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# ARTICLES

## UNITED STATES POLICY TOWARD FOREIGN INVESTMENT: WE CAN'T HAVE IT BOTH WAYS

Elliot L. Richardson\*

### INTRODUCTION

The direction of United States policy toward foreign investment is one of the most important public policy issues facing America today. The competitiveness and future economic vitality of the United States are integrally related to the international flow of capital. The United States must both continue to attract foreign investors to meet this country's requirements for investment capital, and prevent the erection of barriers to foreign investment that would undoubtedly lead to reciprocal action by other governments with serious adverse effects on the ability of American business to meet investment and export opportunities abroad.

Despite the growth of the economies of Western Europe and East Asia, and despite all the changes of the past two decades, the United States retains enormous leadership power around the world, which it can exercise for good or ill. What the United States cannot do, however, is have it both ways. The United States cannot negotiate for more liberal investment policies in other countries, as Congress asked the President to do in the Omnibus Trade and Competitiveness Act of 1988,<sup>1</sup> and at the same time adopt new restrictive trade measures at

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1. See Statement by the President on International Investment Policy, 19 WEEKLY COMP. PRES. DOC. 1214 (Sept. 9, 1983) [hereinafter President's Statement] (stating that the United States will pursue an active international investment policy aimed at reducing foreign government actions that impede or distort investment flows). This policy also is aimed at developing an international system based on national treatment and

home. It is patently impossible to open doors for American business abroad while we slam shut the doors to foreign business in our own country. Quite simply, the United States cannot reverse its traditional policies toward investment without profoundly affecting the policy perspectives of others.

Moreover, even if the United States could surround itself with inward investment restrictions without provoking foreign retaliation, it should not do so. Foreign investment in the United States is not a burden; rather it is a great benefit to our economy. It provides much needed capital to modernize and expand United States productive facilities, enhance international competitiveness, and enable us to meet our fiscal deficit without crushing inflation. The United States needs investment capital from abroad because not enough is available domestically to meet the needs of a growing economy.<sup>2</sup>

The economic leadership of the United States is not a birthright; it must be earned. The United States must work to maintain a high standard of living. The competition can no longer be taken for granted. Nevertheless, continued United States leadership is vital on issues affecting the increasingly interdependent world, such as reducing barriers to trade and investment, promoting economic expansion in the Third World, and coming to grips with the crushing external debt of many developing countries. This article will address these issues by focusing on what should be the long-term goals of United States policy toward foreign investment in the United States.

## I. HISTORICAL BACKGROUND

The fundamental policy of the United States government toward international investment is neither to promote nor discourage inward or outward flows of capital.<sup>3</sup> This has been described as an open invest-

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most favored nation principles that permit investment flows to respond more freely to market forces. *Id.*

2. *Id.*; see *Federal Collection of Information on Foreign Investment in the U.S.: Hearing before the Senate Comm. on Commerce, Science and Transportation*, 100th Cong., 2d Sess. 39 (1988) (statement of Robert Ortner, Under-Secretary of Commerce) (stating that the United States opposes government intervention that impedes or distorts investment funds); *Disclosure of Foreign Investment in the United States: Hearing before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 99th Cong., 1st Sess. 91 (1986) (testimony of Stephen J. Canner, Dir., Int'l Investment Office, Treasury Dep't.) (stating that the maximum contribution of foreign investment occurs when it flows according to market forces).

3. See President's Statement, *supra* note 1, at 1216 (stating that the United States intends to continue its efforts to reduce or eliminate measures that restrict, distort, or place undue burdens on international direct investment flows).

ment policy.<sup>4</sup> Another way of saying this is that the traditional United States policy toward foreign investment is to welcome foreign investment that flows according to market forces.<sup>5</sup>

From the birth of the United States as a nation until the eruption of the First World War, the United States was a net borrower in financial markets.<sup>6</sup> Foreign investment was an important element for the success and growth of the United States economy in the nineteenth century. Foreign investors profited. American industry boomed. The United States economy expanded. This history illustrates our very early experience with the "win/win" nature of inward foreign investment in productive resources. And all that time, foreign investment never involved the loss of the economic or political independence of the United States.

Following the Second World War, when most other economies were languishing from the effects of the war, the United States economy was preeminent. American business filled the vacuum and expanded abroad, giving rise to the term "multinational corporation." All across the globe, American companies invested working capital, built new plants, created jobs, and transferred technology in fulfillment of an international business strategy. This was far from an eleemosynary undertaking; indeed, American business reaped great rewards, as did the countries in which such investments were located. For example, income from American overseas direct investment was on average about 14 percent of the asset value throughout the 1980s, compared with a return on assets for all American manufacturing corporations of seven to eight percent during the same period.<sup>7</sup> This too illustrates the "win/win" nature of foreign investment. It is worth noting, by the way, that while the war-torn world was dependent on American investment and aid, the United States economy was driven almost entirely by domestic growth.<sup>8</sup> Foreign trade and investment were only minor parts of eco-

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4. *Hearings before the Subcomm. on Commerce, Consumer Protection, and Competitiveness of the House Energy and Commerce Comm.* 100th Cong., 1st Sess. 1 (1987) (testimony of David C. Mulford, Assistant Secretary, International Affairs, United States Department of the Treasury).

5. See President's Statement, *supra* note 1, at 1216 (stating that an open international investment system responding to market forces provides the best and most efficient mechanisms to promote global economic development).

6. Lipsey, Schimberni & Lindsay, *Changing Patterns of International Investment In and By the United States*, in *THE UNITED STATES IN THE WORLD ECONOMY* 475, 476 (M. Feldstein ed. 1988).

7. U.S. DEP'T COMMERCE, 68 SURV. OF CURRENT BUS. 41, 78 (June 1988) [hereinafter SURVEY]; Census Bureau, *Quarterly Financial Report for Manufacturing, Mining, and Trade Corporations* (1981, 1st quarter - 1987, 1st quarter).

8. For example, throughout the decade of the 1950s, United States real exports represented about 5 percent of real GNP. By the mid-1970s to present, this figure has more than doubled to more than ten percent. ECONOMIC REPORT OF THE PRESIDENT

conomic life. It is, therefore, not surprising that international investment, either inward or outward, was never in the forefront of the American public's consciousness.

But the economic disequilibrium engendered by the Second World War, severe though it was, was only temporary. The global economic balance has again shifted. Although the United States economy remains the largest in the world and has been growing at a fairly rapid pace, other economies have grown much more rapidly,<sup>9</sup> and have reduced American dominance. This is unsettling, of course, especially to those who may have assumed that economic dominance was an immutable aspect of the United States and being American. Viewed from this perspective, it is understandable that the recent surge in foreign investment<sup>10</sup> has prompted fears that foreigners are "buying up America," and that the political and economic destiny of the United States is in some way jeopardized.<sup>11</sup>

In a broader perspective, the current situation reflects confidence in the United States economy and its continuing attractiveness as a place to invest money. The fact that foreigners are now in a position to provide a larger share of global investment capital is a natural consequence of the recovery of the industrialized countries from the Second World War.<sup>12</sup> This, in turn, is a measure of the success of United States policies in favor, initially, of European and Asian recovery from the Second World War and, thereafter, in support of an open and expanding international economy.

Obviously, however, the result is not all roses. Other countries, rather than sinking into poverty or being swayed by radical ideologies, are now competing with the United States in the global marketplace. Rather than becoming military and ideological adversaries, they have become tough economic competitors.

C. Michael Aho of the Council on Foreign Relations summed up our present situation this way:

The channels linking the U.S. with the global economy have become deep and

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1988 250-51 (Feb. 1988).

9. *See id.* at 374 (listing the growth rates in real gross national product for 1961 through 1987 for OECD countries, the European Community, developing countries, and communist countries).

10. SURVEY, *supra* note 7, at 41.

11. *See generally* TOLCHIN & TOLCHIN, BUYING INTO AMERICA: HOW FOREIGN MONEY IS CHANGING THE FACE OF OUR NATION (1988) (citing the fear that the United States is "'addicted' to foreign capital").

12. *See* ECONOMIC REPORT OF THE PRESIDENT 1988, *supra* note 8, at 374 (listing the growth rates in real gross national product for 1961 through 1987 for OECD countries, the European Community, developing countries, and communist countries).

wide, and they transmit shocks in both directions. Over 70 percent of U.S. manufacturing competes directly with foreign firms. Today vast electronic networks integrate American capital markets into a global financial network, Americans depend on these capital networks for investment opportunities, and increasingly as a source of funds. International financial flows now swamp trade flows on world markets. The volume of interest sensitive funds on world markets has grown exponentially as highspeed computers and communications technologies have lowered transaction costs and rendered political boundaries almost meaningless.<sup>13</sup>

This Article will discuss why this development is not in any way ominous and, in fact, why it is good for the United States.

