BARRIERS TO FOREIGN INVESTMENT IN THE UNITED STATES

Policy, Research and
Communications Branch

FOREIGN INVESTMENT REVIEW AGENCY

BARRIERS TO FOREIGN INVESTMENT IN THE UNITED STATES

INDEX

PART TWO: MONITORING FOREIGN INVESTMENT

Scope of Monitoring Activity

PART THREE: SPECIAL ISSUES

EXECUTIVE SUMMARY

A ranking member of the Carter Administration, C. Fred Bergsten, testified before a House of Representatives Committee in 1979 that:

> "There has not been a single instance that I am aware of in which we needed any special authority to protect the national interest against any unwanted foreign investment, on economic grounds, on political grounds, or for any other reason."

This study of the barriers to foreign investment in the United States contains substantial evidence to support that statement. U.S. officials, politicians, and businessmen claim that the United States supports and maintains an open policy toward incoming foreign investment. This report shows that this is hardly the case. The foreign investor contemplating the establishment or acquisition of a business in the U.S. must be prepared to cope with a plethora of laws, regulations, agencies, hearings, programmes and ordinances at both the state and federal levels. He must be prepared for ambiguous rules and unexpected delays. He must be prepared to find that regulatory agencies such as the Interstate Commerce Commission, the National Aeronautics Board, or the Securities Exchange Commission, may go beyond their traditional mandate and in fact examine and bar his investment precisely because it is not U.S. controlled. He must be prepared for unexpected legal expenses and the possibility that his business intentions will be publicly questioned and villified.

Barriers to investment may be direct legislative ones at the federal or state level, or they may be the indirect result of laws directed at all firms operating in the country. Non-legislative barriers, whether political, cultural or financial, are also important. All these barriers are examined in this report.

Federal Legislation Directly Controlling Foreign Investment

In the United States several statutes exist that, either wholly or in part, are aimed directly at existing and prospective foreign investment. In certain "national interest" sectors of the economy, foreign participation may be prohibited, or restricted in a number of ways, such as:

1. the allowance of investment only from countries which offer reciprocal privileges;
2. stock ownership limitations;
3. management participation restrictions.

Table I lists the major restricted sectors and the degree of restriction. In some statutes, particularly those covering defense, nuclear power, and communications, the prohibitions are clear. In others, there is often a degree of latitude possible in the interpretation of the law. Considerations of "public interest" under the Public Utility Holding Company Act, for instance, give the

Table I

Direct Federal Legislation

Activity	Status of Foreign Control	Legislation
coastal and freshwater shipping	prohibited	The Jones Act Merchant Marine Act
dredging and salvage operations	restricted	Regulation of Vessels in Domestic Commerce
shipbuilding	barred from Government benefits	Fishing Fleet Improvement Act Merchant Marine Act Merchant Ship Sales Act
fishing	reciprocal countries restricted others: prohibited	Fish & Wildlife Act Fishery Conservation & Management Act
air carriers (domestic)	prohibited	Federal Aviation Act
air carriers (international)	restricted	Int'l Air Transport. Fair Competitive Practices Act
radio, television, telegraph & telephone licenses	prohibited	Communications Act
radio and television operators	prohibited	Communications Act
nuclear power	prohibited	Atomic Energy Act
hydro-electric facilities	restricted	Federal Power Act
transmission of natural gas and electricity	permitted or "restrained"	Federal Power Act
transfer of federally-owned land	prohibited unless reciprocal	Small Tract Act
mineral rights - oil, coal etc.	prohibited unless reciprocal	Mineral Land Leasing Act
mineral leases on continental shelf (oil, gas, sulphur)	restricted (in practice: prohibited)	Outer Continental Shelf Lands Act
exploration for deep sea resources	restricted	Deep Seabed Hard Mineral Resources Act
defense supplies from all parts of the U.S. economy	prohibited (in most cases)	National Security Act
Banking	regulated	The Banking Act The Int'l Banking Act Bank Holding Co. Act

Securities Exchange Commission, as the regulatory agency, the possibility of using this Act to exclude foreign control in utilities. Another act, the Outer Continental Shelf Lands Act, contains no provision as to citizenship or reciprocity, but over time the practice has developed of limiting rights to oil, gas and sulphur leases to U.S. citizens and domestic corporations. And, on occasion, the requirements of "national security" have been expanded to exclude foreign participation in fields that do not normally involve questions of security.

Indirect Control

There are a number of laws and regulations, especially in the anti-trust and securities areas, that apply equally to both foreign and domestic investors. The Clayton Act, the Sherman Act, the Federal Trade Commission Act and the Securities Exchange Act can frequently present special problems for the foreign investor, particularly because the legal system of the United States facilitates both private and public litigation to enforce these acts. The ambiguity of these laws allows their interpretation to change from administration to administration. The resulting uncertainty confuses the foreign investor and leaves him open to legal and political pressures. In recent years a number of foreign firms including Joseph E. Seagrams and Sons Inc., Canadian Pacific Enterprises, British Oxygen Corporation and BIC Corporation found their activities challenged under anti-trust legislation, while Elf Acquitaine, Nu-West Group Ltd. and Dome Petroleum faced challenges under security legislation.

Further restrictions on foreign takeovers are contemplated under proposed margin requirement legislation now before Congress. This legislation would establish margins to prevent the "excessive use of credit" by some foreign firms.

Foreign-owned firms are also subject to the Export Administration Act which allows the U.S. President to prohibit or curtail exports if they are found to be detrimental to the national interest.

State Regulations

Many states have laws that discriminate against foreign investors. While aliens are rarely banned completely, certain conditions of establishment or operation are frequently applied to them. Reciprocal requirements are a common feature of many statutes. State restrictions abound in land and real estate, limiting or prohibiting ownership, agricultural practices or mineral exploration. In banking and insurance the number of foreign directors or incorporators is often severely limited and special deposit or asset requirements are common. In eleven states foreigners are banned from ownership of utilities. The right of states to prescribe the terms

under which foreigners may hold stock in a corporation has been upheld in the courts, and a number of states do require that a majority of the shares of certain companies be held by U.S. nationals.

Monitoring Foreign Investment

The American Government's mounting concern over the amount of foreign investment flowing into the country has resulted in the development of a vast information-gathering system. Monitoring agencies have been established, task forces appointed, consultants hired, congressional hearings held, new laws proposed. Foreign investors are questioned, studied and evaluated at every turn. A number of statutes require disclosure by foreign investors. The Foreign Investment Study Act of 1974 directs the Secretaries of Commerce and the Treasury to study the impact of foreign investment in the country.

The most important monitoring agency is the Committee on Foreign Investment in the United States (CFIUS). Comprised of ranking members of the departments of the Treasury, State, Defense, Commerce, the Office of the U.S. Trade Representative and the Council of Economic Advisors, the CFIUS has the primary responsibility for monitoring the impact of foreign investment in the U.S., both direct and portfolio, and coordinating U.S. policy on foreign investment. Its major concerns are consultations with foreign governments on their prospective investments and a review of investments which, in the view of CFIUS, might have implications for the national interest. The Committee has no legal power to block or modify investments, but considers that diplomatic representation would generally be enough to bar an unwanted investment by a foreign government. It has reviewed investments such as the Government of Iran's proposed acquisition of stock in Occidental Petroleum, Shell Oil's proposed acquisition of Beldridge Oil Co., and Elf Acquitaine's merger with Texasgulf.

In response to congressional criticism in 1981 that the Committee has been "seriously deficient" in protecting the national interest, the Chairman, Marc Leland, suggested that CFIUS's ability to focus executive attention on investments which may fall under other U.S. laws provides them with adequate means to prevent any unwanted investment. In his testimony before a congressional committee he pointed out that:

> "there are several means available to stop a purchase. The purchase might be stopped for various reasons. The Anti-trust Division may find it a violation of the anti-trust laws. There are other laws under which it could also be a violation. You could go and try to ask for legislation, if necessary, if it is found not to be in the national interest and you have no other specific way to stop it. You could legislate to stop it."

Another monitoring agency is the Interstate Commerce Commission (ICC) which is responsible for the regulation of common carriers, such as railroads, motor and water carriers, and pipelines. Since 1974 it has also attempted to determine 'sources of control' of carriers. Two cases involving foreign ownership are currently under consideration. In one, the ICC has responded to pressure from the U.S. trucking industry and has frozen all applications filed by Canadian carriers pending an investigation of alleged Canadian discrimination against U.S. truckers. In the other, a recent ruling by a U.S. judge has given the ICC authority to approve the proposed purchase of the Chicago and Milwaukee Rairoad's core system by the Grand Trunk Corporation, a subsidiary of Canadian National.

Non-Legislative Barriers to Foreign Investment

The United States is no different than any other country when it comes to protecting its own interests through prohibiting or limiting foreign investment and actively supporting its domestically controlled firms. Laws governing foreign investment abound. But beyond those laws are a number of other factors which may equally be barriers, or at least deterrents, to foreign investment. The very size and complexity of the U.S. economy is a barrier especially when combined with the complexity and cost of legal arrangements in what is a very litigious country. The ambiguity of the laws can easily ensnare an unwary foreign investor, as can the strength of an orchestrated public campaign launched to prevent an investment.

Defense Funding

The massive funding of defense projects carried on by American firms enhances their competitive capacity, even in civilian markets where such firms may enjoy "spillover" benefits. The size of U.S. Government support is staggering, amounting to over half the approximately $40 billion spent each year on research and development. The Department of Defense alone supports between 1/3 and 1/4 of all scientists and engineers in the U.S. In 1980 it spent $76.8 billion on R & D, services construction and supplies.

The electronics industry has particularly benefited from this funding. In a study of the impact of defense funding in electronics for the U.S. Federal Trade Commission, William Baldwin points out that Americans

> "critical of foreign subsidization of electronics industries tend to overlook the hundreds of millions of dollars of federally funded research and development that the industry of this country has received and continues to receive."

U.S. corporate executives list R & D funding, the volume of business, the experience of handling high technology programmes and the normally long terms of defense contracts as the most significant benefits to defense contractors. In these circumstances foreign firms might easily find that they are unable to compete successfully against U.S. firms serving both military and civilian markets.

The Cable Industry

In the cable industry, foreign ownership has become a political issue. Representative D. Walgren has introduced a bill which calls for reciprocal conditions for foreign cable companies and also suggests a 20% limitation on ownership. Even without the enactment of this legislation foreign cable companies face barriers to further investment. Politicians, spurred by American cable interests, have suggested that foreign investment in cable systems could present a threat to national security, and some licensing authorities have refused licenses to foreigners. Under these conditions a foreign company must be very capable, rich and aggressive to succeed in investing in the U.S..

Conclusion

It is clear that Americans, like Canadians, or Japanese, or Britons, welcome foreign investment only to the extent that they consider it will serve the national interest. Even though foreign direct investment accounts for only about 2% of all direct investment in the United States, many Americans are concerned about the impact of further investment. The result has been the formation of an array of investigations, studies, reporting requirements and monitoring agencies.

Today a long list of legislative measures advocating greater control of foreign investment, reciprocal or "mirror" laws, sector-by-sector parity, and limitations on foreign ownerhip in specific areas, are being considered by Congress. They are unneccessary. Even if none of them become law, the United States will still be well able to prevent any unwanted foreign investment.

BARRIERS TO FOREIGN INVESTMENT IN THE UNITED STATES

INTRODUCTION

"The United States has been a world leader in the promotion of a free trading and investing system. We have been a model for the world..."

Malcolm Baldridge,
U.S. Secretary of Commerce (1)

"The United States government cannot remain neutral while its citizens, who invest in other countries relying on their good faith to adhere to international principles and laws, find their interests threatened by derogations from such principles and laws. We believe in the concept of fair play. We practice it, and our investors abroad should expect no less."

Robert D. Hormats,
Assistant Secretary of State
for Economic Business Affairs (2)

"The United States has, therefore, traditionally supported and currently maintains an open policy toward both outward and inward private investment."

Hon. C. Fred Bergsten,
Assistant Secretary of
the Treasury (3)

One of our investment policy objectives is "the maintenance of the maximum degree of openness of the U.S. economy to the contribution of foreign direct investment. We have one of the, if not the, most liberal policies toward inward foreign investment; very few areas are restricted."

Harvey E. Bale,
Assistant U.S. Trade Rep.
for Investment Policy (4)

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1. New York International Business Conference, July 20, 1981.
2. Economic Policy Council of the UN Assoc., Sept. 18, 1981.
3. American Law Institute/American Bar Assoc., N. Y., Feb. 28, 1980.
4. House Subcommittee on International Economic Policy & Trade, Washington, Feb. 23, 1982.

In recent years American politicians, officials and businessmen have been quick to condemn legislation in other countries which is designed to control foreign investment. In this process, Americans tend to assume that the United States is largely free from regulations governing foreign investment. The above quotations reflect a recurrent theme of U.S. spokesmen, who tend to confuse the absence of clearly labelled foreign investment regulations with a completely open field for the foreign investor.

The United States Government, like any other, has on a number of occasions passed legislation to control foreign investment in order to protect its own interests. Statements on the open nature of the American economy are simply not borne out by American practice. What we find in place of a visible regulatory authority is a web of laws, regulations, public hearings, programs and ordinances, at both the state and federal level, which can effectively prevent, or at least delay, a foreign investment transaction at the discretion of almost anyone with the knowledge and resources to selectively apply the procedures.

This report is an examination of these laws and programs. It in no way suggests that foreign investment is not welcome in the United States. What it does suggest is that Americans, like Canadians, or Japanese, or Britons, have available, and use, the tools they feel are necessary to protect their own interests. Fred Bergsten made this clear when he testified before a House of Representatives Committee:

> "There has not been a single instance that I am aware of in which we needed any special authority to protect the national interest against an unwanted foreign investment, on economic grounds, on political grounds, or for any other reason."(5)

Foreign investment in the United States then, whether it be direct or portfolio, can and does meet both pre-/and post-investment obstacles. These obstacles exist in several forms:

1. federal and state legislative controls, restrictions, limitations and prohibitions;
2. federal and state legislation and agencies designed to monitor foreign investment; and
3. political, economic and social pressures which discourage or prevent foreign investment.

This study deals with these obstacles and, where possible, cites examples of enforcement of legislation or policy activity in the area under discussion.

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5. Fred Bergsten, testimony in "The Operations of Federal Agencies in Monitoring, Reporting On, and Analyzing Foreign Investment in the United States," Part 3, House Subcommittee on Government Operations, Washington, D.C., July 1979, p.34.

PART ONE: LEGISLATIVE CONTROLS

I. FEDERAL

A. DIRECT

In the United States, several statutes exist that either in whole or in part are aimed directly at existing or prospective foreign investment. These are to be distinguished from those pieces of legislation that only indirectly affect foreign investment; that is, those that restrict or control both foreign and domestic investment.

1. "National Interest" Legislation

In certain so-called "national interest" sectors of the U.S. economy, restriction on foreign investment is achieved through prohibition, prohibition waived by reciprocity, stock ownership limitation, management participation limitation provisions in the governing legislation, and other means.

a) Maritime

1) Shipping:

Under the Jones Act of 1920, (46 U.S.C.S. s.688), coastal and fresh water shipping, including towage, of freight or passengers between points in the United States or its territories must be done in vessels which were built and are registered in the United States and which are owned by United States citizens. For a corporation to register a ship in the United States, the corporation's principal officer must be a United States citizen and 75 percent of the stock must be owned by United States citizens. (Shipping Act, 1916, 46 U.S.C. s.801, 802, 883, 888).

Certain exceptions are permitted to this general rule, for example, shipping incidental to the principal business of a foreign-controlled United States manufacturing or mining company.(46 U.S.C. s.883-1) There is also an exception for intercoastal transportation of empty items such as cargo vans, containers, tanks, etc. where the country of the vessel's registry grants reciprocal privileges to United States vessels. Merchant Marine Act, 1920 (46 U.S.C. s.883).

During time of war or national emergency proclaimed by the President, a foreign-controlled enterprise (FCE) may not acquire or charter, without the approval of the Secretary of Commerce, United States flag vessels, vessels owned by a United States citizen, or shipyard facilities, or acquire a controlling interest in corporations owning such vessels or facilities. (46 U.S.C. s.835)

FCE's may not, unless exempted by specific statutes, transport certain commodities procured by or financed for export by the United States Government or an instrumentality thereof (see the section on dredging or salvage for the management restrictions imposed). (15 U.S.C. s.616(a); 46 U.S.C. s.1241).

