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ARTICLES

THE EXON-FLORIO AMENDMENT: A SOLUTION IN SEARCH OF A PROBLEM

Marc Greidinger*

INTRODUCTION

On August 23, 1988, the president of the United States gained broad authority to investigate and block mergers, takeovers, and acquisitions that could result in foreign control of domestic companies. Congress granted this authority as part of the Omnibus Trade and Competitiveness Act of 1988,¹ by enacting the Exon-Florio Amendment to Title VII of the Defense Production Act of 1950.² Congress passed the Exon-

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In preparing this article, the author relied in part on official government documents which have not yet been made public. In order to publish this article in an unclassified format, it was necessary to omit some citations to source materials.

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1. Omnibus Trade and Competitiveness Act, Pub. L. No. 100-418, § 721, 102 Stat. 1107 (1988) (to be codified at 50 U.S.C. app. § 2170); *see also* 137 CONG. REC. S2107 (daily ed. Feb. 21, 1991) (statement of Sen. Exon) (requesting an exemption for the Exon-Florio Amendment from sunset provisions of the Defense Production Act of 1950).

2. 50 U.S.C. app. § 2170 (1988).

Florio Amendment (Exon-Florio or the Amendment) in response to a surge in the rate of foreign takeovers of American firms that produce high technology goods and services.

Several factors contributed to this increased takeover activity. Favorable exchange rates allowed foreign investors to buy United States assets cheaply.³ Foreign high technology firms, concerned that the declining value of the dollar would make foreign imports too expensive for American consumers, increased their acquisitions of American high technology firms.⁴ By investing in United States production facilities, foreign firms benefitted from the lower production input prices inside the United States and increased their profits as well as their market share.⁵

This increased foreign direct investment in United States high technology assets received much political attention.⁶ Politicians made patriotic speeches that presented images of dramatic increases in sales of the country's leading-edge industries.⁷ Congress also expressed sentiment that the United States should protect sensitive technologies from military and economic competitors.⁸ Many felt that the United States was growing too dependent on foreign sources for defense-related production.⁹ In addition, management in companies that were targets of hostile takeover attempts clamored for protection.¹⁰ In order to retard erosion of the competitiveness of the United States in world markets and to retaliate against the trade policies of foreign states, members of Congress advocated blocking foreign takeovers.¹¹

3. See 134 CONG. REC. S4833 (daily ed. Apr. 27, 1988) (statement of Sen. Exon) [hereinafter Exon Statement] (calling for a revamped investment policy to protect national security).

4. See *infra* notes 15-23 and accompanying text (setting forth the background and legislative history of the Exon-Florio Amendment).

5. Production facilities in the United States give parent companies an added advantage: greater access to American technological advances. Facilities in the United States also help to deter the creation of import barriers.

6. See *infra* notes 112-23 and accompanying text (discussing the debates leading up to the passage of Exon-Florio).

7. See, e.g., *Federal Collection of Information on Foreign Investment in the U.S.: Hearing Before the Comm. on Commerce, Science, and Transportation*, 100th Cong., 2d Sess. 5, 10 (1988) [hereinafter *Federal Collection of Information on Foreign Investment in the U.S.*] (statements of Hon. Tom Harkin and Hon. John W. Bryant) (advocating the implementation of foreign investment data provisions).

8. *Infra* notes 122-30 and accompanying text.

9. *Federal Collection of Information on Foreign Investment in the U.S.*, *supra* note 7, at 3, 4, 10, 33, 74 (statements of Sen. McCain, Hon. Tom Harkin, Hon. John W. Bryant, Sen. Pressler, and Dr. Susan J. Tolchin).

10. *Infra* notes 278-80 and accompanying text.

11. *Infra* notes 111-16 and accompanying text.

Finally, political forces pushed the control of foreign investment in domestic high technology firms onto the congressional agenda¹² when Fujitsu, a Japanese computer company, attempted to purchase Fairchild Industries, a silicon valley semi-conductor manufacturer.¹³ Specific concerns regarding the national security implications of this acquisition¹⁴ generated more discussions, revealing the fear that domestic defense suppliers were becoming too dependent on the Japanese for semi-conductors.¹⁵ In addition, many authorities feared that the Japanese shared too much sensitive technology with Warsaw Pact nations.¹⁶ Moreover, by the end of 1987, total Japanese investment in the United States had risen to \$33.3 billion, a 195% increase from the amount of investments five years earlier.¹⁷ The debate over the Fujitsu merger fueled the larger controversy over rising Japanese investment in the

12. Comments of D. Mulford, The Association for Foreign Investment in America and Bureau of National Affairs, Conference on *Foreign Investment: The Economic Perspective*, Fed. News Serv., Oct. 6, 1988.