## II. LEVEL AND EXTENT OF FOREIGN INVESTMENT

As of mid-1988, United States investors had under \$1.2 trillion invested abroad<sup>14</sup> while foreigners had invested somewhat more than \$1.6 trillion in the United States.<sup>15</sup> These figures include private and governmental investments. Tables I and II in the Appendix to this Article show United States and foreign holdings, respectively, by major categories. It should be noted that nonofficial holdings represent the bulk of internationally-held assets. In turn, these private investments are divided into two categories: "direct" (ownership of 10 percent or more of the equity or its equivalent in a business) investment and "portfolio" (all other) investment.

### A. UNITED STATES INVESTMENT ABROAD

#### 1. U.S. Direct Investment

For many years, but particularly since the Second World War, American businesses have been making direct investments abroad. As of the end of June 1988 these investments totaled \$315 billion as they are normally measured, *i.e.*, based on their "book" value (the price paid when the asset was acquired).<sup>16</sup> The United States Chamber of Commerce estimated, however, that as of the end of 1987, the market value of American overseas assets exceeded the value of foreign-held

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13. Address by C. Michael Aho, *After Reagan: Confronting the Changed Global Economy*, Bankers' Assoc. for Foreign Trade 3 (April 24-28, 1988).

14. SURVEY, *supra* note 7, at 77; Dilullo, *U.S. Dep't Commerce, U.S. Int'l Transactions, Second Quarter 1988, Table A-Summary of U.S. International Transactions*, 68 SURVEY OF CURRENT BUSINESS 39 (Sept. 1988) [hereinafter SURVEY 2].

15. SURVEY, *supra* note 7, at 78; SURVEY 2, *supra* note 14, at 39.

16. See SURVEY, *supra* note 7, at 78 (documenting international investment position of the United States); SURVEY 2, *supra* note 14, at 39 (documenting United States international transactions).

assets in the United States by about \$200 billion.<sup>17</sup> Because most of the \$282.6 billion in foreign direct investment in the United States was made recently,<sup>18</sup> its book value more closely reflects its market value. By either measure, therefore, the United States has significantly more direct investment abroad than is invested in the United States.

## 2. *United States Portfolio Investment*

Portfolio investment consists of all privately-held assets other than direct investments, and includes both debt and equity holdings.<sup>19</sup> Much of these holdings are sensitive to interest rate differentials and can easily be transferred internationally. These portfolio investments constitute about seventy percent of all American private foreign investment abroad.<sup>20</sup>

### B. FOREIGN INVESTMENT IN THE UNITED STATES

#### 1. *Foreign Direct Investment*

Although foreign investment in the United States has always existed, it began to surge in the early 1980s.<sup>21</sup> This timing is worth noting. Although many people associate the increase in foreign purchases of United States assets with the relatively lower value of the dollar since late 1985, the pace of foreign investment actually began to accelerate during the early 1980s, when the value of the dollar was rising relative to foreign currencies.<sup>22</sup> The annual rates of increase in foreign direct investment in 1986 and 1987 were only two-thirds of those achieved in these earlier years.<sup>23</sup> This tends to confirm the fact that it is the strength of the United States economy that has attracted foreign investors. Although it has grown rapidly, the \$282.6 billion foreign direct investment in the United States still constitutes only about five percent

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17. W. MACREYNOLDS, *FACTS AND FALLACIES ABOUT FOREIGN INVESTMENT* 3 (U.S. Chamber of Commerce Policy Working Papers, June 1988).

18. *See* SURVEY, *supra* note 7, at 41 (stating that, for example, from 1982 to 1986, foreign assets in the United States more than doubled from \$102 billion to \$211 billion).

19. *Id.*

20. *See id.* (stating that in 1986 the net private assets abroad of the United States amounted to \$96,303,000, of which \$68,492,000 or approximately 70%, was from privately-held assets other than direct investments).

21. *See id.* (showing that between 1980 and 1987, net foreign investment in the United States increased from \$58,112,000 to \$211,490,000).

22. *See id.* (documenting the acceleration of foreign investment during the 1980s).

23. *See id.* (listing the amounts of direct foreign investment for the years from 1980 through 1987).

of United States assets.<sup>24</sup> Thus, in relative terms, foreign investment has remained fairly small.

## 2. Foreign Portfolio Investment

Private portfolio holdings of United States assets by foreigners consists of a mix of public and private securities, deposits with banks in the United States, and similar investments. (The public securities include United States Treasury notes and debt instruments issued by other governmental authorities.) The largest area of foreign portfolio investment is with banks, followed by holdings of federal government securities other than those issued by the United States Treasury.<sup>25</sup>

As of June 30, 1988, portfolio holdings by foreigners exceeded one trillion dollars.<sup>26</sup> These liquid and interest-sensitive assets have accounted for about 80 percent of all foreign investment in the United States throughout this decade.<sup>27</sup>

### C. TRENDS IN INVESTMENT FLOWS

Despite the popular perception that foreign investment is a one-sided affair, American business continues to invest abroad.<sup>28</sup> According to the Bureau of Economic Analysis at the Commerce Department, in 1987 the value of direct investments by foreigners here and by Americans abroad each rose 19 percent.<sup>29</sup>

The parallel increases of American investment abroad and foreign investment here make it difficult to discern any net trend. The reasons for foreign investment flows are complex. At one level, however, it would be fair to say that foreign investment is a part of the process of the internationalization of industries, a process that has been taking place for about two decades. Thus, as Thorton Bradshaw commented

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24. Hersey, *Foreign Stake in U.S. Rose to Record in '87*, N.Y. Times, July 1, 1988, at D1 (quoting Under Secretary of Commerce Robert Ortner). Another study of the share of all foreign-owned financial assets in the United States puts this share at between 4 and 5 percent. Memorandum from Betty Barker, Chief, International Investment Division, Bureau of Economic Analysis, Department of Commerce, to Robert Ortner, Undersecretary of Commerce for Economic Affairs, How Much of the United States Is Foreign Owned (Mar. 9, 1988) (unpublished memorandum) (on file with The American University Journal of International Law and Policy).

25. See SURVEY, *supra* note 7, at 78 (noting foreign investment in United States banks in the amount of \$539 billion, and in United States Treasury notes in the amount of \$78 billion).

26. *Id.*; SURVEY 2, *supra* note 14, at 78.

27. SURVEY, *supra* note 7, at 78.

28. See *id.* at 76-80 (discussing United States direct investment abroad).

29. Hersey, *supra* note 24, at D1.



when he was Chairman of RCA, business is moving toward the point where it invests based on a series of factors with national boundaries only one of many considerations. The process is much the same that a New York corporation would go through in deciding to locate a facility in New Mexico, Nevada, or California.

Foreign investment in the United States is also, in part, a fulfillment of the internationalization strategy being pursued by companies in other countries, just as American companies transformed themselves into multinational corporations in the 1950s and 1960s. This includes considerations such as risk diversification, proximity to markets, economies of scale, and so forth. If anything, an increase in foreign investment is a consequence of the globalization of markets and the internationalization of industries.

And, as previously noted, the increase in foreign investment in the United States indicates that the international business community believes that our economy will continue to be an attractive market for investment.

#### D. COUNTRIES INVESTING IN THE UNITED STATES

All Organization for Economic Cooperation and Development ("OECD") countries have businesses with investments in the United States.<sup>30</sup> By far, the British are the largest investing nationality in the United States with \$75 billion or almost 29 percent of total direct foreign investment.<sup>31</sup> American investment constitutes 50 percent of all foreign direct investment in the United Kingdom.<sup>32</sup> The Dutch are the second largest investing nationality, with \$47 billion, comprising almost 20 percent of total foreign investment in the United States.<sup>33</sup> By way of contrast, in 1987, American investors comprised 40 percent of foreign investment in The Netherlands.<sup>34</sup> The Japanese are the third largest investing nationality, with \$33.4 billion or 12.7 percent of the total foreign investment in the United States.<sup>35</sup> American investors are the largest foreign investors in Japan with 44.1 percent of the total foreign investment in 1987.<sup>36</sup> In fourth place are Canadian investors with \$21.3

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30. See Appendix, Table III (charting foreign direct investment by country); U.S. DEP'T COMMERCE, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES OPERATIONS OF U.S. AFFILIATES OF FOREIGN COMPANIES PRELIMINARY 1986 ESTIMATES Table 8 (June 1988).