Foreign citizens may not act as officers of or serve in certain other positions on certain vessels. "Officers And Crews Of Vessels" (46 U.S.C. s.221).

2. Dredging or Salvage:

To engage in dredging or salvage operations in United States waters, FCE's must satisfy certain management restrictions. To register a vessel to engage in these activities, the President or chief executive officer of a domestic corporation and the chairman of its board, must be United States citizens; and, foreign citizens serving as directors cannot be more than a minority of the number necessary to constitute a quorum. "Regulation of Vessels In Domestic Commerce" (46 U.S.C. s.316(d), 11.).

3. Shipbuilding:

FCE's operating in this sector of the United States economy are deprived of many government benefits available to domestic investors. As the following examples illustrate, this nationalistic incentive policy could, in fact, be viewed as a deterrent to foreign investment:

- FCE's may not obtain special government loans for the financing or refinancing of the cost of purchasing, constructing or operating commercial fishing vessels or gear; (United States Fishing Fleet Improvement Act, 46 U.S.C.S. s.1401,1402, June 12, 1960; Fish and Wildlife Act of 1956, 16 U.S.C. s.741, s.742(c)(7)).

- FCE's may not sell obsolete vessels to the Secretary of Commerce in exchange for credits towards new vessels; (Merchant Marine Act, 1936, 46 U.S.C. s.1101, s.1160(b))

- FCE's may not receive a preferred ship mortgage; (Ship Mortgage Act, 1920, 46 U.S.C. s.911, s.922).

- FCE's may not purchase vessels converted by the government for commercial use, or surplus war-built vessels at a special statutory price. Merchant Ship Sales Act of 1946 (50 U.S.C. App. s.1737, 1745).

- FCE's may not obtain certain types of vessel insurance unless the management restrictions applicable to companies operating vessels in salvage are satisfied. (46 U.S.C. s.1281 et seq).

- FCE's may not obtain construction-differential or operating-differential subsidies for vessel construction or operation (46 U.S.C. s.1151 ff., s.1171 ff., s.802).

4) Fishing:

Foreign controlled fishing companies may not:

- fish in the territorial waters or fishing zone of the United States, or
- land fish in the United States that was caught on the high seas unless certain management restrictions are met:
  - the president or chief executive officer must be a U.S. citizen, and
  - foreign citizens serving as directors cannot be more than a minority of the number necessary to constitute a quorum.

It should be noted that where these restrictions are met and a permit to fish is issued, it is generally done as a result of reciprocal agreements between the U.S. and the foreign country. (See: Fish and Wildlife Act of 1956, 16 U.S.C. s.741, s.1081; Fishery Conservation and Management Act of 1976, 16 U.S.C. s.1801, s.1802(12), (25), s.1821, s.1824; "Regulation of Vessels in Domestic Commerce," 46 U.S.C. s.251 et seq.).

b) Aviation/Aeronautics

The Civil Aeronautics Board, established by the Civil Aeronautics Act of 1938 (now the Federal Aviation Act of 1958, 49 U.S.C. s.1301-1542), administers investment regulations in the aviation industry.

Relevant provisions of the Federal Aviation Act of 1958, are as follows:

- All certified U.S. air carrier corporations must be "citizens" of the United States; (49 U.S.C. s.1371(a), 1301(3), (10), (21), (22), (23));
- Only U.S. citizens may own registered aircraft; and, other than under limited circumstances, registration is necessary to operate an aircraft in the United States; (49 U.S.C. s.1401 (a),(b));
- in order to qualify as a U.S. citizen, a corporation:
  - must be organized under U.S. state or federal law;
  - the president and 2/3 of the directors of the corporation must be U.S. citizens; and,

- 75 percent of the voting interest in corporation must be owned or controlled by U.S. citizens; (49 U.S.C. s.1301(13));

- The acquisition of control of an air carrier corporation (10 percent of the voting interest gives rise to a presumption of control), cannot be concluded without the approval of the Civil Aeronautics Board; (49 U.S.C. s.1378).

- No foreign air carrier may acquire control of a U.S. "citizen" engaged in any phase of aeronautics. (49 U.S.C. s.1378 (a)(4)).

It can also be noted that no FCE operating in the United States can obtain war-risk insurance for aircraft. (49 U.S.C. s.1531, s. 1401).

Foreign-controlled carriers cannot compete for federal government contracts for international air carriage of persons and property, except in limited instances involving Government contracts for carriage of persons and property between two foreign points. Specifically, Federal Government Regulations pursuant to Section 5 of the International Air Transportation Fair Competitive Practices Act of 1974 (49 U.S.C. s.1517) require any federal department, agency, or instrumentality, and their contractors, to contract for the international air transport of persons and property only with "air carriers" operating under Civil Aeronautics Board authority to the extent service by such carriers is available. International air transport refers to the transportation between a point in the U.S. and a foreign place, or between two foreign points. Guidelines have been issued by the Comptroller General to define instances where U.S. flag-carrier service may be deemed unavailable for the purposes of the Act. Because the Federal Aviation Act defines an "air carrier" certified by the Civil Aeronautics Board as a U.S. citizen, with a maximum foreign participation of 25 percent of voting shares and 33 percent of the carrier's board of directors, foreign investment in a carrier eligible to provide international air transportation under federal contract is restricted.

In 1975 the Civil Aeronautics Board (CAB) was able to use its authority to prevent a takeover basically unrelated to aviation. In this case an Italian company, Liquigas, announced its intention to take over Ronson Corporation. After 2 years of battle to achieve 36% ownership of Ronson shares and a proxy fight to get 2 of its directors on the 9 man board of directors, Liquigas capitulated and sold its shares back to Ronson. In the 2 years Liquigas had faced not only a high-pitched publicity campaign against the takeover, but also an appeal to the Securities and Exchange Commission that it be investigated, and finally, a successful appeal to the CAB which stopped the acquisition because Ronson has a small incidental helicopter business. The CAB enjoined the takeover completely on these

grounds without even offering Liquigas the option of disposing of the helicopter business.(6)

c) Communications

1) Radio and Television Licensing:

The Communications Act of 1934, (47 U.S.C. s.151 et seq.) requires that a license be issued by the Federal Communications Commission (FCC) for all radio and television transmission within the United States. (s.301). The Act also prohibits aliens, representatives of aliens, foreign governments or their representatives, or foreign-registered, owned or controlled corporations from receiving a license from the FCC to operate an instrument for the transmission of radio or television communication.

A corporation is considered foreign-owned if any director or officer is an alien or if more than 20 percent of its capital stock is owned by aliens, by a foreign government, or by a corporation organized under the laws of a foreign country. A corporation is considered foreign-controlled if any officer or more than one-fourth of the directors are aliens or if it is directly or indirectly controlled by a corporation, 25 percent of the capital stock of which is owned by foreign interests. Certain exceptions can be made if the FCC determines that the grant of a license would be in the public interest (e.g. broadcasting operations ancillary to another business of a foreign-controlled corporation). (47 U.S.C. s.310(a)).

2) Telegraph Operations:

The FCC is prohibited from approving a merger among telegraph carriers which would result in more than 20 percent of the capital stock of the carrier being owned, controlled, or voted by an alien, a foreign corporation, a foreign government entity or a corporation of which any officer or director is an alien or of which more than 20 percent of the capital stock is foreign owned or controlled. (47 U.S.C. s.222(d)).

3) Radio and Television Operators:

Foreign citizens may not be licensed by the FCC as operators in radio or television stations. Waiver of the citizenship requirement is permitted for certain licensed aircraft pilots. (47 U.S.C. s.303(l)).

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6. "Are Foreign Multinationals Excluded from Entering the U.S. by Takeover?" Multinational Business, The Economist Intelligence Unit, No. 4, December 1975, pp.41-43.

4) Communications Satellite Corporation (Comsat):

Not more than an aggregate of 20 percent of the shares of stock of Comsat which are offered to the general public may be held by aliens, foreign governments, or foreign-owned, -registered or -controlled corporations. (47 U.S.C s.734(d)).

d) Energy

Foreign investment in power production is basically prohibited. "Alien direct investment is prohibited in the case of nuclear power, restrained in the case of hydro electric power and permitted in the case of the transmission of natural gas and electricity. Because the same utilities often produce power by several different means, however, the prohibition of alien investment with respect to even one power source, most notably nuclear energy, serves to restrain alien investment in power production by other means as well". (7) The detailed regulation of investment in power production is discussed below.

1) Atomic Energy Act 1954, (42 U.S.C. s.2011 et seq)

This legislation prohibits the issuance of licenses for the operation of atomic energy utilization of production facilities to aliens, foreign governments, foreign corporations or corporations owned, controlled or dominated by such foreign interests. In defining foreign ownership or control, there is no threshold test of percentage ownership or other rule of thumb. Determinations are made on a case by case basis. Clearly, the legislation provides for maximum possible restrictions against foreign investors in this area.

2) Federal Power Act, (16 U.S.C. s.791 et seq.):

"Despite the absence of an explicit reference to alien control of domestic hydro electric facilities through stock ownership, officer positions or directorships in the utility possessing the facility, the FPC (Federal Power Commission) staff have opined that the Commission would not issue a license to an alien-controlled corporation on the ground that the legislative intent (of the Federal Power Act), as evidenced by the ineligibility of an alien for a license, extends to alien control over a corporate

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7. Phillips, David Morris, Report To The Congress: Foreign Direct Investment In The United-States, Vol. 7, Appendix K, U.S. Dept. of Commerce, April 1976, p.K-138.

license."(8) "At least with respect to companies importing or exporting natural gas or electricity, the statute implicitly includes affiliations with foreign governments as part of the public interest consideration in determining whether the license should be granted. That inclusion could be interpreted to authorize the FPC to revoke licenses for subsequent affiliations with foreign governments and, perhaps, with aliens and alien corporations as well." (9) That is to say, initiation or extension of alien control with respect to an acquisition, merger or consolidation of an electric utility would be a component of the public interest consideration applied by the Commission. It is apparent that the FPC is well positioned to discriminate against foreign investors, if this is in the U.S. national interest.

3) Public Utility Holding Company Act of 1935, (15 U.S.C. s.79 et seq.):

The Security and Exchange Commission (SEC) is authorized to regulate certain transactions pursuant to the Act. According to David Phillips of the Boston University School of Law, in a report commissioned by the U.S. Department of Commerce, considerations of public interest, in approving or disapproving applications, "could, perhaps be broadly interpreted to encompass a consideration of alien control". (10) The SEC can apply its regulations in a way that controls foreign investment.(See section B2: Securities.)

4) Geothermal Steam Act, (30 U.S.C. s.1001-1025):

Under this Act, leases for the development of geothermal steam and associated resources may be issued only to U.S. citizens and corporations organized under the laws of the United States or of any state (s.1015). If a foreign-controlled enterprise chooses to operate through a sole proprietorship or a branch office, rather than a corporation organized under the laws of one of the states, it may not obtain licenses to develop and utilize geothermal steam and associated resources on federal lands. However, a licensed domestically incorporated enterprise may be foreign owned or controlled. (11)

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8. Ibid, p.K-146.

9. Ibid, p.K-149.

10. Ibid, p.K-151.

11. "Summary Of Federal Laws Bearing On Foreign Investment In The United States", Department of the Treasury News, Washington, May 27, 1975, pp:1-21 at p.3.

e) Natural Resources

1) Land: Small Tract Act

According to the U.S. Treasury Department, "Federally-owned land may be transferred or leased only to:

(i) U.S. citizens or persons having declared their intention to become U.S. citizens;

(ii) partnerships or associations, each of the members of which is a U.S. citizen; and

(iii) corporations organized within the United States and permitted to do business in the state in which the land is located, and states, municipalities or other policital subdivisions. "Small Tract Act" (43 U.S.C. SEC. 682a et seq., SEC. 682c.)

There is no limit upon the percentage of foreign ownership that a domestically incorporated firm may have, provided that the country whose citizens own shares of the U.S. firm grants reciprocal privileges to U.S. citizens. Where there is no such reciprocity, an American corporation purchasing public land must be majority owned by United States citizens. "Alien Owners of Land" (48 U.S.C. SEC. 1501-1508)" (12)

2) Agriculture:

Foreign-controlled enterprises operating in the U.S., whether in branch or subsidiary form, may not obtain special government emergency loans for agricultural purposes after a natural disaster (Consolidated Farm and Rural Development Act (7 U.S.C. s.1921 et seq., 1961)), or government loans to individual farmers or ranchers to purchase and operate family farms (7 U.S.C. s.1922, 1941).(13)

3) Mining Claims and Mineral Lands Leasing Act

According to Raymond J. Waldmann, current U.S. Assistant Secretary of Commerce, "Alien ownership and development of mineral and energy resources on federal lands is governed by The Mining Act of 1872, and the Mineral Lands Leasing Act of 1920." (14)

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12. Ibid, p.4.

13. Ibid, p.8.

14. Waldmann, Raymond J., Direct Investment and Development In The U.S., Transnational Investments Ltd., Washington D.C., 1980-81, p.26.

a) Mining Claims:

"Only U.S. citizens may locate and patent mining claims. (30 U.S.C. s.s.22, 71). However, although only corporations incorporated in the United States, a state, territory or possession are eligible, there is no restriction on foreign stock ownership in the U.S. corporation. (Mining And Minerals Policy Act of 1970, 30 U.S.C. s.24; Doe v. Waterloo Min. Co., 70 F. 455, 462-64 (9th Cir. 1895))."(15) The definition of "U.S. citizen" may become an issue if there is hostility against particular foreign investors.

b) Mineral Lands Leasing Act of 1920, (30 U.S.C. s.181 et seq.):

Under this legislation, popularly known as the Mineral Leasing Act of 1920, alien or foreign-controlled enterprises may not acquire rights of way for oil pipelines, or acquire any interest therein, or acquire leases or interests therein for mining coal, oil, or certain other minerals, on federal lands other than the outer continental shelf. However, a foreign-controlled corporation may hold such an interest if its home country grants reciprocal rights to U.S. corporations:

> s.181 "... Citizens of another country, the laws, customs, or regulations of which deny similar or like privileges to citizens or corporations of this country, shall not by stock ownership, stock holding, or stock control, own any interest in any lease acquired under the provisions of this chapter."

During the 1920s this reciprocity provision was applied to Royal Dutch Shell (Netherlands), and in 1948 the United Kingdom was declared non-reciprocal with regard to coal, when it nationalized its coal industry. (16)

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15. Law, Alfred J. "Aspects Of The Regulation Of Foreign Investment In The United States", Foreign Investment In The United States John E. McDermott (Chairman), Practising Law Institute, New York, 1977, pp:9-54 at p.49.

16. The Adequacy Of The Federal Response To Foreign Investment In The United States, Twentieth Report By The Committee On Government Operations, 96th Congress, 2nd Session, Washington, August 1, 1980, p.137. It is noted that British firms such as British Petroleum are free to mine coal in the U.S., and do so. This would indicate that notwithstanding application of the reciprocity provision, there is not now, at least, enforcement of British non-reciprocal status for coal.

The U.S. Department of the Interior recently reviewed Canada's reciprocal status under the Act. It had been made public that Canada could be declared wholly or partly non-reciprocal, in which case Canadian firms could be banned wholly or partly from mineral leases on U.S. federal lands.(17) Secretary of the Interior, James Watt, after months of delay, decided in February 1982 that Canada was still a reciprocal country because Canadian laws and regulations do not deny Americans" the privilege of stock ownership in corporations which have an interest in Canadian mineral resources".(18)

4) Outer Continental Shelf Lands Act, (43 U.S.C. s.1331 et seq.):

This Act regulates oil, gas and sulphur leases, and the general consensus is that it contains no provisions as to citizenship or reciprocity. "Over time, however, practice has limited rights to U.S. citizens and domestic corporations."(19)

Also, it has been suggested that by virtue of SEC. 1337 and 43 C.F.R. s.3300.1, the Secretary of the Interior may only grant mineral leases on the outer continental shelf to U.S. citizens or aliens admitted for permanent residence in the U.S.(20)

5) Deep Seabed Hard Mineral Resources Act, (30 U.S.C., s.1401 et seq.):

In s.1401(b)(3), Congress declares that one of the purposes of this Act is to establish an interim program to regulate the exploration for and commercial recovery of hard mineral resources of the deep seabed by United States citizens, pending U.S. ratification of and entering into force with respect to an international Law of the Sea Treaty.

