for Economic Affairs):

To balance off [multilateral enterprise] investments, we must export securities and bring in foreign investments to the United States.

As a country which faces increasing needs for resources of energy and raw materials from abroad, we will have to invest abroad and increase the flow of investment earnings to justify that investment, and to balance off that investment we will have to attract investments from abroad. We will have to maintain and strengthen our ability to raise capital throughout the world as well as at home.

<sup>105</sup> See *Acquisitions*, *supra* note 8, at 66,67,72,75. (Letters were received from British Petroleum, North America Inc.; Ciba-Geigy Corporation; the Business Roundtable and the United States Council for International Business. The proposal would invite retaliation by countries which currently welcome investment by multinational companies, including many of the largest American corporations.)



riers.<sup>106</sup> First, it undermines America's bargaining position at the GATT Uruguay Rounds.<sup>107</sup> The Act is contrary to one of the important principles the United States is advocating at GATT, that of the removal by countries of their investment restrictions.<sup>108</sup> The Reagan Administration strongly opposed any measure that would send to America's trading partners a signal that the United States was backing away from its traditional position of leadership on this issue.<sup>109</sup> Second, section 5021 runs counter to United States obligations under a number of friendship, commerce and navigation treaties (FCNs) and the OECD Capital Movements Code and Declaration on National Treatment.<sup>110</sup> Third, it conflicts with the message conveyed by the United States in debt negotiations with developing countries like Brazil and Mexico.<sup>111</sup> These developing countries are vitally important to the United States' economic future because of their potential as future markets for American goods and investment opportunities for American capital.<sup>112</sup> Fourth, efforts to revitalize stagnant industries and regions in the United States will be retarded by any measures that interfere with the direct investment from abroad that has fueled many of these efforts.<sup>113</sup>

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<sup>106</sup> See *Acquisitions*, *supra* note 8, at 75. (Letter from Abraham Katz, President, United States Council for International Business).

<sup>107</sup> *Id.* at 8 (statement of Malcolm Baldrige, Secretary of Commerce); *Id.* at 52 (statement of Robert McNeill, Executive Vice Chairman of the Emergency Committee for American Trade).

<sup>108</sup> *Id.* at 50.

<sup>109</sup> *Id.* at 19; 133 Cong. Rec. S8,740 (daily ed. June 25, 1987) (the bill's undermining of investment initiatives in GATT was cited as one reason for initial Administration opposition to Sen. Exon's amendment).

<sup>110</sup> See *Acquisitions*, *supra* note 8, at 51-52 (statement of Robert McNeill, Executive Vice Chairman, Emergency Committee for American Trade) (stating that § 5021 does not appear to have been adequately examined with respect to its relationship and effect on existing United States treaty obligations, such as FCN's, OECD Codes and Declarations and bilateral investment treaties); *Id.* at 66 (letter from British Petroleum, North America, Inc.); 133 Cong. Rec. S8740 (daily ed. June 25, 1987).

<sup>111</sup> See *Acquisitions*, *supra* note 8, at 7 (statement of Malcolm Baldrige, Secretary of Commerce); *Id.* at 47 (statement of Richard Darman, former Deputy Secretary of Treasury); Murray, *Reagan's Legacy: America For Sale*, Wall St. J., Feb. 29, 1988, at 1, col. 6 (Eastern ed.).

<sup>112</sup> See *Acquisitions*, *supra* note 8, at 54 (statement of Robert McNeill, Executive Vice Chairman, Emergency Committee for American Trade).

<sup>113</sup> See Hicks, *The Takeover of American Industry*, N.Y. Times, May 28, 1989, section 3, at 1 (examples include Firestone, National Steel, Inmont and General Tire).

Moreover, foreign ownership breathes new life into stagnant companies and helps the economy as a result. *Id.* at 9 (statement by economist Michael Dertouzos, chairman of the commission on Industrial Policy at the Massachusetts Institute of Technology).

The aforementioned negative effects of section 5021 need not be suffered, since already-existing mechanisms sufficiently protect the American economy against harmful foreign investment, without threatening the same problems as section 5021.<sup>114</sup> First, the CFIUS already exists to protect national security by analyzing certain proposed mergers and acquisitions, and reporting to the Economic Policy Council if a proposed transaction requires further scrutiny.<sup>115</sup> Second, the powers granted to the President in section 5021 merely repeat those vested in him under the IEEPA.<sup>116</sup> Moreover, section 5021 confers authority on the President to ban an acquisition only after the President determines that the IEEPA is an insufficient means with which to protect national security.<sup>117</sup> Third, there already exist sectoral controls over vital national industries such as aviation, banking, communications, defense, energy, mining and shipping, which controls are consistent with international custom.<sup>118</sup> Fourth, existing regulations allow the government to require foreign purchasers to divest themselves of particularly sensitive operations or permit their acquisitions to be operated as a blind trust.<sup>119</sup>

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Equally important, the United States economy would not continue to expand without foreign investment.