31. SURVEY, *supra* note 7, at 83.

32. Telephone interview with the Embassy of Great Britain (Sept. 20, 1988).

33. SURVEY, *supra* note 7, at 83.

34. Telephone interview with the Embassy of The Netherlands (Sept. 20, 1988).

35. SURVEY, *supra* note 7, at 83.

36. Telephone interview with the Embassy of Japan (Sept. 19, 1988).

billion or 8.3 percent of the total foreign investment in the United States.<sup>37</sup> This compares with American investment in Canada in 1987 comprising seventy-two percent of its total foreign investment.<sup>38</sup> These figures clearly show that foreign investment is a two-way street.

These figures also indicate that the United States share of foreign investment in each of the countries mentioned is larger than the country's share of foreign investment in the United States. Despite the large United States foreign investment presence, political interference of American businesses in the internal affairs of these countries has proven to be a non-issue. Of course, American companies have pursued their own economic self-interest within the framework of the political system of each host country. This is distinctly different, however, from dominating the political destiny of these great trading partners. Similarly, there is no reason to believe that the relatively smaller shares of foreign businesses from each of these countries will lead to the loss or diminution of the political or economic sovereignty of the United States.

#### E. SECTORAL INVESTMENTS IN THE UNITED STATES

Just as foreign direct investment in the United States stems from many national sources, it is also widely distributed on a sectoral basis. Tables IV and V, in the Appendix to this Article, illustrate respectively the sector-by-sector position and annual flow of foreign direct investment for 1980 through 1987. Over this period of time, manufacturing has almost always been the largest recipient of direct investment. In 1987, for example, the manufacturing sector received almost half of all foreign direct investments made that year.<sup>39</sup> Within manufacturing there is also a widespread distribution by national ownership among the foreign investors in manufacturing. This distribution accords with the overall direct investment position of countries in the United States except that a number of European investors, such as West Germans, French, and Swiss, rank ahead of the Japanese, as do the Canadians.

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37. SURVEY, *supra* note 7, at 83.

38. Telephone interview with the Embassy of Canada (Sept. 20, 1988).

39. SURVEY, *supra* note 7, at 83.

### III. UNITED STATES POLICY TOWARD FOREIGN INVESTMENT

#### A. TRADITIONAL UNITED STATES POLICY

##### 1. *The Free Flow of Capital Benefits the United States and Global Economies*

The United States has traditionally welcomed foreign investment that flows in response to market forces.<sup>40</sup> The federal government does not normally provide special incentives or disincentives to investment flows and does not normally intervene in the decisions of individual companies regarding international investment. The federal government does accord national treatment to foreign investors; that is, the United States government treats foreign investors the same as American investors.

The basic premises of United States policy toward foreign investment are:<sup>41</sup>

—International investment generally results in the most efficient allocation of economic resources if it is allowed to flow according to market forces.

—There is no basis for concluding that a general policy of actively promoting or discouraging international investment would further the United States national interest.

—Unilateral United States government intervention in the international investment process might trigger actions by other governments with adverse effects on the United States economy and United States foreign policy.

—The United States has an important interest in seeking to assure that American investors abroad receive national treatment.

The United States policy toward foreign investment is rooted in the national self-interest of the United States. This country has maintained an open door policy for foreign investment not as an accommodation to foreigners or their governments, but rather because of the benefits foreign investment provides to the United States economy. The United States has viewed foreign investment as a means of growth, a way of introducing new technologies and management skills, expanding employment, and increasing productivity.

It bears emphasis that foreign investors are subject to all the laws

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40. See President's Statement, *supra* note 1, at 1216 (stating that an open international investment system responding to market forces provides the best and most efficient mechanism to promote global economic development).

41. *Id.*

and regulations of the United States and, by and large, foreign investors are very good corporate citizens of the United States. It therefore, is beneficial to enhance the constructive engagement of foreign-owned corporations in the American communities in which they operate through programs of dialogue, education, and community assistance. In fact it is encouraging to see how positively foreign investors are taking up these traditional American activities and their associated values.

## 2. *The United States Has Worked at the Multilateral and Bilateral Levels to Reduce Barriers to Investment*

The United States has been in the forefront of efforts to liberalize restrictive investment practices multilaterally in the OECD and the General Agreement on Tariffs and Trade (GATT) and bilaterally. This policy was most recently set forth in Section 1102(b)(1)(B)(ii) of the Omnibus Trade and Competitiveness Act of 1988,<sup>42</sup> which authorizes the President to negotiate the elimination of barriers to international investment that distort international trade.

At the multilateral level, the United States is currently engaged in two mutually reinforcing efforts to further liberalize investment regimes: the inclusion of Trade-Related Investment Measures, or TRIMs, in the Uruguay Round of GATT negotiations, and the initiative to strengthen the National Treatment Instrument of the OECD.

The Uruguay Round offers the latest opportunity for the GATT to address the impact of government interference with foreign direct investment on international trade.<sup>43</sup> The United States position on TRIMs was stated in the following terms:

The trade restricting and distorting effects of investment measures are a function of government actions or policies. The results of these measures are, *inter alia*, import, export and manufacturing patterns distorted relative to what the patterns would have been absent such government intervention. The ability of an enterprise to respond to developments in the marketplace is impaired. Depending on the "investment measures" chosen, these distortions and rigidities reach beyond the trade of the individual investor which may have agreed to them and even the broader bilateral trade of the two countries. The multiple use of investment measures correspondingly multiply trade distortions.<sup>44</sup>

The OECD has begun to focus on a work program that includes a strengthened National Treatment Instrument, better support for

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42. Pub. L. 100-418, 102 Stat. 1107 (1988).

43. Statement by the United States Delegation to the Uruguay Round Negotiating Group on Trade-related Investment Measures 1 (Apr. 1987).

44. *Id.*

GATT negotiations on Trade-Related Investment Measures, and more analytical support to understand positive and negative factors affecting investment flows to the Less Developed Countries (LDCs) and to encourage a healthier investment climate in developing countries.

Finally, at the bilateral level, the United States has negotiated national treatment provisions in numerous Friendship, Commerce, and Navigation treaties<sup>45</sup> and in all ten of the bilateral investment treaties we have signed.<sup>46</sup> Most recently, the United States/Canada Free Trade Agreement liberalized capital restrictions,<sup>47</sup> paving the way for increased American investment in Canada.

## B. THE TRADITIONAL UNITED STATES POLICY SHOULD NOT BE CHANGED

### 1. *The United States is a Beneficiary of Foreign Investment*

#### a. *Foreign investment, like domestic investment, promotes real growth*

Like domestic investment, foreign investment promotes real growth and increases the competitiveness of American industry. It adds to the industrial capacity of the economy by expanding the nation's stock of new plants and equipment. This is particularly important at this time because, in the economy as a whole and in many manufacturing sectors, the United States is operating at the highest levels of capacity utilization in eight years.<sup>48</sup>

In order to continue to grow domestically and to exploit our comparative advantage in the global marketplace (including the relatively low value of the dollar) and thereby to increase our international market share, the United States needs to expand its industrial base. This, of course, is in large measure dependent upon the availability of invest-

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45. *E.g.*, Treaty of Friendship, Commerce, and Navigation (United States and Netherlands), with Protocol and Exchange of Notes, *entered into force* Dec. 5, 1987, 8 U.S.T. 2043, T.I.A.S. No. 3942, 85 U.N.T.S. 231.

46. *E.g.*, Treaty Between the United States of America and the Republic of Senegal Concerning the Reciprocal Encouragement of Investment, Dec. 6, 1983, United States-Senegal, *reprinted in* Investment Laws of the World, 1983 INVESTMENT PROMOTION AND PROTECTION TREATIES 99 (ICSID ed. 1986); Treaty Concerning the Reciprocal Encouragement and Protection of Investments, Dec. 3, 1985, Turkey - United States, *reprinted in* 25 I.L.M. 85 (1986).

47. United States - Canada Free Trade Agreement, Pub. L. 100-449 (1988), Chapter 16.

48. BOARD OF GOVERNORS, FEDERAL RESERVE SYSTEM, STATISTICAL RELEASE, CAPACITY UTILIZATION: MANUFACTURING, MINING, UTILITIES AND INDUSTRIAL MATERIALS 1 (Sept. 15, 1988) (unpublished release) (on file with The American University Journal of International and Policy).

ment capital at reasonable interest rates.

*b. Foreign investment helps keep domestic interest rates down*

At least until the budget deficit is eliminated, foreign investment will continue to exert downward pressure on American interest rates. Lower interest rates benefit the United States economy, encouraging domestic business expansion and creating new jobs. One well-known economist, Stephen Marris, of the Institute for International Economics, estimated that real United States interest rates would have to rise by 3.5 to 5.5 percent in the absence of the surge in foreign investment the United States has experienced since 1981.<sup>49</sup> These higher interest rates would have serious adverse consequences for the United States economy and would almost certainly precipitate a recession.<sup>50</sup> This is one of the principal reasons why a great many in the American private sector and the Reagan administration opposed the Bryant amendment to the Omnibus Trade and Competitiveness Act of 1988,<sup>51</sup> and H.R. 5410.<sup>52</sup> These two measures would require public disclosure on a company-by-company basis of confidential business information, the effect of which would be to discourage foreign investment in the United States at a time when it is needed to help sustain the economy.