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17. Southam News Service, "Avoid Reprisals On Energy Policy U.S. Is Warned", The Gazette, Montreal, August 7, 1981, p.45.

18. "U.S. Refuses to Bar Canadian Investors from Oil, Gas Lands", The Toronto Globe and Mail, February 4, 1982, p.2.

19. "Controlling Foreign Investment in National Interest Sectors of The U.S. Economy", Comptroller General of the United States Report to Congress, Washington, October 7, 1977, p.21.

20. Law, op. cit., p.49.

Section 1412(c)(1)(f) states that the Administrator may not issue a license or permit, or approve the transfer of a license or permit, except to a United States citizen.

By virtue of the rather complicated definitions of "U.S. citizen" (s.1403 (14)(c)) and "controlling interest" (s.1403(3)), it appears there may be categories of foreign investors that cannot be issued a license for the exploration for, or recovery of deep seabed hard mineral resources.

Further, s. 1412 (c), paragraphs 2 and 3, state:
(2) "No permittee may use any vessel for the commercial recovery of hard mineral resources or for the processing at sea of hard mineral resources recovered under the permit issued to the permittee unless the vessel is documented under the laws of the United States.
(3) Each permittee shall use at least one vessel documented under the laws of the United States for the transportation from each mining site of hard mineral resources recovered under the permit issued to the permittee."

f) Defense

1) National Security Act of 1947, (50 U.S.C. s.401-412):

The Industrial Security Regulations issued under the Act by the Secretary of Defense, state that, as a general rule, facilities which are determined to be under foreign ownership, control or influence (FOCI), shall be ineligible for a facility security clearance necessary for bidding on U.S. Government contracts. Considerations in determining FOCI are:

- voting stock ownership or control (6%) by foreign interests;
- the corporate structure of the company, such as interlocking directorates, holding companies;
- licensing or patent exchange agreements;
- control of appointment and tenure of officers and directors;
- access by foreigners to classified material; and
- financial backing or support by a foreign interest.

Should the Department of Defense, through the Defense Industrial Security Program (DISP), presume FOCI exists in a firm performing classified defense contracts, the firm might lose its

security clearance and be ineligible for future classified government contracts (worth billions of dollars). (21) In Grombach v. Oerlikon Tool & Arms Corp. of America (276 F. 2d. 155, 158, 4th Cir. 1960), for example, FOCI was interpreted to preclude clearance of any facility with more than 25 percent alien stock ownership.(22)

Application

According to Thomas J. O'Brien, Director, Defense Investigative Service, Department of Defense, "There have been a number of instances where inquiries were made on behalf of foreign investors. When the DOD explained that foreign acquisition would jeopardize the U.S. company's security clearance, the foreign investor decided not to proceed with the investment. There are other cases where a cleared DOD contractor was acquired by a foreign interest and the facility's security clearance was terminated. For example, K.D.I. Score, Inc. was a cleared facility performing on classified army contracts. It was acquired by a French-owned firm. The facility's security clearance was invalidated, the classified material was recovered and the classified contracts were terminated. Another example, Maremount Corporation. This company had a secret facility clearance and its contracts involved the manufacturing of machine gun barrels for the Department of the Army. In 1979 Maremount was acquired by a Swiss-owned firm. The facility security clearance of Maremount was terminated. Another recent case involved U.S. Filter. A significant percentage of Filter's stock was acquired by a FRG Corporation. Attorneys for the German firm proposed a corporate governance procedure which they contended would provide sufficient isolation of the foreign owner to permit U.S. Filter to retain its facility security clearance. The corporate governance did not provide the degree of isolation as could be achieved by the trust or proxy arrangements which I described earlier. Therefore, it was decided that the corporate governance's procedure could not be accepted. Subsequently, the German investor sold its interest in the U.S. Filter to Ashland Oil, a U.S. Corporation." (23)

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21. Phillips, op.cit., pp.K25-K40; "Controlling Foreign Investment..." op. cit., (footnote 20), pp.8-10.

22. Elmer, Brian C. and Johnson, Dwight A. "Legal Obstacles To Foreign Acquisition of U.S. Corporations.", The Business Lawyer, Vol. 30, April, 1975, pp.680-698 at p.685.

23. "Federal Response to OPEC Country Investments in the United States", Part 2, Hearings before a House Subcommittee of the Committee on Government Operations, Washington, October, November and December, 1981, pp.259-260.

FOCI, in the approximately 11,500 facilities performing classified government contracts under DISP, is monitored by the Defense Logistics Agency of the Department of Defense. It must also be noted that DISP's authority encompasses the classified procurement activities of seventeen federal departments or agencies, including: the Environmental Protection Agency and the departments of Health, Education and Welfare, Transportation, Treasury, Labour, Agriculture and Commerce. (24)

The United States exercises administrative discretion both in interpreting the requirements of security clearance of foreign firms and in the timing of such clearance.

For example, when the Federal Communications Commission (FCC) instructed American Telephone and Telegraph (AT&T) to open to competitive bidding, its proposed construction of a fibre optic telephone system between Washington, New York, and Boston, no restriction was made as to the nationality of the bidders and no suggestion was made that the construction of the system involved a question of national security. However, when it became apparent that the lowest bidder (by far) was a Japanese Corporation, Fujitsu Ltd., a campaign was launched in the U.S. to prevent the award from going to a foreign company. After months of political manoeuvring, the FCC ordered AT&T "to address the concerns raised" on national security. Fujitsu's bid was then rejected and the contract awarded to Western Electric, AT&T's subsidiary equipment manufacturer. (25)

In another instance, AES Data Ltd., a Canadian firm, failed to qualify for a major State Department word processor contract when delays in obtaining the appropriate security clearance prevented AES from studying the specification in time to compete with the U.S.-owned winner. (26)

For a further discussion of the impact of United States defense spending on foreign investment see Part Three, 1: Defense Funding.

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24. "Controlling Foreign Investment..." op.cit. pp.8-10.

25. Meadows, Edward, "Japan Runs into America Inc." Fortune, March 22, 1982, pp.56-61.

26. The Financial Post, Toronto, August 1, 1981.

g) Banking

A foreign bank may take part in banking in the U.S. either directly through representative offices, agencies or branches, or indirectly through the ownership of a domestic bank.

In order to engage in banking activity in the United States, affirmative licenses from or supervision by a federal or state regulatory authority are required (using the definition of "banking activities" in Section 21(a)(2) of the Banking Act of 1933 (12 U.S.C. s.378, 1970)). (27) The Banking Act of 1933 is incorporated in the Federal Reserve Act, 12 U.S.C. s.221-522. Federal law makes the permissibility of direct deposit-taking operations by alien banks in the U.S. dependent upon state law. (28)

International Banking Act of 1978 (12 U.S.C. s.3101 et seq.):

The International Banking Act was signed into law by President Carter on September 17, 1978. The Act removes the previous advantages enjoyed by foreign banks over U.S. domestic banks and appears to establish a principle of parity of treatment between foreign and domestic banks in like circumstances. It is not easy to distinguish between differential and discriminatory treatment in this sector.

Some of its relevant features are described below.

a) A foreign-controlled corporation must meet certain management requirements, e.g. foreign citizens cannot be appointed as directors of U.S. national banks without the approval of the Comptroller of the Currency. The Comptroller of the Currency is authorized to approve up to a minority of directors of a national bank that is a subsidiary of or affiliated with a foreign bank to be foreign citizens.

The same requirements also apply to domestically-incorporated corporations. However such requirements inhibit the degree of foreign ownership and control, notwithstanding the lack of stockholder citizenship requirements. Finally, this legislation is an improvement over the previous one which required every director and president of a national bank to be a U.S. citizen.

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27. Phillips, op. cit., pp: K-168, K-341.

28. Ibid. p. K-169.

b) The Act now opens up ownership of Edge Act corporations to foreigners by deleting the requirement that all directors of these corporations be U.S. citizens. The Act also permits foreign majority ownership of shares of capital stock with prior Federal Reserve approval, when the foreign owner(s) and holder(s) are a foreign banking institution or its U.S. subsidiary. (Domestic banks may invest in domestic corporations whose function it is to engage in financing transactions that facilitate international trade. When these corporations are federally chartered, they are referred to as Edge Act corporations; when state chartered, they are referred to as Agreement Corporations. The deposit-taking ability of these corporations is restricted to foreign source and such other deposits as are related to their international or foreign business. Edge Act corporations may make loans or such other advances as are usual in financing international commerce.)

c) The Act prohibits a foreign bank, henceforth (after July 26, 1978) from establishing either a Federal branch or a State branch outside its home State unless its operation is permitted by the State in which it is to be operated and the foreign bank enters into an agreement with the Federal Reserve to receive only such deposits at the place of operation of such a branch as would be permissible for a corporation organized under Section 25(a) of the Federal Reserve Act (i.e. an Edge Corporation).

d) The Act prohibits a foreign bank from establishing a State agency or commercial lending company subsidiary outside of its home State unless its operation is permitted by the bank regulatory authority of the State in which it is to be operated. Alternatively, a foreign bank is prohibited from establishing a Federal agency outside of its home State, unless the operation of the agency is expressly permitted by the State in which it is to be operated. A foreign bank may not acquire any interest in a bank subsidiary outside of its home State unless such acquisition would be permitted for a domestic bank holding company whose banking subsidiaries operated principally in that home State.

e) Future non-banking activities of foreign banks in the United States will be limited to those permissible to domestic banks under the Bank Holding Company Act.

A foreign bank may retain direct or indirect ownership or control of any voting shares of any non-banking U.S. company that it owned or controlled as of September 17, 1978, only until December 31, 1985, after which it ...

"... may continue to engage in non-banking activities in the United States in which directly or through an affiliate it was lawfully engaged on July 26, 1978, ... and may engage directly or through an affiliate in non-banking activities in the United States which are covered by an application to engage in such activities which was filed on or before July 26, 1978; except that the Board by order, after opportunity for hearing, may terminate the authority conferred by this subsection on any such foreign bank or company to engage directly otherwise permitted by this subsection if it determines having due regard to the purposes of this chapter and the Bank Holding Company Act of 1956... that such action is necessary to prevent undue concentration of resources, decreased or unfair competition, conflicts of interest, or unsound banking practices in the United States." "Non Banking Activities" 12 C.F.R. Part 28 (12 U.S.C. s.3106(c)).

f) The Act prohibits maintenance of a Federal branch and a Federal agency in the same state.

Finally, indications of U.S. concerns regarding foreign investment in the banking sector were set out by Raymond Waldmann, (current U.S. Assistant Secretary of Commerce) who stated that:

"During the last session of Congress a proposal was passed instituting a temporary moratorium until July 1980 on foreign takeovers of American banks (except in emergency situations), with the intent that Congress would use the opportunity thereby provided to fashion groundrules governing such takeovers in the future. Such groundrules could affect such matters as whether foreign takeovers should be conditioned on the existence of reciprocity in the foreign country; whether steps would be taken to assure a continuation of local lending; whether limits would be placed on the size of American banks which could be acquired; whether the foreign owners should be required to submit as a condition of the takeover, to the exercise of supervisory and investigatory power by U.S. bank regulatory authorities; and under what circumstances hostile foreign takeovers would be permitted. While some uncertainties remain regarding what course any legislation in this area will take, nevertheless foreign control of the credit resources of the United States has increased

to the extent that some knowledgeable observers are predicting restrictions of some sort are likely."(29)

h) Emergency Provisions

The House Committee on Government Operations, in the report entitled "The Adequacy of the Federal Response to Foreign Investment in the United States" (1980), referred to the International Emergency Economic Powers Act as a foreign investment policy instrument.

1) International Emergency Economic Powers Act (50 U.S.C. s.1701 et seq., 1976, Supplement III):

Under this Act (formerly the Trading with The Enemy Act) the President of the United States has the power to control completely any property in the United States which is (or will immediately be) owned by foreign investors, by:

- stopping the acquisition
- condemning and expropriating (subject to compensation) or
- requiring priority defence production or other uses.

However, before this power can be used, the President must declare a national emergency, (30) and it is unlikely that the provisions would be used in anything other than the most dire circumstances:

> s.1701(a) "Any authority granted to the President by section 1702 of this title may be exercised to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat."

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29. Waldmann, op. cit., pp.24-25.

30. "The Adequacy of the Federal Response..." op. cit., pp. 133-134.

The broad wording and lack of standards for invoking the Act, lead to its being applied on an ad hoc basis. (See Application)

Presidential authority is outlined in s.1702 of the Act:

(a)(i) "At the times and to the extent specified in section 1701 of this title, the President may, under such regulations as he may prescribe, by means of instructions, licenses or otherwise -

(A) investigate, regulate or prohibit -

(i) any transactions in foreign exchange,

(ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers on payments involve any interest of any foreign country or a national thereof,

(iii) the importing or exporting of currency or securities; and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transaction involving, any property in which any foreign country or a national thereof has any interest;

by any person, or with respect to any property, subject to the jurisdiction of the United States."

2) Application:

On November 14, 1979, President Carter issued Executive Order No. 12170 "Blocking Iranian Government Property", pursuant to the powers vested in him under the International Emergency Economic Powers Act (50 U.S.C. s.1701 et seq., 1976, Supplement III)

The assets of aliens from North Vietnam, North Korea and Cambodia are presently "blocked" by executive order, without compensation.(31 C.F.R. s. 500.201)

2. Other Legislation

a) Overseas Private Investment Corporation Insurance And Guarantees

"In 1969, the Overseas Private Investment Corporation (OPIC) was created to insure United States citizens against risks incurred in foreign investments. This insurance, which covers losses from expropriation, revolution and currency-conversion difficulties, is available to 'eligible investors'(a). A corporation qualifies as such only if it is domestically incorporated and 'substantially beneficially owned by United States citizens'(b). On one occasion the latter requirement was interpreted by a predecessor of the present Corporation to require majority American stock ownership(c)".(31)

In response to pleas from U.S. multinationals, the Reagan Administration plans to expand OPIC, promoting U.S. business abroad.(32)

b) Customs House Brokerages

For a foreign-controlled firm to obtain a license to operate as a customs house broker at least two of the officers of the corporation must be U.S. citizens. Tariff Act of 1930 (19 U.S.C. s.1641)(33)

c) Loan Guarantees

Business and Industrial Development Loan Guarantees under Farmers Home Administration, Department of Agriculture, are provided in order to further business and industrial development, establish enterprises and increase employment in rural areas. The assistance is extended to pollution abatement projects. "Applicants must be U.S. citizens or legal permanent residents; if a corporation, 51 percent ownership must be held by such persons."(34)

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31. Elmer, op. cit., p. 684, Elmer cites as authority
    a) 22 U.S.C. s.2194(a)(1970);
    b) 22 U.S.C. s.2198(c)(1970);
    c) U.S. Int'l Cooperation Admin. Investment Guaranty Handbook 5 (rev. ed.1960).

32. "Third World Giving U.S. Business A Better Break Abroad". Business Week, McGraw-Hill, New York, August 3, 1981, p.39.

33. Hearings, Subcommittee of the Committee on Government Operations, House of Representatives, 96th Congress, 1st Session (1979).

34. Waldmann, op. cit., p.42.

B. INDIRECT

There are a number of laws and regulations in the United States, especially in the anti-trust and securities areas, which apply equally to both foreign and domestic investors. However, foreign investors may be placed at a particular disadvantage in their attempts to comply with such laws and regulations. This aspect of the regulation of foreign investors is relevant, in particular because the legal system in the United States facilitates both private and public litigation to enforce these laws and regulations. Private litigation or threats of private litigation with their uncertainties, delays and costs, have deterrent effects on foreign takeovers. Opinions and actions by government officials also have similar effects.

1. Anti-trust Legislation

While acquisition of a U.S. company may be the easiest form of entry into the U.S., the anti-trust laws can prevent particular acquisitions by foreign investors because of their effect on actual or potential competition.

a) Clayton Act

Under the Clayton Act, (15 U.S.C. s.12), foreign direct investment is subject to anti-trust scrutiny when such investment involves a purchase of or merger with an existing U.S. firm, or a joint-venture with an existing U.S. firm, or a joint-venture with a U.S. or foreign firm to operate an enterprise which may tend to lessen competition or to create a monopoly. The Clayton Act is limited to acts in interstate commerce.