13. See 134 CONG. REC. H2320 (daily ed. Apr. 21, 1988) [hereinafter Florio Statement] (statement of Rep. Florio) (using the Fujitsu merger as an example to create a protective policy against foreign investment); see also Exon Statement, *supra* note 3, at S4833 (calling for a protective policy in the wake of the Fujitsu merger).

14. Florio Statement, *supra* note 13, at H2320. Fairchild produced a number of sophisticated electronic components used in aircraft, missile guidance, strategic defense research, and supercomputers made for encryption and decryption. Woodruff, *Huge Japanese Holdings Prompt Concern About Economic Clout in U.S.*, The Sun, Jan. 15, 1989, at 8E. Domestic defense contractors that were in competition with Fujitsu depended on Fairchild, the sole source of unique subcomponents necessary for fulfilling defense contracts. See Hansan, *The Regulation of Foreign Direct Investment in the United States Defense Industry*, 9 NW. J. INT'L L. & BUS. 658, 670 (1989) (providing a detailed account of the Fujitsu merger attempt). After the sale, the defense community became concerned that Fujitsu would have economic incentives to curtail Fairchild's production of subcomponents for firms with which Fujitsu competed. Woodruff, *supra*, at 8E.

15. See *New Omnibus Trade Law Said to Offer Weapon Against Foreign Take-over Bids*, Daily Rep. Exec. (BNA) No. 215, at A-4 (Nov. 7, 1988) (stating that Fairchild was a subsidiary of the French holding company Schlumberger, Ltd.).

16. *Charges against Toshiba Jumble Trade Bill Talks*, Chicago Tribune, Mar. 20, 1988, (Business Section), at 3; Auerbach, *CIA Says Toshiba Sold More to Soviet Bloc*, Wash. Post, Mar. 15, 1988, at C1. The media's focus on the Toshiba-Kongsberg sale of sensitive manufacturing technologies to the Soviet Union contributed to the concern that Japanese control of firms such as Fairchild would result in more damaging transfers of technologies to the Eastern Bloc. *Id.*

17. Woodruff, *supra* note 14, at 8E.

United States,¹⁸ and politicians placed more importance on the issues that such mergers raised.¹⁹

As a result of political pressure, Fujitsu dropped its acquisition plans. Nevertheless, the debate made Congress aware that the president did not have adequate authority to block the Fairchild acquisition, unless he resorted to invoking emergency powers.²⁰ Exercise of emergency powers, however, would have caused a diplomatic crisis with Japan,²¹

18. See Schlender & Yoder, *Chip Makers See New Threat from Japanese Firms: Fujitsu's Plan to Merge with Fairchild Stirs Concern*, Wall St. J., Oct. 27, 1986, at 6 (reporting the slumping sales that weakened United States semiconductor manufacturers, including Fairchild, making them desirable to the Japanese purchasers); see also OFFICE OF JAPAN, DEPARTMENT OF COMMERCE, JAPANESE INVESTMENT STRATEGY IN THE UNITED STATES 1 (1983) (on file with *The American University Journal of International Law and Policy*) (noting that Japan's government "to blunt foreign criticism of Japan's current account surplus" encouraged Japanese firms to capitalize on these opportunities by recycling accumulated capital).

19. See Schendler & Yoder, *supra* note 18, at 6 (relating the defense industry's concern over Fujitsu's plan to purchase Fairchild).

20. See Florio Statement, *supra* note 13, at H2320 (testifying in support of the Exon-Florio Amendment).

21. See *Foreign Takeovers and National Security: Hearing on § 905 of H.R. 3 Before the Subcomm. on Commerce, Consumer Protection, and Competitiveness of the House Comm. on Energy and Commerce*, 100th Cong., 1st Sess. 17-18 (1988) [hereinafter *Foreign Takeovers Hearing*] (statement of J. Michael Farren, Deputy Under Secretary for International Trade, Department of Commerce) (interpreting the International Emergency Economic Powers Act [IEEPA], 50 U.S.C. § 1701, to give the president authority to block foreign acquisition of Fairchild if it would be an extraordinary threat to national security, foreign policy, or the economy); see also *Acquisitions by Foreign Companies: Hearing Before the Senate Comm. on Commerce, Science and Transportation*, 100th Cong., 1st Sess. 17 (1987) [hereinafter *Acquisitions Hearing*] (statement of Sen. Pete Wilson) (equating a presidential decision to block a foreign acquisition to a declaration of hostilities against the government of the acquiring company); see, e.g., Exec. Order No. 12,205, 45 Fed. Reg. 24,099 (1980) (prohibiting certain transactions with Iran). The Reagan administration explored the possibility of blocking the merger under United States antitrust laws. Alvarez, *Political Protectionism and United States International Investment Obligations in Conflict: The Hazards of Exon-Florio*, 30 VA. J. INT'L L. 1, 61 (1989). The Department of Justice, however, found no significant restraint of trade resulting from the merger. *Id.* Under applicable antitrust law, the standards are the same for mergers involving foreign firms and mergers between domestic companies.