*c. Foreign direct investment employs approximately three million Americans<sup>53</sup>*

Some foreign direct investment that results in the employment of Americans is "greenfield" investment, such as the new Japanese auto plants in Tennessee and Ohio. A larger portion of foreign investment results from the acquisition of existing enterprises.<sup>54</sup> The greatest concentration of foreign direct investment in the United States is in the manufacturing sector. Importantly, while employment overall in American manufacturing declined 6.4 percent between 1980 and 1986,<sup>55</sup> em-

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49. S. MARRIS, *DEFICITS AND THE DOLLAR: THE WORLD ECONOMY REVISITED* 44, 140-41 (rev. ed. 1987).

50. *Id.*

51. Omnibus Trade and Competitiveness Act, Pub. L. No. 100-418, 102 Stat. 107 (1988).

52. H.R. 5410, 100th Cong., 2d Sess. (1988). A virtually identical measure was introduced in the first Session of the 101st Congress as H.R. 5.

53. Howenstine, *United States Affiliates of Foreign Companies: Operations in 1986*, 68 SURV. OF CURRENT BUS. 50, 57 (Dep't. of Comm. May 1988).

54. Herr, *U.S. Business Enterprises Acquired or Established by Foreign Direct Investors*, 68 SURV. OF CURRENT BUS. 56-57 (Dep't. of Comm. May 1988).

55. ECONOMIC REPORT OF THE PRESIDENT 1988, *supra* note 8, at 256.

ployment by American affiliates of foreign firms rose 25 percent in the same period.<sup>56</sup> This suggests that many blue-collar jobs would have been lost but for foreign investment. One example is Bridgestone's acquisition of Firestone. Several years ago, the once thriving Firestone plant in La Vergne, Tennessee, faced a shutdown. Almost 400 people had already been laid off, and further reductions were imminent. Bridgestone purchased the faltering company and breathed new life into the plant. While most analysts are aware that the employment effects of foreign investment deserve further microeconomic analysis, the three million figure is the best available approximation.

The United States economy is, moreover, a beneficiary in another way of foreign acquisitions of American business enterprises. Just as American shareholders generally receive premium prices as a result of domestic acquisitions, they also receive premium prices from foreign purchasers. These funds, in turn, are usually reinvested in the United States economy, and help to expand the American industrial base. This enhances the ability of the United States to exploit its comparative economic advantage and make significant gains in the international market share.

*d. Foreign direct investment facilitates the introduction of new technologies and management practices*

Along with foreign investment comes new technologies and management techniques which strengthen the American industrial base. It goes almost without saying that, in a world where the United States is striving to maintain a competitive edge, access to technology from abroad is highly desirable. Many foreign investors bring in new products, new production technologies, and new management methods. Foreign investors are often at the cutting edge. One illustration is that research and development spending by American affiliates of foreign firms has increased at a considerably faster rate than the average for all American industry.<sup>57</sup>

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56. See generally U.S. DEP'T COMMERCE, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES (various issues 1980-1986) (offering annual estimates made up by the Bureau of Economic Analysis of operations of United States affiliates of foreign companies).

57. *Id.*; U.S. DEP'T COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 567 (1988).

*e. Foreign direct investment benefits American consumers by increasing competition*

Foreign direct investment stimulates competition, which directly benefits the American consumer through lower prices and a wider selection of goods. In order to compete industries must cut costs, improve products, and satisfy the consumer. Without foreign investment American consumers would have to pay higher prices for lower quality goods.

*f. Foreign direct investment in the United States is the other side of the coin to American freedom to invest abroad*

The United States is a major foreign investor with more to gain than to lose from freer investment regimes internationally. Foreign investment is not a zero-sum game: both the international economy and the United States domestic economy stand to benefit from the growth effects of freer, more efficient capital allocation. In negotiations with developing countries with large external debt, the United States has emphasized time and again the virtues of an open investment policy that creates a hospitable environment for foreign capital. A retreat from this position at home would undercut our efforts with these countries abroad.

*g. Foreign direct investment expands American access to foreign markets*

When foreign businesses invest in the United States, they bring with them access to markets in their home countries. This access to foreign markets is also linked to the home market business network of foreign parent companies. It is, therefore, not surprising that foreign-owned manufacturing affiliates in the United States exported at a significantly greater rate than all manufacturers.<sup>58</sup> Further, and perhaps contrary to the general perception, imports by American manufacturing affiliates of foreign firms rose less rapidly than did overall American imports of manufactures.<sup>59</sup>

*2. The Continued Health of the United States Economy is Dependent upon Foreign Investment*

Three factors tend to make the United States economy dependent on foreign investment. First, the record federal budget deficits have been

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58. See Appendix, Table VI.

59. See Appendix, Table VII.



funded by the sale of government securities. The national debt has almost tripled since 1980 and no end is in sight to the annual budget deficits.<sup>60</sup> During the same period, the United States economy grew annually in nominal terms by 7.4 percent.<sup>61</sup> The combined effect of private and public borrowing, in turn, has been to attract a substantial inflow of foreign capital into the United States.

Second, the international trade deficit of the United States has seen an unprecedented volume of dollars flowing abroad.<sup>62</sup> These dollars do not simply evaporate. Instead, many must be invested in dollar-denominated assets. One of the most attractive places for this, of course, is in the United States.

Third, the United States has relatively low domestic savings.<sup>63</sup> Unless the United States is able to meet its investment needs from the savings of its own citizens, it will remain dependent upon foreign capital. It would be preferable, of course, to reduce American dependence on foreign capital, but given the current situation, the United States would be far worse off without it.

*a. The federal budget deficit has been funded by borrowing and attracting large inflows of foreign investment into the United States*

As of November 1988, the current expansion of the United States economy has extended for almost six consecutive years, the longest peacetime period of growth in the history of the United States economy. In 1987, the real output of the economy rose by 3.4 percent,<sup>64</sup> with three million additional jobs created.<sup>65</sup> The inflation rate remained in the four percent range, well below the double-digit rates at the outset of this decade.<sup>66</sup>

During this period, gross private investment has averaged 16 percent

60. See ECONOMIC REPORT OF THE PRESIDENT 1988 *supra* note 8, at 337 (calculating the deficit from Table B-76).

61. *Id.* at 248 (calculating national income from Table B-1); U.S. DEP'T COMMERCE, NATIONAL INCOME AND PRODUCT ACCOUNTS, SECOND QUARTER 1988 GNP, REVISED ESTIMATES: 1985 THROUGH FIRST QUARTER 1988 Table 3 (1988) [hereinafter NAT'L INCOME AND PRODUCTS ACCTS. 1988].

62. See SURVEY, *supra* note 7, at 40-41 (analyzing United States assets abroad and capital outflow).

63. See ECONOMIC REPORT OF THE PRESIDENT 1988, *supra* note 8, at 100 (discussing domestic savings); Frankel, *International Capital Flows and Domestic Economic Policies*, in THE UNITED STATES IN THE WORLD ECONOMY, 609 (M. Feldstein ed. 1988) (describing low levels of savings in the United States).

64. NAT'L INCOME AND PRODUCTS ACCTS. 1988, *supra* note 61, Table 3.

65. See ECONOMIC REPORT OF THE PRESIDENT 1988 *supra* note 8, at 284 (calculating new jobs created from Table B-32).

66. NAT'L INCOME AND PRODUCTS ACCTS. 1988, *supra* note 61, Table 2.

of the Gross National Product (GNP).<sup>67</sup> At the same time, the annual budget deficits of the federal government have hovered at about four percent of GNP, reaching levels in excess of \$200 billion a year, until the recent decline brought about by the balanced budget initiative.<sup>68</sup> But even the balanced budget initiative has yet to achieve a reduction in the structural deficit.

It bears repeating in this context that the budget deficit has been funded by the sale of government securities which have competed with private borrowers for available funds. In a sense, this competition for investment capital has acted like a vacuum, attracting all available capital, both domestic and foreign. Without foreign investment in the United States, interest rates would have risen dramatically, as the federal government would be competing with the American private sector for a smaller pool of funds.<sup>69</sup>

*b. The United States trade deficit has shifted billions of dollars abroad that ultimately return to the United States*

Since 1980, the huge and persistent United States current account deficit has shifted more than \$630 billion abroad.<sup>70</sup> Once overseas, however, the foreign owners of these dollars must put them somewhere. Eventually almost all these United States dollars will return to the United States economy in one of three forms: direct investment, portfolio investment, or as purchases of American exports.<sup>71</sup>

*c. The domestic savings rate is insufficient to provide the capital needed to meet American investment demands at reasonable interest rates*

Throughout this decade, the overall national savings rate in the United States has been insufficient to finance the demand for capital from the American private and public sectors.<sup>72</sup> This posed a dilemma for the United States economy. And it is the essence of a dilemma that one must choose between two alternatives and this was certainly the case with the need for investment capital. At one extreme, the United

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67. ECONOMIC REPORT OF THE PRESIDENT 1988, *supra* note 8, at 100.