The Clayton Act, however, goes beyond safeguarding against increased "industrial concentration" in the U.S. It also allows for the scrutiny of competition between firms with production facilities in the U.S. and firms whose production facilities are located abroad. "A merger between an important exporter to the United States and a significant United States producer will be treated much in the same way as would the merger of two United States producers with corresponding market shares." (35)

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35. "General Laws Affecting the Conduct of Business in the United States by Foreign Investors", Business Policies, Treasury Department Summary of U.S. Laws and Regulations Applicable to Foreign Investment in this Country, Bureau of National Affairs, Washington, D.C.

b) Sherman Act

Foreign-controlled firms which invest in the United States are also subject to the Sherman Act (15 U.S.C. s.1-7), which outlaws conduct weakening or eliminating competition. This Act prohibits anti-competitive practices, such as monopolizing (section 2), price fixing, group boycotts and market allocation (section 1). Those foreign-controlled firms which plan an investment in the United States by purchase or merger of an existing firm can use the Business Review Procedure of the Anti-Trust Division whereby the Division will review the investment proposal and state its enforcement intentions with respect to that proposal.

c) Federal Trade Commission Act

The Federal Trade Commission Act (15 U.S.C. s.41 et seq.) sets up the Federal Trade Commission and gives it the power to investigate the organization, business, conduct, practices and management of, other than banks and common carriers, corporations engaged in commerce and their relation to other corporations, individuals and partnerships (s.46(a)). If acquisition or ownership by or of an export trade corporation has the effect of restraining trade or substantially lessening competition within the United States, the Commission has the power to forbid such acquisition or ownership (s. 63).(36)

> "The Sherman and Federal Trade Commission Acts have broader jurisdictional reach than the Clayton Act, since they cover all activities that Congress has the power to regulate under the constitution ... this includes 'commercial intercourse between the Unite States and foreign nations'. Communication or transportation between the United States and foreign countries, as well as U.S. exports and imports, have been deemed within the scope of these statutes." (37)

d) Application

It is usually under Section 7 of the Clayton Act that foreign companies may find their acquisition or merger plans challenged. In recent years, Inco, Alcan, Mitsui Petrochemical Industries, B.C. Forest Products, Siemens Corp. and Ibstock Johnson have all faced litigation under this section.

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36. Also see: Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C.S. s.1311, and Antitrust Procedural Improvements Act of 1980.

37. Waldmann, op. cit., p.7.

The uncertainty surrounding the application of these laws can be particularly burdensome to a foreign investor. This problem was recognized in 1977 when an Antitrust Guide for International Operations was issued by the Department of Justice. In the introduction to the Guide it was noted that many international transactions do not raise serious antitrust issues. "Yet uncertainty on this score may sometimes cause businesses to abandon or limit unobjectionable transactions, or to embark upon unnecessarily restrictive transactions which would not be undertaken if the antitrust risk were more clearly perceived." (38)

Frederick Rowe goes even further in an article advising European investors on U.S. anti-trust legislation:

> "Foreign reluctance to make more U.S. investments can be blamed, in part, on excessive concern about U.S. antitrust laws and unclear enforcement policies." (39)

The resulting confusion means that this legislation is particularly vulnerable to political pressures. The thoroughness with which it is applied varies depending on the particular beliefs of the administration in power.(40) Adverse publicity and pressures from the legislative branches can also force the filing of anti-trust suits against transactions that might otherwise be ignored. Companies may give up an investment rather than face months of litigation and public attacks. Rowe notes, for example, that Brascan's $1.1 billion bid for F.W. Woolworth was dropped in the face of adverse anti-trust and political publicity.(41) In the same way Mannesmann Machinery Corp., a U.S. subsidiary of Mannesmann AG of West Germany, dropped its offer to buy Harnischfeger Corp. rather than face the threatened litigation by the FTC. (42)

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38. Antitrust Guide For International Operations, U.S. Department of Justice, Antitrust Division, January 26, 1977, p.1.

39. Rowe, Frederick M., "Anti-trust Aspects of European Acquisitions and Joint Ventures in the U.S.", Law and Policy in International Business, vol. 12, no. 2, 1980, p.341.

40. See, for example, Financial Times of Canada, Aug. 7, 1978, p.3. U.S. Antitrust Policy relaxes under Reagen Administration", The Gazette, Montreal, July 9, 1981. "The Escalating Struggle between the F.T.C. and Business", Business Week, Dec. 13, 1976, p.52.

41. Rowe, op. cit. pp. 340-341.

42. Ibid., p. 341.

Even the attempt to clarify matters by asking for an initial advisory opinion from the enforcement agencies may create a negative situation for the foreign investor, suggests Rowe, because

> "the enforcement agency's opinion may have an inherent tilt toward negative advice. Also such a negative response may pressure the agency to file suit against a transaction, which, without the inquiry and advice, might have been left in peace." (43)

Both foreign and domestic investors can be subjected to allegations of breach of Anti-trust legislation. Examples relating to foreign investors follow.

1) Joseph E. Seagram and Sons Inc. of New York, the principal U.S. subsidiary of Seagram Co. Ltd. of Montreal, offered to buy all the shares of St. Joe Minerals Corp.. St. Joe succeeded in obtaining a withdrawal of this bid by filing suits that alleged violations of federal securities and anti-trust laws and the Missouri Takeover Bid Disclosure Act, and by involving itself in discussions of reciprocity provisions of the Mineral Leasing Act in Congress. (44) It gained time and eventually found a rescuing "white-knight" (i.e. an alternative American buyer) in Fluor Corp. of California.

2) A long-term concern about the possibility of running afoul of U.S. anti-trust regulations has been an inhibiting factor in CPE Ltd.'s proposed takeovers.(45)

3) "The Federal Trade Commission (FTC) has reacted very sharply in a number of cases where the foreign investors have decided to come in via the acquisition route. Three recent examples were the FTC's formal challenges to (1) the acquisition by British Oxygen Corporation of a 35 percent interest in Airco (producer of industrial gases); (2) BIC Corporation's planned acquisition of the Safety Razor Division of Philip Morris; and (3) Nestle's acquisition of Stouffer.

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43. Ibid., p.337.

44. "St. Joe files to balk takeover by Seagram", The Globe and Mail, Toronto, March 17, 1981, p.B7.
Farnsworth, Clyde H., "Washington Watch: A Challenge to Canada", The New York Times, April 6, 1981, p. D2.

45. Booth, Amy "Feathers Unruffled in CPE Takeover Of CIP", The Financial Post, Toronto, July 25, 1981, p.4.

In all three cases the respondents had similar business outside the United States at the time of the acquisition. In one of the cases, respondent BIC had just introduced a razor in the U.S. market a few months before the challenged acquisition of a domestic razor producer. The FTC's position in such cases is that the acquiring company should either come in de novo or make a toehold acquisition (10 percent or less of market share) rather than going after one of the bigger companies."(46)

Apparently, the FTC uses the "actual potential entrant" test to thwart mergers. That is, if the FTC concludes the foreign investor would have made an actual successful entry into the U.S. market but for the acquisition, and this entry would have decreased concentration and improved competition in the relevant market, there would be a finding of anti-trust violation. (47)

In an article published by the Conference Board, Franklin Gurley states: "The EEC's position is that the FTC's application of the actual potential entrant doctrine 'appears to ignore the peculiar difficulties facing foreign investors and thus discriminates against them'."(48)

4) R. Donald Pollock, chairman of the Industrial Policies Committee of the Science Council of Canada, in an article entitled "Why The U.S. Is Putting The Squeeze On Canada", states:

> "The United States also has more extensive and subtle means of excluding foreign investment using regulatory and other measures. Specifically, anti-trust legislation was utilized to prevent a foreign investor from acquiring a U.S. company for what was officially termed "restriction of competition reasons", yet shortly after a number of the U.S. firms in the same sector were allowed to merge." (49)

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46. Gurley, Franklin L. "Foreign Investments In The United States: Some Antitrust Considerations", The Conference Board, (David Bauer, ed.), Ottawa, Second Quarter, 1977, p.1.

47. ibid.

48. ibid., p.4.

49. Pollock R., Donald, "Why the U.S. is Putting the Squeeze on Canada", The Globe and Mail, Toronto, October 23, 1981, p.7.

2. Securities

a) Laws and Legislation

U.S. securities laws and practices apply to all investors but are generally far more rigourous than those in other countries, and foreign investors often find this burdensome. Accounting and reporting requirements and standards under the Securities Act of 1933 (15 U.S.C. s.77(a)) and Securities Exchange Act of 1934 (15 U.S.C. s.78(a)), are examples.(50) The Securities Exchange Commission requires any investor, foreign or domestic, private or public, who buys more than 5% of the voting stock of a publicly held firm, to so report.

In an article appearing in The Business Lawyer, John H. Young examines the impact of securities legislation on foreign investors. He states that, under the securities legislation:

> "the registration requirement poses a major obstacle to the use of stock or debt securities as consideration. First, the registration requirement eliminates the surprise element, inasmuch as the process of registering securities takes at least several weeks to complete. From the standpoint of the foreign investor, this is a serious obstacle to the success of a public exchange offer if existing management is opposed to the takeover. Second, many foreign firms do not wish to make the detailed disclosure required in the registration statement and offering prospectus. Third, financial statements included in a registration statement must in general adhere to U.S. financial accounting standards, which often differ from those of other countries. Substantial time and expense may be required to conform the financial statements to U.S. standards."(51)

As with Anti-trust legislation, alleged violations of securities requirements are a means of attacking both domestic and foreign investors. Examples relating to takeover bids of foreign investors are discussed below.

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50. Law, op. cit, pp:11-15.

51. Young, John H., "The Acquisition of the United States Business by Foreign Investors", The Business Lawyer, Vol. 30, November 1974, p. 118.

b) Application

1) Société Nationale Elf Aquitaine of France, in its bid to acquire Texasgulf Inc. faced lawsuits alleging violations of security regulations:

> "Monroe J. Weintraub filed a suit in U.S. federal court alleging Elf Aquitaine, CDC and Texasgulf violated securities laws by issuing denials that a tender offer for Texasgulf's shares was imminent.
>
> Weintraub claimed 'certain insiders', primarily Canadian banks, purchased Texasgulf shares knowing the offer was forthcoming."(52)

2) Cities Service Co., Tulsa, Oklahoma, filed suits against Nu-West Group Ltd. of Calgary in an effort to have Nu-West divest itself of its then acquired 6.3% interest in Cities Service. It alleged that there were violations of the Securities and Exchange Act and U.S. margin or downpayment regulations:

> "Cities earlier filed a lawsuit claiming Nu-West Group Ltd. of Calgary provided false information and violated federal regulations in purchasing Cities stock. Nu-West spent $272 million (U.S.) to buy up 7.2 percent of Cities stock last spring...
>
> Cities Service officials charged Nu-West and Amarillo, Tex.-based Mesa Petroleum 'engaged in manipulative acts and practices' in obtaining Cities stock and have 'agreed to act in concert as a group...without making required public disclosures.'
>
> Cities Service officials said they first filed suit against Nu-West because they feared the Canadian firm, which is now Cities's second-largest stockholder, would use its Cities stock to bargain for Cities' Canadian interests".(53)

Recently, Cities Service bought back its stock from Nu-West.

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52. "Elf Says Suit Won't Affect Texasgulf Bid", Toronto Star, Toronto, July 24, 1981, p.D11.

53. "New Defendant Joins Nu-West In Cities Service Suit", The Gazette, Montreal, August 25, 1981, p.48.

3) Conoco Inc. of Stamford, Connecticut delayed a bid by Dome Petroleum Ltd. of Calgary to purchase 13 to 20 percent of the U.S. company's shares by launching suits that alleged Dome had violated U.S. Securities and Exchange Act and Federal Reserve Board Regulations.(54)

4) A U.S. subsidiary of Canadian Pacific Enterprises tried to acquire Hobart Corp. of Troy, Ohio. Hobart launched lawsuits alleging violation of U.S. security laws, margin or downpayment regulations of the Federal Reserve Board and the Ohio State Takeover Act. It managed to get a U.S. Senate Judiciary Committee to agree to examine the impact of the transaction. Hobart finally found a rescuing "white-knight" in Dart and Kraft Inc.

5) "A Maine supermarket chain has asked for a U.S. federal court order barring further purchase of its stock by a Canadian group headed by Sobey Stores Ltd. of Stellarton, N.S.

Hannaford Brothers Co. charged that the Nova Scotia group has already acquired more than 20 percent of Hannaford's outstanding shares, creating 'widespread uncertainty and confusion' over future control and operations (and 'conspired' to acquire 30 to 40 percent).

The complainants charged the Canadian group began buying Hannaford securities eight years ago, but did not file a disclosure statement with the SEC until more than three years after the time set by United States' securities law. And it claimed that the statement was 'materially false and misleading.'

According to the complaint, the Sobey group:

- began acquiring Hannaford securities as early as 1973.
- had obtained more than five percent of the stock by May 1976.
- first filed with the SEC on Oct. 1, 1979, indicating it had 13.7 percent of Hannaford stock.

Hannaford is seeking a court order requiring the Canadians to file a statement of their intentions with the U.S. Securities and Exchange Commission.....

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54. Pritchard, Timothy, "Injunction sought against Dome bid", The Globe and Mail, Toronto, May 12, 1981, p.B1.

The lawsuit also charged the Sobey group, which includes about 10 firms, most of which are investment companies, was seeking to buy the shares 'at depressed prices by concealing material information from (existing) Hannaford shareholders and the investing public.'(55)

3. Proposed Margin Requirements Legislation

Bill H.R. 4145, a proposed amendment to the Securities Exchange Act of 1934, has been introduced in the House of Representatives, and has a twofold purpose:

1. "to provide uniform margin requirements in transactions involving the acquisition of securities of certain U.S. corporations by non-U.S. persons where such acquisition is financed by non-U.S. lenders", and

2. to specify a private right of action under the margin provisions for certain classes of persons that might not have implied rights under existing judicial interpretations of Section 7 of the Securities Exchange Act of 1934.

As stated in the report accompanying H.R. 4145, Mr. John Dingell of the Committee on Energy and Commerce submitted that the proposed Section 7(g) would "make clear that there are private rights of action on behalf of an issuer, or other person injured or threatened with injury by reason of a violation in connection with an acquisition of a tender offer for 5 percent or more of the issuer's equity securities."(p.2).

A violation would occur in circumstances where any person obtains, receives or enjoys the beneficial use of credit in connection with the purchase of U.S. securities, if such credit transaction is or would be contrary to the existing margin provisions for U.S. purchasers and lenders.

The bill comes as a congressional response to the substantial number of recent takeovers and attempted takeovers of U.S. corporations by foreign persons and entities.

Some of the foreign takeovers or takeover attempts cited in the report as highlighting the need for this legislation, are:

1. tender offers for Zale Corp., Hobart Corporation and Bache & Co. by Canadian firms;

2. the plan by Société Nationale Elf Aquitaine to acquire Texasgulf Inc.;

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55. "U.S. Food Chain Fights Embrace of Canadian Firm", The Gazette, Montreal, August 11, 1981, p.39.

3. the purchase of Kennecott Corp. by British-controlled Standard Oil Co. (Ohio);

4. the announced acquisition of a 56 percent stake in Asarco Inc. by M.I.M. Holdings Ltd.;

5. the failed attempt by Seagram Co. to acquire St. Joe Minerals; and

6. the disclosure that Sunshine Mining Co. had become 22 percent owned by Arab investors.

The Committee, it is stated, is "further concerned by the simultaneous manoeuvres by some foreign governments to make it harder for American companies to retain their own holdings abroad". (p.5)

An important caveat in footnote 6, page 9 of the Dingell report, is that it should be noted that, depending on the degree of the lender's participation in the violation, any applicable legal "state of mind" (i.e. mens rea) requirement for an offence, and jurisdictional limitations, a foreign lender might be held accountable, in appropriate circumstances, for aiding and abetting a principal violation.

Under the present legislation, the Federal Reserve Board is authorized to impose margin requirements on "domestic" companies to prevent the excessive use of credit for the purchase or carrying of securities. These margin requirements establish maximum percentage of market value for loans to purchase securities traded on the stock exchanges and selected securities traded over the counter. The legislation prohibits any U.S. person from obtaining credit for the purchase of United States securities in an amount exceeding the margin limit, regardless of whether the lender is subject to the margin requirements.