The administration also explored the possibility of forging an agreement with Fujitsu to guarantee that Fairchild would continue to produce semiconductor components used in defense industries for a period of years. To this end, the agreement would set minimum levels for capital investment in Fairchild's operations, research, and development. In addition, Fujitsu would segregate Fairchild's sensitive technologies from the parent corporation, and United States trustees would manage these technologies. In order to enforce this agreement, the government would judge Fujitsu's efforts to fulfill its obligations by a standard of "satisfactory record of integrity and business ethics" to determine whether the company is eligible for government contracts. Federal Acquisition Regulations, Title 48, 9.104-1(d) (1989). The merger fell through, however, before the government reached an agreement with Japan. *Foreign Takeovers Hearing, supra*, at 17.

because application of the president's emergency powers would necessitate labeling the Japanese acquisition of Fairchild an "extraordinary threat."²² Further complicating the problem, a French holding company owned Fairchild at the time of the attempted acquisition,²³ raising questions of whether the use of emergency powers would be appropriate. A presidential move to prevent the sale of Fairchild to the Japanese could signal a preference for European ownership, and result in a trade war that would endanger American national security even more than the attempted takeover.

Members of Congress active in the Fujitsu-Fairchild debate proposed the Exon-Florio Amendment to govern transactions similar to the contested Fujitsu merger attempt. The Amendment would act as an intermediate measure to address less "unusual and extraordinary" threats than the threats that emergency powers laws address. The Amendment would also apply in circumstances where existing law is not "adequate and appropriate"²⁴ for the president to use in response to national security concerns.

The Exon-Florio Amendment²⁵ empowers the Committee on Foreign Investment in the United States (CFIUS)²⁶ to investigate "mergers, acquisitions and takeovers [that could result in] foreign control of per-

22. International Emergency Economic Powers Act [IEEPA], 50 U.S.C. § 1701 (1988).

23. See Wilson & Dryden, *What the Fairchild Fiasco Signals for Trade Policy*, BUS. WK., Mar. 30, 1987, at 28 (discussing the French owners' negotiations for sale of Fairchild); see also Schlender & Yoder, *supra* note 18, at 6 (explaining that although Schlumberger, Ltd. is based in New York, many consider it a French company).

24. 50 U.S.C. app. § 2170(d)(2) (1988).

25. For full text of the Exon-Florio Amendment see the appendix following this article.

26. See Exec. Order No. 11,858, 54 Fed. Reg. 779 (1989) (delegating primary responsibility for implementing Exon-Florio to CFIUS). CFIUS is an interagency group created in 1975 to "review investments in the United States, which, in the judgment of the Committee might have major implications for the United States national interests." Exec. Order No. 11,858, 40 Fed. Reg. 20,263 (1975), *as amended by* Exec. Order No. 12,188, 45 Fed. Reg. 989 (1980), and Exec. Order No. 12,661, 54 Fed. Reg. (1989). The Secretary of the Treasury is the chairperson of CFIUS. *Id.* CFIUS' members include the Secretaries of Defense, Commerce, and State, the United States Trade Representative, the Chairman of the Council of Economic Advisors, the Attorney General, and the Director of the Office of Management and Budget. *Id.*; see also *Treasury Fully Implementing National Security Provision, Brady Says*, Daily Rep. Exec. (BNA) No. 246, at 4-11 (Dec. 22, 1988) (detailing the composition of CFIUS). Before the enactment of Exon-Florio, CFIUS had no legal authority to block foreign direct investments. *Id.* CFIUS review has resolved national security problems arising from a transaction, however, either through negotiation with the parties to the transaction or by referring them to the appropriate executive department. See *Foreign Takeovers Hearing*, *supra* note 21, at 20-22 (statement of David C. Mulford, Assistant Secretary for International Affairs, Department of Treasury) (providing examples of recent successful CFIUS causes).