68. *See id.* at 337 (calculating deficit and decline from Table B-76).

69. *See supra* note 49 and accompanying text (describing how interest rates stay low due to capital inflows).

70. *See SURVEY 2, supra* note 14 (showing United States money spent abroad).

71. SURVEY, *supra* note 7, at 100.

72. *See ECONOMIC REPORT OF THE PRESIDENT 1988, supra* note 8, at 100 (discussing the relationship between national savings and the net inflow of foreign capital).

States could rely on inadequate domestic funding, which surely would have meant less growth, higher interest rates, more unemployment, a greater rate of inflation, and a less competitive United States economy in the global marketplace. At the other extreme, the United States could borrow to meet its need for capital, leading to greater domestic expansion, more jobs, lower interest rates, lower inflation, and a more competitive economy in the global marketplace. The United States made the obvious choice.

During this period of reassessment of American policy toward foreign investment, the United States necessarily revisits the same dilemma. Until domestic savings increase, the United States will continue to be dependent upon foreign investment to meet its capital demands.

### *3. The United States Nevertheless Remains the Leader of the Western World and Has a Responsibility to Avoid Protectionism*

Not too long ago, it was said that "when the United States sneezes, Europe catches a cold." This was an appropriate metaphor to describe the economic relationship between the United States and the rest of the industrialized world from 1945-1970 — the period of recovery from the Second World War. Although the economic gap has narrowed between the United States and the other industrialized countries, the United States still has the largest economy, as well as the greatest military power. For these and other reasons the United States remains the natural leader of the western democracies. If anything, the need for the United States to assert its leadership has never been greater. This is, in part, a function of the economic interdependence that has developed, by which the health of all the industrialized economies depends upon their ability to achieve greater economic policy coordination. For an illustration of this point, one need only recall the stock market crash in October 1987, in which the precipitous decline in the American markets sent shock waves throughout the world.

In particular, American leadership at the multilateral level is still essential to the maintenance of liberal rules governing international investment. The United States has continued to exercise its leadership both through example and hard bargaining in international forums.

#### *a. The United States position in the new GATT round*

The United States has been in the forefront of the effort to reduce barriers to international investment in the Punta del Este round of mul-

tilateral trade negotiations.<sup>73</sup> This effort is based on the proposition that trade-related investment measures can have the following trade restrictive and distorting effects:

—Prevent, reduce, or divert imports by limiting the sale, purchase, and use of imported products;

—Restrict the ability to export by home and third country producers; and

—Inflate exports from a host country, thereby distorting trade flows in world markets.<sup>74</sup>

The effort to reduce these barriers is consistent with traditional American investment policy.

#### *b. The position of the United States in the OECD*

In the Organization for Economic Cooperation and Development, the United States was one of the principal supporters of the *Code of Liberalisation of Capital Movements*.<sup>75</sup> The Code provides for the progressive abolishment of restrictions on capital movements.<sup>76</sup> In particular, the signatories undertake “to treat all non-resident-owned assets in the same way,” and “to permit the liquidation of all non-resident-owned assets and the transfer of such assets or of their liquidation proceeds.”<sup>77</sup>

The United States is also in the forefront of states working to strengthen the OECD’s Instrument on National Treatment. The Instrument states that:

Member countries should. . . accord to enterprises operating in their territories and owned or controlled directly or indirectly by nationals of another Member country. . . treatment under their laws, regulations and administrative practices, consistent with international law and no less favorable than that accorded in like situations to domestic enterprises. . . .<sup>78</sup>

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73. Submission of the United States to the Negotiating Group on Trade-Related Investment Measures 1 (June 1987) (on file with The American University Journal of International Law and Policy).

74. *Id.*

75. ORGANIZATION FOR ECON. COOPERATION AND DEV., *CODE OF LIBERALISATION OF CAPITAL MOVEMENTS* (1986).

76. *Id.* art. 1.

77. *Id.* art. 1(b)(i) & (ii).

78. Declaration on International Investment and Multinational Enterprises II.1 (June 21, 1976), reprinted in ORGANIZATION FOR ECON. COOPERATION AND DEV., *INTERNATIONAL INVESTMENT AND MULTINATIONAL ENTERPRISES* 11-12 (rev. ed. 1979).

#### IV. COMPARISON OF G-7 POLICIES TOWARD FOREIGN INVESTMENT

The Group of Seven ("G-7") industrialized countries—the United States, the Federal Republic of Germany, the United Kingdom, France, Japan, Canada, and Italy—have remarkably similar policies with respect to the treatment of foreign direct investment.<sup>79</sup> For the purposes of this Article, these policies have been broken into two categories: investment restrictions by sector and screening of foreign direct investment.

##### A. G-7 FOREIGN INVESTMENT RESTRICTIONS BY SECTOR

None of the G-7 countries has a general policy of prohibiting or restricting foreign direct investment. Of those sectoral restrictions that do exist, there is a remarkable degree of commonality among the G-7. The sectoral restrictions are principally in air and maritime transportation, telephone operations, radio and television broadcasting, financial services, insurance, and nuclear energy.

As a general proposition, sectoral restrictions are implemented under two approaches. The G-7 countries with relatively smaller public sectors tend to restrict foreign direct investment through limitations on foreign equity participation in certain sectors. Countries with relatively larger public sectors are likely to restrict foreign direct investment indirectly, by supporting state-owned monopolies that prohibit both foreign and domestic investments in these industries and services.

The United Kingdom, the Federal Republic of Germany, Japan, and Italy are, by and large, as open to foreign direct investment as the United States; however, the three European countries indirectly restrict foreign participation in certain industries and services by virtue of state-owned monopolies, in which equity participation is restricted. The restriction is considered "indirect" because it is made without regard to whether the investor is foreign or domestic. Moreover, the two countries that actually screen foreign direct investments on a case-by-case basis, Canada and France, also restrict more sectors than their G-7 partners.

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79. The analysis in section V is based on research materials published by the OECD, International Monetary Fund, United States Embassy cables from the G-7, information provided by *Business International*, and other published reports, and unpublished United States Government analyses. This information was initially prepared by the Association for Foreign Investment in America in conjunction with *Business International* and published earlier this year. It is reproduced with permission in *Foreign Direct Investment Regulations*, BUS. INT'L: WEEKLY REPORT TO MANAGERS OF THE WORLD WIDE OPERATIONS Apr. 25, 1988, at 124-25, Chart I.

On the other hand, the United States and Japan make the most frequent use of national security considerations to justify sectoral restrictions. Interestingly, the sectors, restricted because of national security considerations, tend to be the same industries and services in which other G-7 countries restrict equity participation through state monopolies, or, in some cases, through limitations justified on cultural-sensitivity grounds.

Chart I is a side-by-side analysis of G-7 investment regulations prepared by Business International in conjunction with the Association for Foreign Investment in America. The specific G-7 foreign direct investment restrictions are summarized on a country-by-country basis.

### 1. *United States*

a. Under section 5021 of the Omnibus Trade and Competitiveness Act of 1988, in addition to existing authority, the President can block an acquisition, merger, or takeover that threatens the national security.<sup>80</sup>

b. The sectoral restrictions that do exist (in shipping, domestic aviation, communications, and nuclear energy) are based, at least in part, on national security considerations.<sup>81</sup>

c. Foreign investment is prohibited only in nuclear energy; in the other sectors, percentage limitations exist on foreign equity participation in an American enterprise.

d. Other than these few national security-based restrictions, the only federal restriction on foreign direct investment is in the fishing industry. Some state governments limit foreign investment in land ownership and insurance.

e. Few restrictions or discriminatory measures exist against foreign investors after establishment. The few measures concern access to some Department of Defense and Agency for International Development procurement, certain agricultural subsidies, and Overseas Private Investment Corporation investment guarantees.

### 2. *United Kingdom*

a. The Monopolies and Mergers Commission can recommend the blocking of a takeover if it would be against the public interest, which

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80. See *infra* text accompanying notes 83-93 (discussing restrictions placed on the activities of foreign investors in the United States that serve to protect national security interests).