The proposed amendment would extend the margin requirements to foreign borrowers acquiring significant interest (5 percent or more) in publicly traded United States companies. The target company in a takeover attempt, where it can show injury, would be given explicit cause of action against the foreign investor violating margin requirements. The revised legislation would allow private enforcement of the provision in most takeover situations, with consequent uncertainties, delays and costs on the investor, including foreign investors.

It is not clear that foreign investors will be placed on the same footing as domestic investors. Domestic investors may have an advantage:

> "While some politicians in the United States have been mounting a campaign against Canadian companies arranging takeover financing without a 50 per cent

margin requirement, U.S. businesses have access to loopholes which allow them to avoid the regulation, says the chairmain of the Bank of Montreal."(56)

4. Exports

a) Export Administration Act of 1969 (50 U.S.C. s.2401 et seq.)

Foreign-owned U.S. firms are subject to the Export Administration Act of 1969 which allows the President of the United States to prohibit or curtail exports , if such exports are determined to be detrimental to U.S. interests, that is, "if:

- the U.S. national security is threatened,
- there is an excessive drain of a scarce resource,
- a serious inflationary impact results from excessive foreign demand, or
- controls are needed to further U.S. foreign policy." (57)

The provisions of this Act could result in post-investment measures detrimental to foreign investors. (See Application.)

By Executive Order No.11753, 38 F.R. 34983, 1973, the President established the Export Council within the Department of Commerce to serve as a national advisory body to the President on export expansion activities.

In s.2402(7), the Congress makes the following declaration of its policy:

"It is the policy of the United States to use export controls, including license fees, to secure the removal by foreign countries of restrictions on

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56. Mittelstaedt, Martin "Banks Drawn Into U.S. Takeovers", The Globe And Mail, Toronto, August 24, 1981, p.B1.

57. "The Adequacy of the Federal Response to Foreign Investment in the United States," op. cit., pp. 133-134.
The export of armaments and certain types of energy are governed by other rules.

> access to supplies where such restrictions have or may have a serious domestic inflationary impact, have caused or may cause a serious domestic shortage, or have been imposed for purposes of influencing the foreign policy of the United States. In effecting this policy, the President shall make every reasonable effort to secure the removal or reduction of such restrictions, policies, or actions through international co-operation and agreement before resorting to the imposition of controls on the export of materials from the United States;"

The President also has the authority to impose export license fees to effectuate certain policies through export controls, (s.2403(d)(i)).

Penalties for violation are provided in s.2405(a), (b) and (c):

- the greater of $20,000 or five times the value of the export involved,
- a five year prison sentence, or
- both.

b) Application

The requirement under the Act for specific approval for the export of goods to certain embargoed destinations has affected foreign investors in two ways:

(1) foreign parent firms of U.S. subsidiaries may have friendly relations with the embargoed country but find themselves unable to conduct profitable activities because of U.S. law; and

(2) a foreign subsidiary of a U.S. firm may lose sales, for similar reasons.

II. STATE

Many states have laws that discriminate against foreign investors. Rarely do they bar foreign investors outright, but they often impose conditions of establishment or operation that apply specifically to 'aliens'. Reciprocity is also widely used, sometimes applying to out-of-state investors as well as foreign investors.

A. LAND OWNERSHIP AND USE

1. Restrictions

a) Ownership of Real Estate: Individuals

Connecticut: "Statutes provide limitations on realty rights for a deceased alien's spouse and the probate court's right to sell realty inherited by a non-resident alien." (58)

District of Columbia: Non-resident aliens who do not intend to become U.S. citizens may not 'acquire, hold, own or dispose of' land. "If an alien inherits land, he must divest same within ten years unless he is then a U.S. citizen."(59)

Hawaii: "Purchasers of certain residential lots must be citizens or aliens who have declared an intent to become citizens and have resided in the state for five years or more." (60)

Illinois: "Non-US. citizens must dispose of or sell within six years any land they buy or inherit, or be subject to penalty of escheat."(61)

Indiana: "All aliens who reside in Indiana who have declared intent to become U.S. citizens may acquire and hold real estate. A non-U.S. citizen may only acquire land by devise or descent, and must reconvey such within five years upon penalty of escheat. Should an alien acquire over 320 acres he must become a U.S. citizen or dispose of the property within five years of either his eighteenth birthday or acquisition."(62)

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58. Waldmann, op. cit., p.104.

59. Ibid, p.118.

60. Ibid, p.140.

61. Ibid, p.153.

62. Ibid., p.160.

Iowa: "Non-resident aliens must file annual reports on agricultural land holdings. Iowa code dictates restrictions on property rights for and inheritance for non-resident aliens... A new law effective January 1, 1980, limits land holding by non-resident aliens to 320 acres and it requires that such land be used for non-farm purposes."(63)

Kansas: "Aliens not eligible for citizenship may only inherit property as provided by treaty."(64)

Minnesota: "Non-U.S. citizens or those who do not intend to become citizens, ... may not hold more than 90,000 square feet of land, except that acquired by inheritance, corporate liquidation, security for debt, treaty and certain farmlands. Only U.S. citizens or permanent resident aliens may acquire any future interest in agricultural land. Non-resident aliens must file annually reports on their agricultural holdings."(65)

Mississippi: "Non-resident aliens may not own land under penalty of escheat, with the exception of intended U.S. citizens and citizens of Syria and Lebanon inheriting land. Aliens acquiring land through foreclosure may hold such for 20 years."(66)

Missouri: "Since May 5, 1978, purchase by non-resident aliens of more than five acres of farmland for farming has been prohibited."(67)

Nebraska: "A non-U.S. citizen is not permitted to hold land for over five years, except in cities or villages (or within three miles of such) upon penalty of escheat. A resident alien may acquire title by descent or devise if he reconveys within five years. Non-resident aliens may inherit property only if reciprocal rights are given U.S. citizens by the alien's country."(68)

Nevada: "Non-resident aliens may only inherit property in Nevada if a reciprocal right is granted U.S. citizens in their countries."(69)

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63. Waldmann, ibid, p.167.

64. Ibid, p.174.

65. Ibid, p.228.

66. Ibid., p.235.

67. Ibid, p.243

68. Ibid, p.258

69. Ibid, p.265.

New Hampshire: "A non-resident alien is prohibited from taking or conveying land."(70)

North Carolina: "Non-resident aliens may inherit land only if a reciprocal right is granted to U.S. citizens in their country."(71)

North Dakota: "A person who is not a citizen of the U.S. or Canada, or a permanent resident alien of the U.S., may not own agricultural land in North Dakota."(72)

Oklahoma: "Non-resident aliens are forbidden to hold land in Oklahoma; should one acquire such land by devise, descent or purchase pursuant to foreclosure, he must dispose of it within five years upon penalty of escheat."(73)

Pennsylvania: "Aliens, except corporations, may hold land up to a maximum of 5,000 acres or with a net annual income of up to $20,000." A foreign government may hold land in Pennsylvania only with special permission from the legislature. (74)

South Carolina: Alien ownership is limited to 500,000 acres, but the limit may be extended if acquired through foreclosure and reconveyed within five years. (75)

Wisconsin: "Aliens residing outside the U.S. may not hold over 640 acres of land unless it was acquired by means of a debt or inheritance."(76)

Wyoming: A non-resident alien may not own land if his country prohibits a U.S. citizen from exercising the same right.(77)

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70. Waldmann, ibid., p.271.

71. Ibid, p.304.

72. Ibid, p.312.

73. Ibid, p.326.

74. Ibid, p.342.

75. Ibid, p.359.

76. Ibid, p.421.

b) Ownership of Real Estate: Corporations

Iowa: "Foreign organized and/or controlled corporations may not acquire or hold real estate, except under special circumstances associated with a debt or legal judgement."(78)

Minnesota: "...corporations created outside federal or state law, may not hold more than 90,000 square feet of land, except that acquired by inheritance, corporate liquidation, security for debt, treaty and certain farmlands." (79)

South Carolina: Alien corporations are limited to ownership of 500,000 acres of land. This may be extended if acquired through foreclosure as long as it is reconveyed within five years. (80)

Wisconsin: A non-U.S. corporation or one in which non-resident aliens own over 20% of the stock, may not hold over 640 acres of land unless it was acquired by means of a debt or inheritance. (81)

c) Acquisition of State-Owned Lands

California: "State-owned agricultural inland lake, swamp or overflow lands may only be sold to state residents who are or who intend to become U.S. citizens." (82)

Idaho: State-owned lands may only be sold to U.S. citizens or persons declaring an intention to become U.S. citizens. (83)

Oregon: "Land owned by the State may only be bought by U.S. citizens or aliens intending to become U.S. citizens." (84)

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77. Waldmann, ibid, p.427.

78. Ibid, p.167.

79. Ibid, p.228.

80. Ibid, p.359.

81. Ibid, p.421.

82. Ibid, p.91.

83. Ibid, p.148.

84. Ibid, p.335.

d) Land Use Restrictions

Connecticut: A non-resident alien may "only hold and transmit realty used in mining or converting mining products for trade (with some exceptions)".(85)

Iowa: Effective January 1, 1980, a new state law requires that land held by non-resident aliens be used for non-farm purposes.(86).

2. Application

Of primary importance is the fact that numerous court cases have upheld the right of the states to deny to aliens the right to use, acquire and own land.

For example, it has been held that, in the absence of a treaty to the contrary, a state has power to deny aliens the right to own or use land for specific purposes within its borders.(87)

"In De Tenorio v. McGowan, . . . the Court of Appeals for the Fifth Circuit held that Mississippi's restriction of the ownership of land by certain nonresident aliens after inheritance was not a denial of equal protection under the fourteenth amendment (510 F.2d 92 (5th Cir. 1975)." (88)

Robert J. Irvin of Steel, Hector and Davis (Miami, Florida), states that these restrictions "have arisen in response to periodic waves of anti-foreign sentiment over the years, particularly with respect to agricultural land".(89)

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85. Waldmann, ibid, p.104.

86. Ibid, p.167.

87. See: Webb v. O'Brien, 263 U.S. 313, 44 S. Ct. 112, 68 L. Ed. 318 (1923); Porterfield v. Webb, 263 U.S. 225, 44 S.Ct.21, 68 L.Ed. 278 (1923); Terrace v. Thompson, 263 U.S. 197, 44 S. Ct. 15, 68 L. Ed. 225 (1923); Lehndorff Geneva Inc. v. Warren, 246 N.W. 2d 815 (Wis. 1976)

88. Liebman, John R. and Levine, Beth "Foreign Investors and Equal Protection", Mercer Law Review; Vol. 27, 1976, pp:617-628 at p.618.

89. Irvin, Robert J. "Restrictions and Reporting on Investments in the United States", Miami, 1981, p.25.

A further example, is that:

> "The United States Supreme Court, in Frick v. Webb did not hesitate to go behind the corporate entity and regulate the shareholder composition of certain corporations. A California statute limited the ability of aliens, ineligible for citizenship, to acquire shares in companies, associations, or corporations which were authorized to acquire, hold, enjoy, or transfer agricultural land except as prescribed by treaty. Shares sold in violation of this statute escheated to the state. The arguement was advanced that the shares were personal property, thereby obviating the common law disability of aliens to hold realty. The Court failed to address this point, instead assuming that the statute was intended to govern the ownership of agricultural lands rather than to regulate corporate ownership of real property."(263 U.S. 326, 44 S.Ct. 115, 68 L.Ed. 323 (1923).)(90)

Also, in Clark v Allen, 331 U.S. 503, 67 S.Ct. 1431, 91 L.Ed. 1633 (1947):

> "A 1923 treaty with Germany provided that German heirs may inherit real property bequeathed to them by a person holding it in the United States, provided the heirs sell it within three years. The Supreme Court upheld a California statute to the extent it did not overlap with this treaty. Therefore, the state could constitutionally prohibit nonresident aliens from taking personal property by testamentary disposition as provided in the statute." (91)

A recent survey by Ohio State University found that 25 states do enforce restrictions on ownership of real estate, and identified eight of these states as being Minnesota, Idaho, Indiana, Kentucky, Nebraska, Montana, Oregon and Arizona.(92)

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90. Liebman, op. cit. p.625.

91. ibid, p.619.

92. Cook, Peter, "A F.I.R.A. For The U.S.?", Executive, Don Mills, December, 1980, pp: 44-51 at p.50.

In some locations, real estate firms have encountered opposition. For example, Cadillac Fairview Corp. Ltd. and Olympia and York Ltd. have faced criticism over proposed redevelopment schemes in Portland and Dallas.(93)

Implications for the foreign investor in Oklahoma real estate are evidenced in the recent experience of Hillcrest Investments Ltd.:

> "Hillcrest Investments Ltd. of Calgary decided to sell $75 million of office and apartment buildings in several Oklahoma locations after the state Attorney General's office took it to court for owning property. The state pulled out an 1895 law prohibiting land ownership by nonresidents, although the state constitution permits ownership of land within an incorporated city or town by a corporation licensed to do business in the state - the regulation under which Hillcrest had entered the state.
>
> Hillcrest won the court battle and an Oklahoma Supreme Court appeal. When the state decided to ask for a new hearing, the firm sold some of its property."(94)

B. INSURANCE

Insurance is regulated by state law in the United States. "As a general rule, alien insurers are required to satisfy more stringent admission standards than are imposed on insurers formed outside the state but within the United States". (95)

State insurance laws govern actions of alien companies, whether direct or indirect through subsidiaries or affiliates formed in the U.S., and the standards imposed range from capital and deposit requirements to demonstration of successful operations in other jurisdictions. (96)

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93. Ibid.

94. "Limits on Land Purchases", The Financial Post, Toronto, July 25, 1981, p.S-10.

95. Phillips, op. cit. p.K-206.

96. Waldmann, op. cit. pp:28-29.

Specific examples of restrictions are:

a) Special capital and/or deposit requirements for non-U.S. insurers (California, District of Columbia, Georgia, Hawaii, New Jersey, Indiana, Maryland, Minnesota, Maine, Nevada).(97)

b) All, or a majority of directors must be U.S. citizens (Florida-majority, Georgia-majority, Indiana-all, Louisiana-all, Pennsylvania-2/3, Utah-all, Washington-75%).(98)

c) All, or a majority of incorporators must be U.S. citizens, (Alaska-majority, Arkansas-majority, Florida-majority, Georgia-2/3, Indiana-majority, Louisiana-all, Montana-majority, Nevada-all, New-Mexico-2/3, New York-majority, Oklahoma-2/3, South Dakota-all, Utah-all, Washington-all, Wyoming-majority).(99)

d) A certificate of authority may not be granted to an insurer controlled by the government of another country (North Carolina, North Dakota, Tennessee).(100)

e) In 35 states, a reciprocity provision applies. It stipulates that non-state and/or foreign insurers are subject to the same 'obligations' as those in force in that state or country (Alabama, California, Connecticutt, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Vermont, Virginia, West Virginia, Wyoming).(101)

(f) Miscellaneous provisions:

(i) Florida - "A non-U.S. insurer (except a Canadian) is limited to 10% of its U.S. surplus to U.S. policyholders per risk."(102)

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97. Waldmann, ibid, by state.

98. Ibid, by state.

99. Ibid, by state.

100. Ibid, pp:304, 312, 373 respectively.

101. Ibid, by state.

102. Ibid, p.124.

(ii) New York - "Non-U.S. insurers must comply with special regulations and can obtain a license only if a New York insurer may do so in the former's home country."(103)

(iii) Oklahoma - "A non-U.S. insurer must file an annual statement, sworn to by the principal U.S. reprensentative, reflecting the insurer's U.S. financial condition". (104)

(iv) Wisconsin - "A non-U.S. insurer must have five years experience in his own country or prove that his formative term in Wisconsin will be sound."(105)

C. BANKING

Direct deposit-taking operations of alien banks are subject to state laws.

1. Restrictions

The following restrictions are cited in Raymond J. Waldmann's book Direct Investment And Development In The U.S.:

California - Foreign country banks may engage in a deposit business in California if, among other things, U.S. banks are permitted to maintain a branch in or own all the stock of a bank in that country (p.91).

Colorado - 75% of directors of state banks must be U.S. citizens (p.98).