sons engaged in interstate commerce in the United States."²⁷ After an

27. 50 U.S.C. § 2170(a) (1988). The Defense Production Act does not define the terms "merger," "acquisition," "takeover," and "control." *Id.*

The proposed regulations adopt the same loose definitions of "merger," "acquisition," and "takeover" as those used under antitrust laws. *See* 54 Fed. Reg. 29,744, 29,746-47 (to be codified at 31 C.F.R. § 800) (proposed July 14, 1989) (stating that the term "acquisition" is shorthand for mergers, acquisitions, and takeovers) [hereinafter Proposed Treasury Regulations]; C. HILLS, ANTITRUST—TRUST ADVISOR 163 (3d ed. 1985) (asserting that these terms are often used interchangeably under antitrust law to refer to a wide variety of transactions bringing previously independent enterprises together). There are other "transfers," such as a partial stock acquisition, which transfers less than total control, or an operating lease, which transfers less than absolute interest. *Id.* at 164; *see also* United States v. Columbia Pictures Corp., 189 F. Supp. 153, 181-82 (S.D.N.Y. 1960) (stating that acquisition terms are not precise terms of art but rather are broad, imprecise words covering many types of transactions).

Although clearly defining mergers, acquisitions, and takeovers may be difficult, the legislative history does exclude some transactions from their definition. For example, the original House bill would have made joint ventures and licensing arrangements subject to review. H.R. CONF. REP. No. 576, 100th Cong., 2d Sess. 924 (1988) [hereinafter CONF. REP.]. Opponents criticized this language because it could hinder the transfer of foreign technologies to the United States. *See Foreign Takeovers Hearing, supra* note 21, at 75-79 (statement of Robert McNeill, Executive Vice-Chairman, Emergency Committee for American Trade) (stating that regulations under the Export Administration Act and Arms Control Act would protect sensitive technologies under these types of arrangements). Consequently, Congress excluded joint ventures and licensing arrangements from the statute's provisions. CONF. REP., *supra*, at 925.

The proposed regulations, however, do define joint ventures that result in foreign acquisition of a United States firm as "acquisitions" subject to the provisions of Exon-Florio. Proposed Treasury Regulations, *supra*, at 29,748, 29,752. Technically, one could argue that a definition of "mergers, acquisitions, and takeovers" that includes joint ventures frustrates congressional intent as revealed by the legislative history. CONF. REP., *supra*, at 925. Without this regulatory provision, however, foreign entities might attempt to disguise acquisitions as joint ventures. Thus, CFIUS may argue for the inclusion of joint ventures under its authority to issue regulations in order to prevent subversion or contravention of the purposes of the statute. *See* CONF. REP., *supra*, at 926 (acknowledging that Congress intended to interpret the term "national security" broadly). Corporate control is also difficult to define. *See* *Gottesman v. General Motors*, 279 F. Supp. 361, 367 (S.D.N.Y. 1967) (asserting that "corporate control" includes the power to direct policy, exact patronage, and influence decisions and membership of boards of directors). The specific purpose of the law is to determine the degree of proof needed to reject or accept the inference of control. *Id.* at 368.

Administrative precedent exists for stringent definitions of the term "control." *See* 16 C.F.R. § 801.1(b) (1990) (defining control as ownership of 50% or more of the voting stock in the corporation, or the right to at least 50% of the corporate profits or assets in the event of dissolution, or the contractual power to designate 50% or more of the corporation's directors). *But see* *Gottesman*, 279 F. Supp. at 368 (finding control where one block owned 23% of a firm with scattered ownership of the remaining shares). In this situation, the owner of the minor block often has the capacity to control corporate policy through the use of proxy machinery while the majority of shareholders, who have bought shares exclusively for investment purposes, remain inert. *Id.*

Under Exon-Florio, the government would investigate stock acquisitions before the parties could establish any command relationship. 50 U.S.C. app. § 2166(a) (1988). The government does not have to prove, therefore, that the entity exercises control. *See* Proposed Treasury Regulations, *supra*, at 29,752 (including coverage of proposed ac-

investigation, if the president discovers "credible evidence"²⁸ demonstrating that the foreign interest might take action "that threatens to impair the national security"²⁹ of the United States and that other provisions of law are not "adequate and appropriate"³⁰ in dealing with the threat, then the president is authorized to "take such action for such time as [the president] considers appropriate to suspend or prohibit"³¹ the transaction.