81. *Id.*

includes, but goes beyond, anti-trust.

b. Only one sectoral restriction is based on national security: a limitation on foreign equity participation in British Aerospace PLC.

c. The only sectoral restrictions outside of national security are limits on foreign control in aviation and on non-European Community ("EC") investors' control in broadcasting.

d. The government has never used its authority to block a foreign takeover of an "important" manufacturing company to protect the national interest.

e. Foreign (and private domestic) investments are prohibited in two sectors because of state monopolies: coal production and railroads.

f. Discretionary reciprocity requirements exist in banking, financial services, and, for non-EC investors only, in insurance. The government may require reciprocity for takeovers and mergers in general by non-EC investors.

g. The government limits foreign ownership in some privatized companies to about 15 - 20 percent of the equity.

h. Few restrictions or discriminatory measures exist against foreign investors after establishment. The few measures concern access to some government procurement and subsidies.

### 3. *Federal Republic of Germany*

a. German law authorizes the government to promulgate foreign investment regulations to guarantee national security; however, no such regulations have been implemented.

b. Furthermore, there are no sectoral restrictions based upon national security.

c. Foreign equity participation is explicitly limited in only two sectors: aviation and shipping.

d. Foreign (and private domestic) investments are prohibited in several sectors by virtue of state monopolies: radio and television broadcasting, telecommunications, telephone, telegraph, and railroads.

e. The government may require reciprocity in aviation and, for non-EC foreign investors, in banking branches.

f. There are few restrictions or discriminating measures against foreign investors after establishment. The measures that do exist concern access to post office procurement of some telecommunications equipment and lead management on certain new bond issues.

#### 4. *France*

a. The Finance Minister may block a foreign investment deemed to jeopardize order, security, or defense.

b. Based upon national security concerns, foreign investors are discriminated against after entry in their access to government procurement of defense equipment.

c. Foreign investors from non-EC countries need prior approval to make most acquisitions; in recent years, the government has granted approval in almost all cases.

d. Foreign investment is limited in the following sectors: mining, nuclear industry, air transport, maritime transport, aircraft production, defense supplies, import of crude petroleum and refined products with respect to all foreign investors, and, for foreign investors from non-EC countries, agriculture and insurance.

e. Foreign (and private domestic) investments are prohibited in the following sectors because of state monopolies: telephone, railroads, tobacco, explosives, electricity, gas, coal, and nuclear energy.

f. The government may require reciprocity in quite a few sectors, such as mining, nuclear industry, import of crude petroleum and refined products, publishing, audiovisual services, brokerage, tourism services, road transport, and vehicle rental. In addition, reciprocity may be required for foreign investors from non-EC countries in agriculture, banking and financial services, insurance, and travel agencies.

g. In addition to the defense procurement measure already mentioned, only a few restrictions or discriminatory measures exist against foreign investors after establishment. The few measures include a prohibition on non-French airlines establishing ground-handling facilities for aircraft other than their own and limited access to French airline reservation.

#### 5. *Japan*

a. The Finance Ministry and other relevant ministries can block a foreign investment that might imperil the national security or disturb the maintenance of public order.

b. Based partly on national security concerns, foreign investment may be restricted in the following sectors: air transport, maritime transport, radio and television broadcasting, cable television, nuclear energy, defense, narcotics, and telecommunications.

c. Foreign investment may be restricted in coal and other minerals mining and in primary industries related to agriculture, forestry, and



fisheries; oil and gas; and leather and leather products manufacturing. The investments listed in b. and c. have not, however, been restricted under the 1980 Foreign Exchange Law (as amended).

d. The complexities and difficulties of doing business in Japan appear to be the main obstacle to new investments by foreign or domestic investors, according to a study by the American Chamber of Commerce in Japan.

e. Foreign (and private domestic) investments are prohibited in two sectors: tobacco manufacturing and the salt industry.

f. Reciprocity is required for foreign investments in the banking and securities industries.

## 6. *Canada*

a. None of the foreign investment restrictions in Canada are based on national security considerations.

b. Most acquisitions by foreign investors require prior approval; under the Investment Canada Act all acquisitions have been approved.

c. The United States/Canada Free Trade Agreement came into effect on January 1, 1989. The threshold for review of United States direct and indirect acquisitions will be raised so that only direct acquisitions above \$150 million will be reviewable from 1992 (except in the politically-sensitive oil and gas industry, uranium mining industry, and in certain cultural industries). Any new legislation pertaining to United States investors after establishment would also be based on national treatment.

d. Furthermore, some provinces or federal territories restrict foreign investment in land ownership, mining, periodical distribution, and liquor distribution.

e. Foreign (and private domestic) investments are restricted or prohibited in several sectors by virtue of state monopolies: national satellite communications at the federal level, and hydroelectricity, auto insurance, and health programs in some provinces.

f. Canada has no reciprocity requirements for foreign investors.

g. Canada has a number of discriminatory measures against foreign investors after establishment. For example, some discrimination exists in access to provincial, federal, and territorial assistance, and subsidies in agriculture, publishing, mineral exploration, and commerce. Also, some discrimination exists in federal corporate taxation, provincial land transfer taxes, and the awarding of government advertising contracts by the province of Ontario.

## 7. *Italy*

a. None of Italy's foreign investment restrictions are based on national security considerations.

b. Italy has percentage limits on foreign investment in the information (33%), aviation (33%), and shipping (50%) sectors. Foreign investment is prohibited in domestic fishing.

c. Foreign investors from non-EC countries face some restrictions in banking. Such investors may establish branch offices only with the permission of the Bank of Italy.

d. Foreign (and private domestic) investments are prohibited by virtue of state monopolies in telecommunications, electricity, gas, water, local public services, lotteries, nuclear energy, railroads, and national radio and television networks.

e. Italy subjects foreign investors to a reciprocity requirement to explore and exploit hydrocarbons.

f. Italy has reciprocity requirements for foreign investors from non-EC countries in banking and insurance.

g. A few discriminatory measures exist against foreign investors after establishment. They concern access to government subsidies in the film industry, access to domestic capital markets, restrictions on domestic lending in banking, and on operating airline ground handling facilities.

## B. G-7 SCREENING OF FOREIGN DIRECT INVESTMENT

The trend in G-7 countries is clearly moving away from screening and blocking foreign direct investment. Only France, Japan, and Canada retain general authority to screen and block foreign direct investment. Except for Canada, that authority is rarely used; however, even Canada has liberalized its screening procedures substantially and will further liberalize its treatment of American investments under the United States/Canada Free Trade Agreement. France has an active screening policy but infrequently rejects foreign investment. Japan has screening and blocking authority on its books but it has not recently resorted to it. It should be noted that none of the G-7 countries has specific measures regarding high-technology industries or distinguishes between friendly and hostile takeovers.

The G-7 practices may be summarized as follows:

### 1. *United States*

a. The United States has no general screening or blocking authority, but the President has the authority to investigate and block mergers,

acquisitions, and takeovers that threaten national security.<sup>82</sup>

b. No special provisions for foreign investment in high-tech sectors exist, but the United States government's Interagency Committee on Foreign Investment in the United States ("CFIUS") may consider the implications of any investment that may affect the national interest.<sup>83</sup>

c. Federal law makes no distinction between hostile and friendly takeovers, although some states have used a variety of mechanisms to block hostile acquisitions by foreign investors.

## 2. *United Kingdom*

a. The United Kingdom has no general screening or blocking authority, although the (never-used) authority exists to block takeovers in manufacturing, and for reasons that affect national security.

b. No restrictions or special provisions exist for foreign investment in high-tech sectors.

c. The United Kingdom makes no distinction between hostile and friendly takeovers.

## 3. *Federal Republic of Germany*

a. No general blocking or screening authority exists. Authority exists for blocking on national security or foreign policy grounds, but this authority has never been used.

b. No restrictions or special provisions for foreign investment in high-tech sectors exist.

c. The Federal Republic of Germany makes no distinction between hostile and friendly takeovers. In practice hostile takeovers are rare.

## 4. *Japan*

a. General blocking and screening authority for special industries exists, but has not been implemented in recent years.

b. No special measures for foreign investment in high-tech sectors exist.

c. Japan makes no distinction between hostile and friendly takeovers. In practice, hostile takeovers are extremely rare.

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82. *See id.* (discussing the importance of national security considerations).

83. *See The Operations of Federal Agencies in Monitoring, Reporting On, and Analyzing Foreign Investments in the United States: Hearings before the Subcomm. on Commerce, Consumer, and Monetary Affairs of the House Comm. on Government Operations, 96th Cong., 1st Sess. 62-66 (1979) (statement of C. Fred Bergsten, Asst. Sec'y of the Treasury) (discussing the role of the CFIUS).*

### 5. *Italy*

a. Italy has no general blocking authority, although legislation was proposed in the summer of 1988 that would require prior notification and provide authority to block takeovers above a certain threshold.

b. No special provisions exist for foreign investment in high-tech sectors.

c. Italy makes no distinction between hostile and friendly takeovers.