Florida - Non-U.S. banks must be approved by the State Banking Department, comply with special asset and deposit requirements and may only engage in international financial commerce (p.124).

Georgia - A non-U.S. bank whose country allows U.S. banks, is required to be licensed as an "international banking corporation", may not exercise fiduciary powers or receive deposits, and must comply with special asset, deposit and reporting requirements as set by Georgia code. Every bank director must be a U.S. citizen (p.132).

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103. Waldmann, ibid, p.294.

104. Ibid, p.326.

105. Ibid, p.421.

Illinois - a non-U.S. bank may set up a single branch in Chicago, provided an Illinois or U.S. bank may do so in the other country. Furthermore, foreign banks are required to comply with special deposit and asset requirements. (p.153)

Massachusetts - All directors of co-operative banks must be U.S. citizens (p.212).

New Jersey - Banks from a foreign country may not operate in the state (p.279).

New York - A license is required of non-U.S. corporations, and for a deposit business, it may only be granted if reciprocal permission applies in the country of the foreign bank (p.294).

Washington - "The banking supervisor must authorize banks of a foreign country, and may only do so if a reciprocal agreement exists for Washington banks in the former's country."(p.407).

All bank directors must be U.S. citizens in Kentucky (p.181), Louisiana (p.190), Missouri (p.243) and Montana (p.252).

In Oklahoma, three quarters of the directors of state banks must be U.S. citizens (p.326), and in Tennessee, a majority of the incorporators must be U.S. citizens (p.373).

2) Application

Foreign investors in the banking sectors of particular states in the United States may face problems both related and unrelated to specific restrictions.

a) In 1978, in the first move of its kind, the New York State Banking Department drafted new regulations to block foreign takeovers of banks:

"The regulations were drawn up as two unidentified major commercial banks are rumored to be targets of takeovers from abroad....

The State Banking Board is to consider five foreign takeovers - including two involving Middle East interests - in the near future.

The new rules would enable the board to block a bank takeover by requiring prior approval for such a move. It would enable the board to reject a takeover by refusing to permit the purchase of bank shares."(106)

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106. Lutsky, Irvin, "New York Moves To Block Foreign Bank Takeovers", The Toronto Star, Toronto, July 21, 1978, p.B5.

b) Local political and social situations may also have an impact on the foreign investor:

> "Satisfying the Fed, it seems, is the least of the problems facing foreigners eager to buy an American bank. Britain's Midland Bank learned that this week when the Federal Reserve Board held a public meeting in San Francisco to debate the proposed $830m merger with California's Crocker National bank.
>
> The protestors, including representatives of ethnic minorities such as blacks, Hispanics and Asians, all wanted to raise issues embodied in the Community Reinvestment Act. This covers how much (or how little) a bank or savings and loan association is prepared to lend in poorer, often inner-city, areas.
>
> The protestors, whose campaign was organized by the law firm Public Advocates, all wanted assurances that minority groups would, in future, be represented on the banks' boards. They also asked the Fed to extract from the banks written commitments on future lending - ie., more for low-income minorities.
>
> Public Advocates has some successes to its credit.
>
> It squeezed an undertaking out of Japan's Sumitomo Bank, when it bid for Pacific City Bank of Huntington City, California; Sumitomo agreed to reduce the number of Japanese employed at its Californian subsidiary."(107)

D. MINING AND MINERAL RIGHTS

"Alaska has incorporated reciprocity requirements into laws governing mineral rights and leases for geothermal resources on lands owned by the state. Mineral rights may be acquired and held only by U.S. citizens and resident aliens who have declared their intent to become citizens, aliens whose home country accords like privileges to U.S. citizens or, associations of the foregoing persons and corporations organized in the United States if no more than 50 percent of their stock is owned by aliens whose home country denies like

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107. "Too Many Kooks Spoil The Broth", The Economist, London, England, June 27, 1981, p.92.

privileges to U.S. citizens."(108) Qualifications for leases for geothermal resources are comparable to those for mineral rights.

California legislation provides that state oil, natural gas and other mineral leases "may be held only by (1) persons or associations of persons who are citizens of the United States, residents of the United States who have declared their intent to become citizens, or nationals of a country granting like privileges to U.S. citizens, (2) aliens entitled to leases under treaties between the United States and their home country, or (3) corporations if 90 percent of their stock is owned by persons qualified above or by other corporations meeting the same requirement".(109)

In New Hampshire, only U.S. citizens are permitted to receive licenses for prospecting and mining on unimproved state lands.(110)

In Utah, only U.S. citizens may receive permits to prospect for state-owned minerals.(111)

E. UTILITIES

1. Power Utilities

State laws relating to power utilities (i.e. utilities that produce, transport or distribute electricity, natural gas or other fuels for domestic use), are highly diversified.

"Three states, Illinois, Indiana and Virginia have excluded all power utilities that are not incorporated under their laws. (With some exceptions) New Hampshire excludes all power utilities incorporated outside the state... . California has a similar exclusion, dating from 1956, that both excludes all out-of-state power utilities not operating in the state in compliance with state laws in 1956 and prevents those that may continue to operate within the state from transacting any business of a different character in 1956... . The Rhode Island statute provides that no power utility may sell natural gas or electricity, except to another utility or to an electric

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108. Phillips, op. cit., p.K-137.

109. Ibid.

110. Waldmann, op. cit., p.271.

111. Ibid, p.389.

transmission company, unless it is a citizen resident within Rhode Island, an association all of whose members are citizen residents, or a corporation that was created by a special act of the General Assembly." (112)

Some states, including Connecticut and South Dakota, prohibit the entry of alien power utilities. In other states, including Delaware, New Mexico and New York, grants of eminent domain are limited to corporations formed within the state, thus excluding alien utilities and out-of-state utilities. Some states, by restraining the operations of alien power utilities through restrictions on their ability to own or control land, cripple the ability of the alien utility to operate on the same terms as are available to domestic utilities.(113)

In New Mexico, all incorporators and directors of a New Mexico waterworks must be U.S. citizens.(114)

2. Railroads

A minimum of five U.S. citizen incorporators are required to establish a railroad in Arizona, and two directors of the railroad must be state residents.(115)

A Vermont statute declares that (with two exceptions) no alien railroad may be directly or indirectly interested in any stock of a Vermont railroad or be involved in the management and control thereof (Vt. Stat. Ann. 30 707(1970)).(116)

New Mexico and Pennsylvania require all directors of railroads to be U.S. citizens. (N.M. Stat. Ann. 69-1-12(1974) Pa. Consol. Stat. 67 App. 4001).(117)

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112. Phillips, op. cit., p.K 152.

113. Ibid., p. K 153.

114. Waldmann, op. cit., p.287

115. Ibid, p.77.

116. Phillips, op. cit., p. K 94.

117. Ibid., p. K 95.

F. MARITIME

Robert J. Waldmann cites the following restrictions on commercial fishing and the maritime sectors of state economies:

Connecticut - "For a non-U.S. vessel with cargo to arrive at a Connecticut port, it must have a local agent who is: (i) a state resident, (ii) in a partnership or incorporated association with at least one member who is a state resident, or (iii) in a corporation with at least one principal officer who is a state resident."(p.104)

Florida - "U.S. Secretary of State must determine whether the license applicant's country is an ally or neutral; other non-Communist vessels receive licenses on the basis of reciprocity."(p.124)

New York - "The owner and captain of a trawl or beam taking fish for food must be U.S. citizens and state residents."(p.294)

Oregon - "Only a U.S. citizen may obtain a shipping pilots license." (p.335)

Pennsylvania - "Non-U.S. citizens and non-residents pay higher license fees. Licenses may only be issued to persons whose state or country has reciprocal licensing agreements." (p.342)

Virginia - "A commercial fishing license may be granted only to U.S. citizens or corporations, which are 75% owned and controlled by U.S. citizens."(p.401)

Washington - "Only U.S. citizens and U.S. residents or corporations authorized to do business in Washington may obtain licenses. Non-residents pay double for license fees." (p.407)

G. SECURITIES

State Securities laws generally apply to all investors, but may prove more burdensome to foreign investors. There are also instances where only foreign investors are regulated.

"State Blue Sky laws ... frequently are similar to the federal laws but, in some cases, impose additional burdens since they extend to the substance of offerings and not simply to the adequacy of disclosure and, generally speaking, are applicable to any offer of securities made from the state or to residents of the state". (118)

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118. Young, John H. "The Acquisition of United States Business by Foreign Investors", The Business Lawyer; Vol. 30, New York, November, - November, 1974, see footnote 27, p.115. The author cites - NYSE Const. art. IX, 2; NYSE rule 301.10. NYSE rule 314.14 prohibits the interest of non-U.S. or Canadian citizens in capital or profit of a member organization from exceeding 45%; see footnote 25, p.114.

Also, "tender offers involving publicly held companies may raise special problems under state ... securities laws. Several states, in response to local fears of new ownership of companies located in their jurisdictions, have in recent years enacted statutes which, at the very least, impose additional filing and reporting requirements upon offerors."(119)

"Many state securities laws do not apply to the acquisition for cash of the assets, rather than the stock, of a target company. However, other considerations, such as the need to overcome the opposition of a minority group of shareholders, may dictate an acquisition of stock."(120)

H. CORPORATE STRUCTURE

1. Restrictions

"The states have inherent plenary power to create (corporations) and to determine and prescribe the mode of their organization, the purposes for which they may be created, the powers which are to be conferred upon them, and the conditions under which such powers may be exercised.

The states ... reserve plenary power (within constitutional limitations) over their corporate franchises, including the power to control the nature of the corporations' shareholders:

> 'A state... may bar nonresident aliens from holding stock in its corporations, or admit them to that privilege only on such terms as the state may prescribe ...' 18 C.J.S. Corporations 35(1939). See also 7 R.C.L. Corporations 272(1915). For example, in State v. Travelers' Ins. Co., 70 Conn. 590, 40 A. 465(1898), the court held that a state could impose a flat-rate tax initially chargeable against a corporation based upon the number of non-resident

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119. Young, ibid, p. 121, The author cites these examples: See, e.g., the state tender offer statutes enacted by Minnesota (Minn. Stat. Ann. s.808.01 et seq. (Supp.1974); Nevada (Nev.Rev. Stat. s.78.376 et seq. (1973)); Ohio (Ohio) Rev. Code Ann. 1707.04.1 (Anderson Supp. 1973)); Pennsylvania Securities Commission Bulletins, Vol. XXXIII, No.2 (April 1, 1972) and Vol. XXXIV, Nos. 3 and 4 (June 1, 1973; August 1, 1973); Virginia (Va. Code Ann. 13.1-528 et seq.(1973)); and Wisconsin (Wis.Stat.Ann. 552.01 et seq. (Spec. Pamphlet 1974)).

120. Ibid, p.121.

shareholders in the corporation by reasoning that the "equal protection" clause (of the U.S Constitution) applied only to those within the territorial jurisdiction of the state."(121)

The goal of some state legislatures appears to be to limit foreign investment to less than a controlling interest. In Missouri, for example, (Mo.H.B. 972, 78th Gen. Assy., 1st Sess. (1975)) legislation was introduced that stated:

> s.351.306 A corporation organized and characterized in Missouri or licensed to do business in this state shall annually report to the Secretary of State the names and addresses of all natural persons not citizens of the United States and all foreign governments or corporations owned or controlled by a foreign government who are shareholders in such corporation, either directly or beneficially. When the Secretary of State shall determine that a corporation is controlled by natural persons not citizens of the United States or a foreign government or corporation owned or controlled by a foreign government, he shall suspend the charter or license of said corporation until such time as the non-citizen natural person or foreign government or corporation owned or controlled by a foreign government shall have divested itself of each controlling ownership....

But, other states have taken different approaches. For example, Hawaii had a bill introduced which would impose prior hearing and approval requirements on corporate takeovers by nonresident aliens. (Hawaii H.B. 2553-74, 7th Leg. (1974)).(122)

Another, more limited example, is a Texas statute (Tex. Rev. Civ. Stat. Ann. art. 1527 (1962)) requiring that all "international trading corporations" be majority owned by U.S. citizens. Texasgulf used this statute in an attempt to prevent the takeover bid by Canada Development Corporation, but its argument was rejected by the courts. (123)

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121. Liebman, op. cit., p.625.

122. Ibid, pp.621-622.

123. Texasgulf Inc. v. Canada Development Corporation, 366F, Supp. 374 (S.D. Texas 1973).

The rationale for discriminatory treatment is that where control passes to interests outside the United States (non-resident aliens), potential loyalty and conflict of interest problems arise.(124)

2. Application

a) The proposed Missouri legislation discussed in section A restricts all corporations with an alien stockholder constituency; and, it appears that alien controlled corporations are being singled out for "special treatment".(125)

b) Discriminatory state legislation has frequently been upheld by the courts. The United States Supreme Court stated in Prudential Ins. Co. v. Cheek:

> "The right to conduct business in the form of a corporation ... is not a natural or fundamental right. It is a creature of the law; and a state in authorizing its own corporations or those of other states to carry on business ... within its borders may qualify the privilege... 295 U.S. 530, 536, 42 S.Ct. 516, 619, 66 L.Ed. 1044, 1051(1922)."(126)

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124. Liebman, op. cit., p.623.

125. Ibid, p.626.

126. Ibid, pp. 626-627.

PART TWO: MONITORING FOREIGN INVESTMENT

Scope of Monitoring Activity

In the early 1970s the Government of the United States became so concerned about the amount of foreign investment flowing into the country that it began to take some action. The first need, it was decided, was information. Monitoring agencies were established, task forces appointed, consultants hired, congressional hearings held, new laws proposed. The result today is a vast information-gathering and monitoring system. Foreign investors are questioned, studied and evaluated at every turn in a country where foreign investors control only about 2% of the economy.

I. LEGISLATION

As with legislation that controls foreign investment, the monitoring legislation may be aimed directly at foreign investors or it may govern both foreign and domestic investors.

A. DIRECT

1. Agricultural Foreign Investment Disclosure Act of 1978, (7 U.S.C. s.350 et seq. (1976, Supplement III)):

> "Any foreign person who acquires or transfers any interest, other than a security interest, in agricultural land shall submit a report to the Secretary of Agriculture not later than 90 days after the date of such acquisition or transfer."

The section goes on to set out the information required in the report, said information to include the agricultural purpose for which the foreign person intends to use the agricultural land. "Agricultural land" includes any land that was agricultural in the past five years, so the filing requirements may also apply to land which is currently residential or commercial.

Note that the definition of "foreign person" includes foreign corporations and United States corporations where "... a significant interest or substantial control is directly or indirectly held ..." by a non-U.S. citizen or foreign government (s.3508(3)). Also, investments in the forestry and timber industries come under the Act.

2. Foreign Investment Study Act of 1974 (15 U.S.C.A. s.78(b), Supp. 1976):

"(The Act) directs the Secretaries of Commerce and the Treasury to conduct a study of the impact of foreign investment in this country. (The Secretary of the Treasury responded quickly to the statutory directive, proposing on November 1, 1974, a new Part 129 to Title 31 of the Code of Federal Regulations. That Part would require, among other things, that domestic issuers of stocks, bonds, and other securities provide certain information concerning foreign ownership of their securities.) Of more immediate concern to foreign investors are those bills which, without further study, would impose severe restrictions on foreign participation in U.S. businesses."(127)

B. INDIRECT

1. International Investment Survey Act of 1976 (22 U.S.C. s.2101 et seq. (1976)):

Following is an excerpt from "The Adequacy of The Federal Response To Foreign Investment In The United States", Twentieth Report by The Committee on Government Operations:

"The purpose of the 1976 Act is:

> To provide clear and unambiguous authority for the President to collect information on international investment and to provide analysis of such information to the Congress, the executive agencies, and the federal public.(Section 2(b).)

The Act makes clear that it is not intended "to restrain or defer foreign investment in the United States or U.S. investment abroad." The Act encompasses both foreign investment in the United States (inward investment) and U.S. investment abroad (outward investment). The Act confers upon the President broad authority and mandates that he shall, to the "extent he deems necessary and feasible", conduct a regular data collection program to secure current information on international investment, including capital flows, balance of payments, and so forth. The Act requires comprehensive benchmark surveys every 5 years, specifying the kinds of detailed information to be collected.