'Like it or not, we have no choice but to accept foreign investment: a major reversal could trigger a sharp, recession and decline in our standard of living,' said Norman J. Glickman and Douglas P. Woodward in *THE NEW COMPETITORS*, their new book about foreign investment in the American economy. 'The withdrawal or slowdown of foreign capital inflows would choke off the funds needed to finance continued domestic growth. Interest rates would inevitably rise. Any policy that severely restricts foreign investment would be counterproductive.' *Id.*

<sup>114</sup> See *Acquisitions* *supra* note 8, at 76 (letter from John Whitehead, Acting Assistant Secretary of State). (Authority currently exists to protect United States national security through restrictions in special sectors of the economy, Presidential authority under IEEPA and the presence of the CFIUS); *Id.* at 11 (statement of Malcolm Baldrige, Secretary of Commerce).

<sup>115</sup> *Id.* at 19-20; 133 Cong. Rec. S8,740 (daily ed. June 25, 1987). (The government argued that § 5021 duplicates investigatory actions of the CFIUS); *but see Foreign Investment in 1982*, *supra* note 20, at 4-5 (statement of Rep. Benjamin Rosenthal) (asserting that CFIUS is a "paper tiger" which lacks the power and purpose to properly protect American interests).

<sup>116</sup> See *Acquisitions*, *supra* note 8, at 14 (statement of Malcolm Baldrige, Secretary of Commerce). See also *supra* notes 39-41 (background information on IEEPA).

<sup>117</sup> See 50 U.S.C. app. § 2170(d)(2); 54 Fed. Reg. 29,755 (1989) (to be codified at 31 C.F.R. § 800.601) (proposed July 5, 1989).

<sup>118</sup> See *Acquisitions*, *supra* note 8, at 5 (statement of Malcolm Baldrige, Secretary of Commerce); see also *supra* notes 31-38 (background information on these sectoral controls).

<sup>119</sup> See *Pentagon Eases Stand*, *supra* note 75, at 20, col. 3; see also *Acquisitions*, *supra* note 8, at 20 (statement of Malcolm Baldrige, Secretary of Commerce).

## IV. CONCLUSION

Unlike other provisions contained in the Omnibus Trade and Competitiveness Act of 1988, section 5021, a product of discriminatory attitudes, is an unnecessary overreaction to a perceived danger which existing controls<sup>120</sup> can adequately remedy. The proposed Fujitsu purchase of Fairchild Semiconductor was the only example of this alleged danger of foreign encroachment specifically cited in both the subcommittee hearings<sup>121</sup> and the final report.<sup>122</sup> Had the sale been approved, all other factors remaining the same, no true loss of national autonomy or security would have occurred.<sup>123</sup> Instead, an unnecessary law was enacted that confers no additional authority on the President and will result solely in a disadvantageous loss of foreign confidence in the United States by its trading partners. Unfortunately, most nations will only observe the statute's billowing smoke of protectionism without realizing that the fire behind it is nothing more than the single glowing ember of the Fujitsu episode.

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<sup>120</sup> See *Pentagon Eases Stand*, *supra* note 75, at 20, col. 2. The Pentagon, citing national security, denied Fujitsu's proposed purchase of Fairchild Semiconductor. The Japanese then withdrew their offer before an antitrust determination on the acquisition was released.

<sup>121</sup> See *generally Acquisitions*, *supra* note 8; but see *id.* at 32 (statement by Robert Mercer, Chief Executive Officer, Goodyear Tire & Rubber, stating that the Exon Amendment would have saved Goodyear from the hostile takeover attempt by British financier Sir James Goldsmith. However, Mr. Mercer admitted the problem faced by Goodyear would have been the same no matter whether it was Goldsmith or American Carl Ichan behind the bid).

<sup>122</sup> See *TECHNOLOGY ACT*, *supra* note 1, at 5.

<sup>123</sup> See *Investment Hearings of 1974*, *supra* note 12, at 26 (letter from Peter Flanigan, Executive Director, Council on International Economic Policy, White House):

A study in England entitled "The Impact of Foreign Direct Investment in the United Kingdom" (the so-called Steuer Report) concluded that:

'In general, our search for concrete cases of loss of national autonomy through inward investment produced very little. Only the most minor indications were found here and there. It is also the case that in many ways the flow of inward investment increases the host country options. One important way is through raising domestic income. And the fact that the foreign firm is foreign, is here on sufferance, and the possibility of exchange control, tend, under present conditions at least, to make it more publicly accountable than domestic firms.'

This quote points out an important fact which is often overlooked with respect to foreign investment- i.e. the assets are under the control of the host country which gives it tremendous residual control over the investment in question. It is not the ownership which is important but what happens to the product.

*Id.*; *supra* note 112.

The adverse effects of section 5021 will be realized at the GATT Uruguay Round negotiations. To reestablish the waning foreign trust in America as a market, section 5021 should be repealed. This would be a harmless and purely advantageous move on the part of the United States. The elimination of section 5021 will not reduce the United States' ability to control foreign direct investment in sensitive industries, but it will restore the needed foreign confidence in the United States as a market and will effectuate the GATT goal of an open investment policy. Failure to do so invites needless retaliation and barriers at the time America requires open investment and trade to solve its budget and trade deficits.

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