### 6. *France*

a. France actively screens acquisitions of twenty percent or more of a French company, though recently, approval is rarely denied.

b. No special restrictions exist for foreign investment in high-tech industries.

c. France makes no distinction between hostile and friendly takeovers.

### 7. *Canada*

a. Canada screens foreign takeovers, but rarely blocks them, except in culturally-sensitive areas and in the energy sector. The United States/Canada Free Trade Agreement will further liberalize the screening provisions for American investments.

b. Screening provides the opportunity to evaluate foreign investment in high-tech industries, but the emphasis of the government has been to attract such industries.

c. Canada makes no legal distinction between hostile and friendly takeovers, but this may constitute an element in the screening process.

## V. UNITED STATES NATIONAL SECURITY IS ADEQUATELY SAFEGUARDED

Any consideration of the United States policy toward foreign investment must take into account provisions to assure United States national security. The government has available to it a number of measures to safeguard national security. Like American investors, foreign investors must comply with all applicable laws, such as Securities and Exchange Commission reporting requirements and the antitrust laws.

Unlike American investors, a number of special restrictions exist for foreign investor activities in certain key sectors, such as radio and tele-

vision broadcasting,<sup>84</sup> coastal and inland shipping,<sup>85</sup> air transportation within the United States,<sup>86</sup> and the production and use of nuclear power.<sup>87</sup> The Defense Department has a comprehensive set of regulations called the Defense Acquisition Regulations,<sup>88</sup> which cover the performance of government contracts involving classified information and limit or bar foreign ownership of the contractor. Section 232 of the Trade Expansion Act of 1962,<sup>89</sup> as amended by Section 127 of the Trade Act of 1974<sup>90</sup> and the Reorganization Plan of 1979,<sup>91</sup> authorizes the President to impose restrictions on imports that threaten to impair national security. The International Emergency Economic Powers Act ("IEEPA")<sup>92</sup> grants the President emergency authority to regulate foreign exchange transactions, transfer of payments between banking institutions where a foreign interest is involved, import or export of currencies or securities, and to control or freeze property transactions where a foreign interest is involved. The Export Administration Act authorizes export licensing for most commercial goods and technical data.<sup>93</sup>

In addition, since 1975, CFIUS has been empowered to review certain foreign investments in this country, which, in the judgment of the Committee, might have major implications for United States national interests.<sup>94</sup> Most recently, Section 5021 of the Omnibus Trade and Competitiveness Act of 1988, the "Exon-Florio Amendment," provides the President with the authority to suspend or prohibit any acquisition, merger, or takeover by a foreign person on certain national security grounds.

## CONCLUSION

This article has discussed two central points. First, foreign investors make a positive and much-needed contribution to our state and local

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84. See 47 U.S.C. § § 153, 310(b)(1)-(4) (1982 & Supp. 1987) (discussing restrictions on wire or radio communication).

85. See 46 U.S.C. § § 251, 292, 316, 319, 802, 883 (1982 & Supp. 1987) (discussing regulation of vessels in domestic commerce and shipping acts).

86. 49 U.S.C. App. § § 1301(3), (6), 1372, 1378, 1508(b) (1982 & Supp. 1986).

87. 42 U.S.C. § § 2133, 2134 (1982 & Supp. IV 1986).

88. 48 C.F.R. § § 201-253 (1987).

89. 19 U.S.C. § 1862 (1982).

90. 19 U.S.C. §§ 1862-63 (1982).

91. Reorg. Plan No. 3 of 1979, 44 Fed. Reg. 69,173 (1980), *reprinted in* 19 U.S.C. § § 147-54 (1982).

92. 50 U.S.C. § § 1701-06 (Supp. 1987).

93. 50 U.S.C. § 2401 (Supp. 1987).

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

communities and to the national economy. Second, freedom of investment abroad, which is so important to United States economic and business objectives, cannot be maintained if we start closing doors here at home. The traditional policies of the United States on foreign investment have served it well, and they should not be abandoned at this juncture when the gap between American capital requirements and the supply of savings is so large, and the necessity for American leadership in international economic policy is so great.

Rather than turning inward, the United States should intensify its efforts to get its own budget deficit under control. Reducing the federal budget deficit will reduce demand for investment capital, permitting the financing of private investment expenditures out of available pools of capital, both private and foreign. This could be accomplished without driving up interest rates and, indeed, could result in a lowering of these rates as inflationary expectations recede. In turn, the added investments in plants and equipment would help reinvigorate the industrial base of the economy, allowing American exports to compete more effectively. The United States should, simultaneously, continue to urge its major industrial trading partners to accelerate their own domestic demand and, to the extent any maintain barriers to the free flow of capital, to reduce them. The combined effect of these two actions will facilitate the needed reductions in the United States current account deficit as well as reductions in the surpluses of the major trading partners of the United States. During this period of adjustment, the United States should continue to keep its borders open to capital flows. These will be needed to ease the required adjustment.

## APPENDIX

## CHART I

## Foreign Direct Investment Regulations

FDI Rules*	US Current*	US Future (under Exon/Florio & Bryant)	Canada
Must foreign investment be reported/registered?	Yes	Yes, both	Yes, reported (notification, does not include portfolio investment).
Can foreign investment be reviewed?	Yes	Yes	Yes
Review authority	Interagency Committee on Investment in the US (CFIUS)	CFIUS	Investment Canada Agency (ICA)
Under what circumstances	CFIUS is authorized to review foreign investment with major national security implications.	President authorized to block mergers, acquisitions, takeovers involving "control of domestic industries and commercial activity" affecting national security.	If direct acquisition, assets worth at least C\$5M, if indirect, assets worth at least C\$50M, if indirect with assets C\$5-50M and Canadian portion is more than 50% of total international value of deal; in culturally sensitive areas (e.g. publishing, video, music).*
Grounds for denial	Not explicit	Harms national security.	No "net benefit" to Canada.
Track record on denials	CFIUS has no legal power, and has never recommended denial. In practice, its review is limited to certain foreign government investments.	None	Rejection in only rare cases.
Off-limits sectors	Nuclear industry	Same as present.	None
Sectors where FDI limited	Radio, tv stations; shipping; airlines; hydroelectric; some states restrict land ownership.	Same as present.	Broadcasting; newspapers; airlines; fishing; coastal shipping; banking and financial institutions.
Information disclosure requirements for new investments	Required for JVs; acquisition of at least 10% interest; green field; or US affiliate acquires & merges with another US firm; all agricultural land acquisitions.	Same circumstances as present, possibly more data once threshold met.	All non-Canadians required to notify ICA within 30 days of acquisition or set-up of new business if not in reviewable categories.
Information required:			
Country of origin	Yes	Yes	Yes
Business activities	Minimal	Minimal	Yes
Legal, financial aspects	Some	Yes, more if "controlling interest"	Yes, depending on size of deal.
Financial structure of parent	No	Yes, if "controlling interest"	Yes, depending on size of deal.
Finances of sub	Minimal	Yes, if "controlling interest"	Yes, depending on size of deal.
Ownership structure of sub	Yes	Yes, if "controlling interest"	Yes, depending on size of deal.
No. of employees involved	Yes	Possibly	Yes
Directors and officers	No	Yes	Possibly.
Other	Incentives and services provided by state, local governments; land owned.	Possibly; major civil litigation within last year in addition to other current requirements.	Possibly detailed investment plans.
Does public have access to this information?	Only aggregated information.	Yes, company specific information could be released.	No

\* BUSINESS INTERNATIONAL

APRIL 25, 1988

\* By 1992, under the U.S.-Canada Free Trade Agreement, the threshold for review will be raised to \$150 million for direct acquisitions and eliminated for indirect acquisitions.