The President has delegated his powers under the 1976 Act to the Commerce Department with respect to FDI; to the Treasury Department with respect to portfolio investment; and, to the Department of Agriculture with respect to the study, mandated by Section 4(d) of the Act, to determine the feasibility of establishing a system to monitor foreign investment in real property.

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127. Elmer, op. cit., p.683.

Pursuant to this delegation, the Commerce Department's Bureau of Economic Analysis (BEA) collects data on FDI by the following statistical surveys: (1) The BE-15 survey of foreign-owned U.S. businesses with total assets, net sales, or net income of $5 million or more. (This effectively excludes around 5,000 firms leaving around 1,700 firms.) (2) The one-time BE-13 report on a foreign acquisition, purchase, or establishment of a U.S. business or real estate, (to be filed within 45 days of the transaction); and the related BE-14 report to be filed by the U.S. person who assists or intervenes in the transaction covered by the BE-13 form or who enters into a joint venture with a foreign investor. (The BE-13 and the BE-14 went into effect January 1, 1979, but excluded foreign investment prior to this date.) (3) The comprehensive benchmark survey of all foreign investment, similar to the one conducted in 1975. The next benchmark survey is scheduled for 1981 to cover the year 1980, unless Congress grants the 2-year extension BEA has requested.

Pursuant to the delegation to Agriculture (USDA), its Economic, Statistics, and Cooperatives Service, in consultation with the Inter-agency Committee on Land Use Data, has been charged with the duty of studying:

> the feasibility of establishing a system to monitor foreign direct investment in agricultural, rural, and urban real property, including the feasibility of establishing a nationwide multipurpose land data system, ... (Section 4(d) of the 1976 Act.)

The Act required USDA to submit a report of its findings and conclusions no later than October 1978. Congress extended this deadline a year. In November 1979, USDA submitted its 4(d) report to the Office of Management and Budget (OMB) for clearance. OMB has never released the report and has not disclosed the reasons for the delay".(128)

The information collected by the Commerce Department is comprehensive enough to permit it to have a good overview of the performance of particular firms and industries in the United States, including trade and innovation performance.

This can readily seen by noting the kind of data collected through FORM BE-15: Interim Survey of Foreign Direct Investment In The U.S. BE-15 is an annual report that must be filed by "U.S. affiliates". That is, by each U.S. business enterprise (other than a bank) in which a foreign person owned or controlled, directly or indirectly, 10 percent or more of the voting securities in an incorporated U.S. business enterprise, or an equivalent interest in an unincorporated U.S. business enterprise, at any time during the reporting period.

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128. "The Adequacy of the Federal Response ...", op. cit., pp. 59-60.

The U.S. affiliate must file on a fully consolidated basis, including in the consolidation all other U.S. affiliates in which it directly or indirectly owns more than 50% of the outstanding voting stock. The fully consolidated entity is considered to be one U.S. affiliate.

Such entity is only exempted from filing if (1) total assets, (2) net sales (or gross operating revenues) excluding sales taxes and (3) net income (after provision for U.S. income taxes) each did not exceed (plus or minus) $5 million during the reporting period and it did not own 200 acres or more of U.S. land during the reporting period.

Parts I, II and III of BE-15 require the following information:

Part I "Identification of U.S. Affiliate"

1. Whether or not the entity reporting is incorporated in the U.S.

2. The percentage of voting stock or equivalent interest owned directly by a foreign parent or other U.S. affiliate of a foreign parent or other person.

3. The number of U.S. affiliates fully consolidated and not fully consolidated but in which the reporting affiliate (as consolidated) has a direct equity interest.

Part II "Financial And Operating Data"

1. Balance Sheet, Income Statement, Statement of Retained Earnings

2. Miscellaneous data (e.g. number of acres of land used for agricultural purposes, research and development expenditures, book value of land owned not contained in fixed or current asset figures on the Balance Sheet).

3. Composition of external financing.

4. Total exports shipped to foreigners and total imports shipped by foreigners.

Part III "Schedule of Employees, Land and Mineral Rights, and Property, Plant and Equipment, By State of Location"

1. Number of employees in each state.

2. Number of acres of land in each state.

3. Mineral rights in each state.

2. Federal Aviation Act of 1958: (49 U.S.C. s.1301 et seq)

All applications for authority to operate an air carrier corporation must identify the officers, partners, owners, members and directors of the corporation, as well as all those holding 5 percent or more of the company stock. The reporting requirements of the Civil Aeronautics Board go so far as to require periodic reports addressing these same issues, even after issuance of a license. This monitoring occurs due to the restrictions on foreign investment in air carrier corporations, but both domestic and foreign applications must comply with the monitoring requirements.

3. Currency and Foreign Transactions Reporting Act (1970) (31 U.S.C. s.1051 et seq. (1976)):

The provisions of this Act apply to all firms, but the demands on the foreign investor could be perceived to be greater than those on the domestic investor.

Any person transacting or receiving more than $5,000 worth of monetary instruments must file a report in accordance with 1101 of the Act.

The definition of "monetary instruments" includes bearer negotiable instruments, bearer investment securities, bearer securities and stock with title passing upon delivery.

By virtue of s. 1121, any resident, citizen or person in the United States doing business, who engages in any transaction or maintains any relationship, directly or indirectly, on behalf of himself or another with a foreign financial agency, must maintain records and/or file reports on same.

Transactions between a U.S. person and a foreign person controlled by a U.S. person, are also covered under the Act.

"(The Act) directs the Secretary of the Treasury to issue such regulations as he deems necessary establishing record-keeping and reporting requirements for certain foreign financial transactions. The breadth of the Secretary's authority under the statute and under a companion provision later enacted, however, makes possible the future imposition of requirements considerably more detailed (31 U.S.C. s.1142, Supp. III 1973)." (129)

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129. Elmer, op. cit., p.686.

4. Securities Act of 1933 (15 U.S.C. s.77(a):

The registration requirement in an acquisition or merger for the offering of stock or other securities to public stockholders in the U.S. applies equally to foreign and domestic investors. But, what may be prohibitive for foreign investors, are the accounting requirements under the Act which mean they may face the tremendous expense of converting their financial reporting systems to conform with the domestic system.(130)

Also, "...when an acquisition is being attempted via a tender offer, the purpose of the purchase of stock must be stated, and if the purpose is to acquire control, future plans must be revealed."(131)

Accounting, reporting and disclosure requirements form a strong basis for monitoring the activities of foreign investors.

II. MONITORING AGENCIES

Following is an overview of various agencies whose function either in whole or in part is to monitor foreign investment in the United States.

A. COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS):

On May 7, 1975, President Ford issued Executive Order 11,858 establishing the inter-departmental Committee on Foreign Investment in the United States or CFIUS. That order specified that the Committee is to be chaired by the Treasury Department and is to include representatives from the Departments of State, Defense, and Commerce, the Office of the U.S. Trade Representative and the Council of Economic Advisors. Other departments and agencies may be asked to participate, depending on the nature of the investment under review. CFIUS has the primary responsibility for monitoring the impact of foreign investment in the United States, both direct and portfolio, and coordinating U.S. policy on foreign investment in the U.S. (132) Among the functions of CFIUS, two are of interest:

- provide guidance on arrangements with foreign governments for advance consultations on prospective major foreign governmental investments in the United States, and

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130. Law, op. cit., pp. 11-12.

131. "Information For Foreign Investors Considering Operation In The United States", Peat Marwick, Mitchell & Co., 1977, p.4.

132. "Federal Response to OPEC Country Investments ...", Part 2, op.cit., p.3.

- review investments in the United States which, in the judgement of CFIUS, might have major implications for United States national interest.

When it was created, CFIUS largely operated on an adhoc basis to respond to congressional and public concerns over foreign investment, and asked all foreign governments to consult with the U.S. government before making direct investment in the United States.

The Office Of Foreign Investment In The United States (OFIUS) was established in the Commerce Department in 1976, to monitor on a day to day basis, through the Securities and Exchange Commission and other sources, individual investments (including private investments) involving foreign investors.

Consultations with foreign governments can range from a mere notification by a foreign government of a prospective investment to detailed discussions between the two governments, depending on the nature of the case involved.

Upon receiving a notification from a foreign government of a proposed investment, the Chairman of CFIUS will make an initial decision as to whether the investment warrants a formal review by CFIUS. If he concludes that such a review is not necessary he will circulate to the other members of CFIUS information on the investment and his recommendation on a response. If the other members are in agreement, he will send a letter to the appropriate foreign government official stating that CFIUS decided not to review the proposed investment and that no further consultation will be necessary.(133)

If a member of CFIUS believes that a proposed investment might have major implications for the national interest, the Chairman will give him an opportunity to convince other members at a meeting of CFIUS to formally review the investment. CFIUS ...

> "has consciously avoided the formulation of criteria for judging major implications for U.S. national interests. It is our opinion that judgements of this type are best made on a case by case basis".(134)

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133. "The Operations Of Federal Agencies In Monitoring, Reporting On, And Analyzing Foreign Investment In The United States", Part 3, House Sub Committee On Government Operations, Washington, July, 1979, p.63.

134. "Federal Response to OPEC Country Investments ...", Part 2, op. cit., p.6.

If CFIUS concludes that an investment would have major implications for the national interest, the Chairman will communicate this conclusion to the Economic Policy Group and to the National Security Council, requesting their concurrence in a notification to the foreign government involved. They would request that government to refrain from making the investment or to modify it in such a manner as to make it acceptable to the U.S. Government.

> "The Committee has no legal power to block or modify investments, but in the case of investments by foreign governments we are confident that diplomatic representation would suffice. Even in the case of an investment by a private foreign investor, a strong negative reaction by the U.S. Government would probably be sufficient to stop it". (135)

and in the case of foreign governments,

> "it is almost inconceivable that a foreign government would persist in undertaking an investment in this country over the strong objections of the U.S. Government. Even if it were insensitive to the implications of such actions for its overall relations with the United States, it would realize that the U.S. Government could always take action after the fact."(136)

CFIUS has reviewed a number of foreign investments over the years, including the Government of Romania's investment in a Virginia coal mine owned by Island Creek Coal Company, the Government of Iran's proposed acquisition of stock in Occidental Petroleum (never consummated), Shell Oil's proposed acquisition of Belridge Oil Co., Renault's partial acquisition of AMC, Nippon Kokan's proposed acquisition of Kaiser Steel assets and Société Imetal's proposed acquisition of Copperweld Corporation.(137)

However in his statement to the Sub-Committee of the Committee on Government Operations of Federal Agencies in Monitoring, Reporting on and Analyzing Foreign Investment in the United States, C. Fred Bergsten, then Assistant Secretary for International Affairs, U.S. Treasury Department, emphasized that:

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135. "The Operations of Federal Agencies ...", Part 3, op. cit., p.63.

136. Ibid., pp.294-295.

137. Ibid., p. 69.

> "One should not, I think, view the formal meetings of the Committee as the only activities of the Committee. Like most committees in Government and elsewhere, the formal meetings are usually the tip of the iceberg and a great deal goes on in informal meetings and discussions within agencies and between agencies. That is the way business is done."(138)

It would appear that CFIUS has in fact examined many more cases than it publicly admits to, but found almost all of them to be non-detrimental to U.S. national interests.

In response to Congressional criticism in late 1981 that the CFIUS' performance has been "seriously deficient" in protecting U.S. national interests, Marc Leland, Chairman of CFIUS and Assistant Secretary for International Affairs, Department of the Treasury, gave a more elaborate picture of how the CFIUS operates:

> "Through its review and monitoring activities, the CFIUS does focus executive branch attention on issues with respect to a given investment in which various U.S. laws apply. Application of these laws may result in the denial, in whole or in part, of an acquisition by a foreign investor... ." (139)

He illustrated the means used by CFIUS to control foreign investment. First of all, it ensures that a broad range of departments and agencies focus on a proposed acquisition. Anti-trust laws, national security laws, and reciprocal limitations through acts such as the Mineral Lands Leasing Act can be used to delay or halt an investment damaging to the national interest. Furthermore a recommendation to the National Security Council or the Economic Policy Board can trigger executive action to stop an investment. (140) Mr. Leland re-emphasized this approach in response to some sharp criticism by Representative Stephen L. Neal:

> "I would say, as in my testimony earlier that there are several means available to stop a purchase. The purchase might be stopped for various reasons.

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138. "The Operations of Federal Agencies ...", Part 3, ibid, p.53.

139. "Federal Response to OPEC Country Investments ...", Part 2, op.cit., p.4.

140. Ibid., p.11.

> The Anti-trust Division may find it is a violation of the anti-trust laws. There are other laws under which it could also be in violation. You could go and try to ask for legislation, if necessary, if it is found not to be in the national interest and you have no other specific way to stop it. You could legislate to stop it." (141)

Mr. Leland's testimony before the House Subcommittee on Government Operations indicates a greater willingness on the part of the Reagan Administration to respond to the possible dangers of foreign investment, particularly if it is government controlled and is not consistent with the "U.S. goal of energy independence". (142) Mr. Leland, himself, is also chairman of a special working group under the Cabinet Council on Economic Affairs which is reviewing U.S. policy toward foreign investment. Among other issues, the group is studying the adequacy of the mandate of the CFIUS. (143)

Recent Examples of CFIUS activity:

i) In July, 1981, CFIUS asked French-owned Société Nationale Elf Aquitaine to hold back on a merger with Texasgulf Inc., to give the committee "more time to study the implications" of the proposed merger.(144)

(ii) "The committee has taken a preliminary look at the actions leading to the acquisition last week by the Montreal-based Seagram Co. Ltd. of about 25,000 shares of Conoco Inc., which made Seagram one of the largest shareholders of E.I. du Pont de Nemours and Co. of Wilmington, Del., after du Pont won the takeover battle for Conoco."(145)

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141. Federal Response to OPEC Country Investments ...", Part 2, ibid., p.13.

142. Ibid., from statement by House of Representatives Chairman, Benjamin S. Rosenthal, p.2.

143. Ibid., p. 5.

144. "Elf Wraps Up Deal For Texasgulf", The Gazette, Montreal, July 29, 1981, p.49. Also see: "U.S. Asks France To Postpone Acquisition Of Texasgulf By Elf", The Globe And Mail, Toronto, July 22, 1981, p.B4.

145. King, John, "Tougher Line Is Sought In U.S. To Monitor Foreign Investment", The Globe And Mail, Toronto, August 10, 1981 p.12.

(iii) CFIUS has also taken a look at several transactions involving the Kuwait Petroleum Corporation (KPC). It looked at KPC's proposed purchase of a block of stock in Getty Oil, a proposed joint-venture with Pacific Resources, Inc., a planned joint-venture with AZL Resources and the proposed merger with Santa Fe International.(146)

(iv) "The CFIUS argues that the proposed acquisition and the transfer of Texasgulf's Canadian assets to the Canadian Development Corporation, a federal crown corporation, would have adverse effects on the availability of sulfur and phosphate fertilizers in the U.S. CFIUS's deferral request is the first in its 6-year history." (147)

B. INTERSTATE COMMERCE COMMISSION: (ICC)

The ICC regulates all types of U.S. common carriers, be it railroads, motor or water carriers, or pipelines. Since 1974, the ICC has been attempting to determine the 'source of control' of U.S. transportation common carriers through the annual and quarterly reports that the carriers must file. Although the ICC does not focus on foreign investors per se, some data has been developed on investors holding and voting more than half of one percent of a carrier's stock. (148)

Since the deregulation of the trucking industry last year, the American Trucking Assocation (ATA) has lobbied both the ICC and Congress to introduce measures to control the entry and operation of motor carriers owned or controlled by persons of any contiguous country. The ATA has succeeded in persuading the ICC to place an effective ban on new licenses for Canadian companies since February, 1982. (149) It has successfully lobbied the U.S. Congress in that the U.S. Senate has proposed legislation prohibiting the ICC from issuing any license to any motor carrier owned or controlled by persons of any contiguous country for a period of two years. The United States Trade Representative may remove or modify in whole or part this restriction if it is determined that such action would be in

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146. "Federal Response to OPEC ...", op. cit., p.5-6.

147. "U.S. vs. Canada: Ominous Developments For Foreign Investors", Business International, July 24, 1981, p.237.

148. "Controlling Foreign Investment in National Interest Sectors...", op. cit., pp. 17-18.