## Foreign Direct Investment Regulations

United Kingdom	Netherlands	Japan	West Germany
No, with minor exceptions.	No, but companies must register with local chamber of commerce.	Yes	Yes, reported
Not formally.	Unclear	Yes	No
None	If any industrial projects, Ministry of Economic Affairs.	Ministry of Finance, Foreign Exchange Council, relevant ministries, Fair Trade Commission (depending on sector).	None
Not applicable (N/A)	No clear legal grounds.	Prior notification required for all investments.	N/A
None	No clear legal grounds.	Not in national interest or will have adverse implications for domestic industry.	N/A
N/A	Never has been a denial.	General approval likely unless strategic industry, but active state involvement in setting terms of investment is likely. There have been no denials since 1950.	N/A
TV, radio stations; telecommunications (de facto)	None	None	None
Privatized firms; British Aerospace, Cable & Wireless; Britoil.	Special permission required for offshore oil & gas exploration.	Agriculture, forestry, fishing, mining, petroleum refining & marketing, leather manufacture, other sensitive industries.	None
None	None unless applying for subsidies. All capital inflows must be reported to central bank for statistical purposes. All companies must deposit a copy of annual report with local chamber of commerce.	None.	Must inform Bundesbank if acquire more than 25% of assets of company. Disclosure for statistical purposes only.
N/A	No	Yes	Yes
N/A	Yes	Yes, foreign & Japanese firms.	Yes, of domestic firms only
N/A	Yes	Yes	No
N/A	No	Possibly	No
N/A	Yes	Possibly	Some
N/A	No	Possibly	Minimal
N/A	Yes	Yes	No
N/A	Possibly	Yes	No
N/A	Estimated sales, exports, annual forex requirements, origin of capital.	Investment aims, business plan, reasons for investment, stockholders.	Periodic financial data.
N/A	Only aggregated data by nationality on capital flows.	Only aggregated information by nationality and by industry	Aggregated information only

(1) Does not include banking or financial services. Since all countries covered maintain a certain production-related restriction, this area is not analyzed.

(2) Information below is required for acquisitions and start-ups.



TABLE I

U.S. Assets Abroad  
1975 - June 30, 1988

(billions of dollars)

	<u>Total</u>	U.S. Government		Private	
		<u>Official</u>	<u>Other</u>	<u>Direct</u>	<u>Portfolio</u>
1975	295.1	16.2	41.8	124.1	113.0
1980	607.1	26.8	63.8	215.4	301.1
1981	719.8	30.1	68.7	228.3	392.7
1982	824.9	34.0	74.6	207.8	508.5
1983	873.9	33.7	79.5	207.2	553.5
1984	896.1	34.9	84.8	211.5	564.9
1985	950.3	43.2	87.6	230.3	589.2
1986	1,071.4	48.5	89.5	259.6	673.8
1987	1,167.8	45.8	88.4	308.9	724.7
1988 IH	1,174.5	44.3	90.0	315.4	724.8

Source: DEP'T COMMERCE, SURVEY OF CURRENT BUSINESS, (June 1988); DEP'T COMMERCE, "SUMMARY OF U.S. INTERNATIONAL TRANSACTIONS, SECOND QUARTER 1988," September 13, 1988.

TABLE II

Foreign Assets in the United States  
1975 - June 30, 1988

(billions of dollars)

<u>Year</u>	<u>Total</u>	<u>Official</u>	<u>Other (Private)</u>	
			<u>Direct</u>	<u>Portfolio</u>
1975	220.9	86.9	27.7	106.3
1980	500.8	176.1	83.0	241.7
1981	578.7	180.4	108.7	289.6
1982	688.1	189.1	124.7	374.3
1983	784.5	194.5	137.1	452.9
1984	892.6	199.3	164.6	528.7
1985	1,061.0	202.6	184.6	673.7
1986	1,340.7	241.7	220.4	878.5
1987	1,536.0	283.1	261.9	991.0
1988 IH	1,624.4	313.4	282.6	1,028.4

Source: DEP'T COMMERCE, SURVEY OF CURRENT BUSINESS (June 1988); DEP'T COMMERCE, "SUMMARY OF U.S. INTERNATIONAL TRANSACTIONS, SECOND QUARTER 1988" (Sept. 13, 1988).

TABLE III  
 Foreign Direct Investment Position  
 By Country  
 1980-87  
 (millions of dollars)

	<u>1980</u>	<u>1981</u>	<u>1982</u>	<u>1983</u>	<u>1984</u>	<u>1985</u>	<u>1986</u>	<u>1987</u>
All Countries	83,046	108,714	124,677	137,061	164,583	184,615	220,414	261,927
Canada	12,162	12,116	11,708	11,434	15,286	17,131	30,318	21,732
Europe	54,688	72,377	83,193	92,936	108,211	121,413	144,181	177,963
UK	14,105	18,585	28,447	32,152	38,387	43,555	55,935	74,941
Netherlands	19,140	26,824	26,191	29,182	33,728	37,056	40,717	47,048
W. Germany	7,596	9,459	9,850	10,845	12,330	14,816	17,250	19,637
France	3,731	5,876	5,708	5,726	6,591	6,670	7,709	10,195
Italy	408	829	1,120	1,238	1,438	1,237	1,323	1,230
Sweden	1,670	1,693	1,739	2,124	2,258	2,357	3,963	4,699
Switzerland	5,070	5,474	6,378	7,464	8,146	10,568	12,058	14,343
Japan	4,723	7,697	9,677	11,336	16,044	19,313	26,824	33,361
Australia	338	572	730	930	2,125	3,264	5,466	6,373
Latin America	9,678	11,739	14,229	15,035	16,201	16,826	16,763	15,287
Netherlands								
Antilles	6,651	8,232	9,190	9,948	10,935	10,443	9,685	8,895
Brazil	155	110	100	84	160	201	182	195
Mexico	136	163	259	244	308	533	847	880
Venezuela	23	29	66	24	48	103	476	451
Kuwait	335	2,994	3,567	3,606	4,333	3,968	3,771	4,002
Hong Kong	148	169	229	324	659	640	605	699

Source: DEP'T COMMERCE, SURVEY OF CURRENT BUSINESS (various issues, 1980-1987).

TABLE IV  
 Foreign Direct Investment Position  
 By Sector  
 1980-1987  
 (millions of dollars)

	<u>1980</u>	<u>1981</u>	<u>1982</u>	<u>1983</u>	<u>1984</u>	<u>1985</u>	<u>1986</u>	<u>1987</u>
All Sectors	83,046	108,714	124,677	137,061	164,583	184,615	220,414	261,927
Mining	1,320	2,152	1,876	1,928	3,920	4,039	5,080	5,619
Petroleum	12,200	15,246	17,660	18,209	25,400	28,270	29,094	35,395
Manufacturing	33,011	40,533	44,065	47,665	51,802	59,584	71,963	91,025
Wholesale Trade	11,560	16,012	18,397	21,031	24,455	29,051	33,997	37,580
Retail Trade	3,650	4,525	5,207	5,482	6,764	6,822	8,923	9,546
Banking	4,617	6,553	7,846	8,697	10,326	11,377	12,394	13,848
Finance	1,319	1,109	2,159	2,269	5,633	4,246	7,239	7,982
Insurance	6,091	7,086	7,928	8,665	8,922	11,806	15,345	15,951
Real Estate	6,120	8,964	11,250	14,636	17,761	19,402	22,512	24,478
Other	3,158	6,533	8,019	8,478	9,599	10,019	13,868	20,502

Source: DEP'T COMMERCE, SURVEY OF CURRENT BUSINESS (various issues, 1980-1987).

TABLE V  
 Foreign Direct Investment  
 Capital Inflows  
 by Sector  
 1980-1987  
 (millions of dollars)

	<u>1980</u>	<u>1981</u>	<u>1982</u>	<u>1983</u>	<u>1984</u>	<u>1985</u>	<u>1986</u>	<u>1987</u>
All Sectors	16,918	25,194	13,792	11,946	25,359	19,022	34,091	41,977
Mining	377	833	(1,345)	54	1,553	(57)	962	484
Petroleum	2,102	3,165	2,414	509	7,210	3,147	662	6,410
Manufacturing	5,755	7,445	2,742	3,542	3,992	8,049	11,865	20,443
Wholesale Trade	1,732	4,114	2,252	2,294	2,940	3,882	4,679	3,549
Retail Trade	1,397	680	672	253	1,185	(21)	1,759	539
Banking	1,089	1,935	1,373	909	1,729	1,445	1,757	858
Finance	656	(106)	907	187	2,570	(1,530)	1,896	730
Insurance	1,327	922	874	800	609	2,250	3,702	569
Real Estate	2,002	2,795	2,521	2,933	2,667	1,574	3,099	1,714
Other	481	3,342	1,380	465	902	285	3,710	6,682

( ) denotes capital outflow

Source: DEP'T COMMERCE, SURVEY OF CURRENT BUSINESS (various issues, 1980-87).

TABLE VI  
 Exports  
 Manufactured Goods  
 U.S. Affiliates of Foreign Firms  
 and Overall U.S. Exports  
 1980-1986  
 (1980=100)

	<u>U.S. Affiliates</u>	<u>Total U.S.</u>
1980	100.0	100.0
1981	150.2	106.8
1982	142.4	96.6
1983	133.2	92.4
1984	144.6	101.8
1985	142.0	104.5
1986	139.0	111.9

Source DEP'T COMMERCE, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES (various issues, 1980-1986); DEP'T COMMERCE, OFFICE OF TRADE AND INVESTMENT ANALYSIS, INTERNATIONAL TRADE ADMINISTRATION, UNITED STATES TRADE PERFORMANCE IN 1987 (1988).