149. Ryan, Leo, "Ottawa takes steps to counter U.S. freeze on trucking", The Globe and Mail, June 21, 1982, p. B10.

the national interest. This proposed legislative barrier to foreign investment is expected to be approved by the U.S. House of Representatives. The Reagan Administration has yet to decide whether or not this restrictive Congressional bill will become law. However, new foreign investment has already been kept out of the United States trucking industry and existing foreign-controlled carriers face considerable uncertainty regarding their future.

Finally, the recent ruling of a U.S. federal judge has given the ICC authority to approve (or disapprove) the proposed purchase of the Chicago and Milwaukee Railroads' 4,670 kilometre core system by the Grand Trunk Corporation, a subsidiary of Canadian National Railways (CN). Under an order issued by U.S. District Judge, Thomas McMillen, the ICC must first approve the sale and then review the reorganization plan agreed on by Grand Trunk and Milwaukee Road. (150) U.S. port officials have opposed the purchase because they think CN's rail-ship network is diverting business from U.S. to Canadian ports. (151)

C. OFFICE OF INTERNATIONAL CORPORATE FINANCE (OICF)

This office was created by the Securities Exchange Commission in 1973 to deal with registration and reporting requirements applicable to foreign firms, regarding the issuance and transfer of securities.(152)

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150. "CNR units rail line purchase needs approval: U.S. judge", Toronto Star, June 3, 1982, p. C15.

151. Solomon Hyman, "U.S. ports Challenge CN takeover proposal", The Financial Post, May 29, 1982, p. 19.

152. Young, op. cit., p. 117.

PART THREE: SPECIAL ISSUES

1. DEFENSE FUNDING

The United States gains international competitive advantage from barring or controlling foreign investment in the national security or defense field - and from very actively supporting American ownership and control of a wide variety of manufacturing and service industries in this field. The massive and direct financial support of almost exclusively U.S. controlled corporations taking part in defense related programmes and lack of market risk associated with those programmes (given the government commitment to buy the completed product) enhances the competitive capacities of participating U.S. firms. Many corporate beneficiaries of these programmes have been successful in generating profitable opportunities in the civilian or commercial markets, based on the work they did for the U.S. Government.

The size of U.S. Government support of U.S. controlled industry is staggering. In a study of the defense industry published in 1980, Jacques Gansler, former Deputy Assistant Defense Secretary, points out that

> "over half of the approximately $40 billion spent in the U.S. each year on research and development comes from the federal government, and of this, national defense accounts for more than half".

The Department of Defense, alone, supports between 1/3 and 1/4 of all scientists and engineers in the United States. (153) In 1980 that Department requested $13.6 billion for research, development, test and evaluation, and $35.4 billion for procurement.(154) In that year, the Department spent $76.8 billion on research and development, services, construction and supplies. (155)

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153. Jacques S. Gansler, The Defense Industry, The MIT Press, Cambridge, Mass., 1980, p.97

154. U.S. Department of Defense, Annual Report, Fiscal Year 1980, p.251.

155. "Defense Department Lists Top 100 Contractors for Fiscal 1980", Aviation Week and Space Technology, April 27, 1981, p.200.

A more micro-economic examination of the scale and impact of U.S. defense programmes was carried out by William L. Baldwin in his study for the U.S. Federal Trade Commission entitled The Impact of Department of Defense Procurement on Competition in Commercial Markets: Case Studies of the Electronics and Helicopter Industries. Baldwin estimates that total direct and indirect spending on electronics by the Department of Defense in 1979 amounted to 47% of the funds spent under research, development, test and evaluation appropriations, 33% of the procurement budget, and 8% of operations and management expenditures. (156) He rightly points out that those Americans

> "critical of foreign subsidization of electronics industries tend to overlook the hundreds of millions of dollars of federally funded R & D that the industry of this country (the U.S.) has received and continues to receive". (157)

Corporation executives list a number of benefits that can be derived from defense contracts, the major one being Government funding of research and development. This carries the added possibility of the transfer of technology from military to civilian production. Other benefits cited by executives include: a significant volume of business, the invaluable experience obtained in managing high technology programmes, and the long term "runs" of 5 to 15 years that are usually assured in a development and production contract. (158) Clearly, these benefits provide a good base from which the corporation can diversify and extend into commercial markets.

U.S. spokesmen have repeatedly argued that foreign investment is barred or controlled in only a few sectors or industries, including defense. (159) However, the term defense is an umbrella for a very large part of the United States economy. It covers a variety of goods as well as services related to air, sea and land transporation, electrical and electronics, communications, contruction, and other industries. The U.S. Defense Department lists some of its top contractors in fiscal year 1980 as General Dynamics Corporation,

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156. William L. Baldwin, The Impact of Department of Defense Procurement on Competition in Commercial Markets: Case Studies of the Electronics and Helicopter Industries, Federal Trade Commission, Washington, December 1980, pp.91-92.

157. Ibid., p.90.

158. Gansler, op. cit., p.41.

159. See, for example, Peter W. Lande, "U.S. Restrictions are Limited", The Financial Post, May 1, 1982, p.8.

McDonnell Douglas Corporation, United Technologies Corporation, Boeing Company, General Electric Company, Raytheon Company, Tenneco, Grumman Corporation, Northrop Corporation, Rockwell International Corporation, Sperry Corporation, Honeywell Incorporated, Litton Industries, American Telephone and Telegraph Company, RCA Corporation, Textron Incorporated, General Motors, TRW Incorporated, International Business Machines, Exxon Corporation, Singer Company, Texas Instruments, Teledyne, Ford Motor Company, Todd Shipyards Corporation, Bath Iron Works Corporation, Amerada Hess Bendix Corporation, Avco Corporation, Goodyear Tire, Xerox and Eastman Kodak Company. (160)

These companies are conglomerates, operating in a lot more than a "few" industries or sectors. In addition, they can and do produce both for the "defense" and commercial markets.

Honeywell Incorporated, for example, is in only one line of business - the design, manufacture, sale, and service of automation equipment and systems for some type of output, control or display - yet this has as many applications in the civilian as in the military sector. Thus Honeywell produces electrical control systems and components used in military aircraft, naval vessels, missiles, and military vehicles and also produces electronic control systems for civilian aviation and petroleum industries. (161) In 1980, Honeywell received $687 million in defense contracts from the U.S. government. A more obvious example is the Boeing Company which received nearly $2.4 billion in defense contracts in 1980. (162) It manufactures aircraft, helicopters, ships and missiles for the military and also commercial aircraft, hydrofoil boats and transit cars for the civilian market. How easy is it for a foreign firm, for example, to compete with Rockwell International Corporation in the manufacturing of diesel locomotives when Rockwell makes large steel castings for the military cast armor programmes as well as for diesel locomotives?

In spite of the advantageous position of U.S. controlled firms, some foreign companies do manage to establish business in the U.S. In the helicopter industry, for example, three major foreign competitors established facilities in the U.S. in order to market successfully there. The French government-owned Société Nationale Industrielle Aérospatiale even managed to break through the government procurement barrier at the civilian level. In these circumstances, however, it appears that only a firm with a very superior product can hope to compete. When Aerospatiale was awarded a $215 million contract for 90 rescue and recovery helicopters for the U.S. Coast Guard in 1979, Bell Helicopter, one of the unsuccessful bidders,

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160. "Defense Lists Top 100 Contractors", op. cit., pp.200-205.

161. Information on company activities comes from Moody's Industrial Manual, vols 1 & 2, 1980.

162. U.S. defense spending on specific companies is listed in "Defense Lists Top 100 Contractors", op. cit., pp.200-205.

contended that the award violated the Buy American Act, even though the assembly was to take place in Aerospatiale's U.S. plant and $77 million in avionics gear was to be subcontracted to an American firm. The Federal District Court supported this contention and the Department of Transport was ordered to add 6% to Aerospatiale's bid. Only when the Department of Transport could show that the Aerospatiale helicopter was "significantly superior" technically and "substantially superior" in quality of design, was the Department of Transport allowed to go ahead with the purchase. (163)

In his study of the helicopter industry, Professor William Baldwin notes that there are "no evident severe barriers" to the entry of foreign or small firms in the civilian helicopter market. He then adds:

> "Although Aerospatiale's successful bid on the 1979 Coast Guard contract may be a harbinger of things to come, the United States military market still remains the exclusive preserve of the four largest domestic firms." (164)

2. THE CABLE INDUSTRY

Foreign ownership of Cable-TV companies has become an issue in the United States. Its regulation is being conducted in an unusual manner. First, Representative Douglas Walgren has introduced a bill which says that if a foreign country denies U.S. cable companies free access to its domestic market, companies based in that foreign country should be limited to owning only 20% of a U.S. cable system. If passed, the bill would allow two years for divestment of excess holdings. Second, "U.S. cable companies will be suggesting to local officials that if they award franchises to Canadian companies, the risk exists that the Canadians might have to sell most of their interest in the franchise at a later date".(165). This is an important means of discouraging foreign investment.

Interest-group activity in the form of newspaper coverage goes so far as to suggest foreign investment in U.S. cable systems could present a threat to national security:

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163. For a discussion of this case, see Baldwin, op. cit., pp. 128-129.

164. Ibid, p. 129.

165. Evans, Eric, "Cable Duel In U.S.", The Financial Post, Toronto, August 15, 1981, p.18.

"However the industry concensus is that Rogers was willing to up the ante because it wanted a base from which to bid for other U.S. urban franchises. Although no law forbids foreign companies from owning U.S. cable franchises, there has been some reluctance by local boards to award franchises to Canadian bidders. For instance, Selkirk Communications, one of the largest cable companies in Canada, was considered out of the running for a franchise in Fairfield County, Connecticut primarily because it is a Canadian company.

Thus Rogers was willing to pay an enormous premium, even for a cable acquisition, to get a toehold in U.S. cable and snap up 430,000 U.S. subscribers with a single purchase." (168)

3. NON-LEGISLATIVE BARRIERS TO FOREIGN INVESTMENT

We have seen that the United States is no different than any other country when it comes to protecting its own interests through prohibiting or limiting foreign investment and actively supporting its domestically-controlled firms. Laws governing foreign investors abound. But beyond these laws are a number of other factors which are equally barriers, or at least deterrents to foreign investment. In a study sponsored by the British North American Research Association, Simon Webley comments that:

"Perhaps the most significant deterrents, especially to the smaller company, is the sheer size and complexity of the United States as an economy and a country. ... and few Americans realize the physiological barrier which exists to direct investment in the United States by smaller foreign-owned companies." (169)

Webley goes on to note that the complexity of the economy is matched by the complexity of corporate law at federal and state levels. This view is supported by the EEC where "a representative from the U.K. pointed out that the very litigiousness of the U.S.

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168. Reier, Sharon, "Acquisition Strategies in Cable TV", Mergers and Acquisitions, vol. 16, No. 3, Fall 1981, p.44.

169. Webley, Simon, Foreign Direct Investment in the United States: Opportunities and Impediments, British-North American Committee, London, 1974, p.36

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169. Webley, Simon, Foreign Direct Investment in the United States: Opportunities and Impediments, British-North American Committee, London, 1974, p.36

constitutes a cultural barrier as formidable as any encountered in Japan."(170) Complex laws create financial as well as cultural barriers, for example:

> "The expense to the corporate clients can be immense - as is the benefit to the lawyers. In what has been described as five weeks of legal lunacy, the battle among Seagram, Mobil and DuPont for Conoco involved almost 200 lawyers, most of whom were from blue-chip New York firms. The cost in legal fees has been estimated at U.S. $15 million."(171)

Foreign investors may also find themselves the center of political controversy. "Opposition to foreign takeover because it is foreign is frequent and sometimes powerful." (172) In 1973 when the Canadian Development Corporation bought 30% of the shares of TexasGulf Sulphur, it:

> "found itself in a bruising battle. The U.S. management whipped up a campaign, virulently anti-Canadian, and largely based on the fact that CDC was a state-owned company. This campaign was nearly successful despite the extraordinary fact that nearly three quarters of the Texas Gulf Sulphur business was represented by the Kidd Creek nickel mine in Ontario, Canada". (173)

The response from Congress to U.S. businessmen attempting to thwart takeovers by foreign companies, has been to involve itself directly in these corporate battles. By introducing legislation to further restrict foreign investment, holding committee and sub-committee hearings into related matters and issuing news releases, resolutions and letters to the executive decrying the plight of the U.S. business community vis-à-vis the foreign "invaders", Congress has

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170. "U.S. Multinationals Query: Will Flowering Reciprocity Yield Protectionist Thorns", Business International, New York, March 19, 1982, p. 91.

171. Monopoli, William, "Takeovers Spawn Legal Specialty", Financial Post, August 22, 1981, p.5

172. "Are Foreign Multinationals Excluded ...", op. cit., p. 41.

173. Ibid., p.41.

helped arouse public sentiment against foreign investment. A result of this is that the foreign investor seeking to enter the U.S. market is faced with an increasing and increasingly high profile set of obstacles and hostilities to investing in the United States.

U.S. laws that have an impact on foreign investment are extensive and confusing. The powers of the agencies administering these laws are often not clearly defined. The resulting ambiguity can easily ensnare an unwary foreign investor. The role of the Federal Trade Commission, to take just one example, increases or decreases depending on the political point of view of the administration of the day. This can happen because the FTC's powers:

> "are broad to the point of fuzziness and the mandate it has from Congress permits it to range over almost all of industry, probing into everything from antitrust violations to deceptive advertising". (174)

The public opposition to foreign investment reflects a real concern felt by American businessmen and politicians. This came as a surprise to politicians from Canada, where foreign investment plays a far greater role in the economy. In reporting on a May, 1982 meeting of the Canada-United States Inter-parliamentary group, Senator Roblin of Canada commented:

> "We found the Americans to be just as touchy nationalists as we are when it came to real estate investments in Denver, or an apartment building in San Francisco, or the movement of Canadian insurance companies into the United States." (175)

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174. "The Escalating Struggle between the FTC and Business", Business Week, December 13, 1976, p.52.

175. The Honourable Duff Roblin, Debates of the Senate, Ottawa, June 3, 1982, p. 4280.

SUMMARY AND CONCLUSION

It is clear that foreign investment is, in fact, controlled in the United States. Steps have been taken to prohibit or restrict foreign investment in many areas including shipping, aviation, aeronautics, communications, nuclear and hydroelectric power, banking, insurance, real estate, mining, maritime activites, and defense (which itself covers many more areas). Special measures are applied to foreign-controlled companies, such as exports controlled under the Export Administration Act and the Emergency Economic Powers Act. Foreign investment is also indirectly controlled through selective application of securities, anti-trust and defense laws, congressional lobbying and hearings, and monitoring by various government agencies.

There are over 20 federal agencies involved in the regulation of foreign investors. These agencies work with legislation in which no two statutes apply the same definition of foreign investment or control. In maritime industries, for example, corporate control is defined differently for domestic shipping, foreign trades and regulations. (176)

The foreign investor encounters not a single central agency, but a highly diffuse set of laws and regulations which may leave him confused and perhaps suspicious that the very ambiguity of his situation is no accident. In The Economist's Multinational Business, it was suggested that the misunderstandings and resulting problems faced by foreign multinationals appeared at times "to amount to a systematic policy of hindrance and exclusion". They found that while there was no basis in many laws for discrimination against foreign acquirors, "many outside the U.S.A. have detected such bias operating in a growing number of instances".(177)

Whether organized or haphazard, the absence of clear authority and well-defined restrictions leaves the system open to abuse. Decisions by regulatory agencies frequently appear arbitrary and unfair. Pressure from interest groups can lead to 'adjusted' interpretations of the law. Lengthy and expensive delays may force the cancellation of an investment, or political and public opposition can sour the financial prospects of an acquisition.

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176. "The Adequacy of the Federal Response", op. cit., p.137.

177. "Are Foreign Multinationals Excluded..." op. cit., p.41.

Today the United States Congress is considering an array of bills calling for limits on foreign investment, reciprocal or 'mirror' laws, sector by sector parity, prohibitions or increased restrictions on foreign purchases of property, and limitations on foreign ownership in certain sectors such as railroads and trucking. Some Congressmen have found the Committee on Foreign investment in the U.S. (CFIUS) negligent in its role as overseer of the 'national interest'. They would like to extend the authority of CFIUS and increase its powers. Administration officials have opposed these congressional initiatives on the grounds that they are unnecessary. The evidence of this report suggests that the administration is correct. The United States is already well able to bar any unwanted foreign investment.