quisitions). Instead, the Exon-Florio "control" standard requires that the foreign entity would have the potential power to exercise control if the government approved of the acquisition. *Id.* In line with the foreign relations purpose of Exon-Florio's and the Defense Production Act's foreign relations purpose, CFIUS applies a concept of control without making strict percentage calculations of assets or equity; CFIUS determines the practical distribution of power over corporate policy. *Id.* at 29,751. This concept takes into account the size of the interest acquired as well as the distribution of remaining assets and equity not involved in the transaction. *Id.*

A definition of "control" that does not focus on percentages of ownership provides flexibility, permits responsiveness to individual circumstances, and has significant policy advantages. Providing a baseline percentage of equitable ownership necessary for foreign "control," however, would enhance uniformity and certainty for foreigners investing in the United States. The Federal Trade Commission is currently considering premerger notification rules that would require acquisition of 10% of the voting stock in a corporation before the Commission could activate reporting requirements under the Hart-Scott-Rodino Act. 16 C.F.R. § 801.3 (1990). Regulations for implementing Exon-Florio could adopt similar concepts. *See* 54 Fed. Reg. 29,751 (advocating non-numeric standards for "control").

Drafters must construe these regulations carefully. If, for example, regulations exempt a party from Exon-Florio when it acquires less than 10% ownership of a corporation, then ownership could be spread out over several foreign "persons" to avoid the reach of the legislation. At the same time, if regulations require Exon-Florio filings every time there is an acquisition after which foreign persons own over 10% of the voting stock, extremely small foreign investments would be subject to the Exon-Florio process. Other terms within the regulations, meanwhile, may reduce the flexibility gained from such a standard of "control." *Id.* For example, the term "parent" in the proposed regulations contains a very rigorous mechanical test that may override this flexibility. *See id.* (requiring a 50% test as the standard for determining ownership).

28. 50 U.S.C. app. § 2170(d) (1988).

29. *Id.*

30. *Id.*

31. *Id.* § 2170(c). This broad language is significant because if the courts determine that the statute authorizes the president's action, then the president's motives, reasoning, findings of facts, and judgment are immune from judicial scrutiny. *See United States Cane Sugar Refiners' Ass'n v. Block*, 683 F.2d 399, 404 (C.C.P.A. 1982) (holding that where statutes authorize the president's actions the judiciary plays no role). This is a well-established principle in United States law. *See also Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 31-32 (1827) (explaining that no one may limit the president's actions once the law authorizes action).

Courts have interpreted corresponding language in subsection 232(b) of the Trade Act of 1962 which authorizes the president to "take such action . . . he deems necessary" to adjust imports that threaten the national security, so that the president has discretion "in broadest terms." *Pancoastal Petroleum, Ltd. v. Udall*, 348 F.2d 805, 807 (D.C. Cir. 1965). In *Federal Energy Admin. v. Algonquin SNG*, 426 U.S. 548 (1976), the Supreme Court held that although section 232 did not expressly grant the president the power, the president could use his discretion in taking unilateral action under sec-

The Amendment gives the president a tremendous amount of discretion to block foreign acquisitions. As of this writing, President Bush has

tion 232 to include imposing tariffs, as well as quotas, on whole classes of imported goods. *Id.* at 570. The similarities between Exon-Florio and section 232 suggest that such discretion also exists in section 2170. Hence, section 2170 might allow the president to unilaterally impose licensing fees or taxes on foreign companies that acquire United States firms or quantitative quotas on foreign direct investment.

Notable differences exist, however, in the scope of actions contemplated under section 232 and those that Exon-Florio authorizes. For example, under subsection 232(b), the objective of presidential action is to "adjust imports." 19 U.S.C. § 1862(c) (1988). The president makes these adjustments not on a firm-by-firm or case-by-case basis, but on an article-by-article basis, and therefore, the president's decision binds all firms involved with importing the good and its derivatives. *See Algonquin*, 426 U.S. at 554-56 (discussing whether to impose a duty on all firms importing petroleum and petroleum products). Under Exon-Florio, both the language of the statute and the legislative history contemplate a case-by-case review of each acquisition. *See CONF. REP.*, *supra* note 27, at 925 (discussing the requirement that the president find evidence of proposed or pending transactions). Nothing in the text of Exon-Florio or the legislative history, however, prevents the president from promulgating a policy either through practice or formal declaration that requires uniform treatment of all transactions involving firms with certain characteristics. As a result, the president's authority to block mergers under Exon-Florio is at least as broad as the authority granted to block imports under section 232 of the 1962 Trade Act. *See Nance & Wasserman, Regulations of Imports and Foreign Investments in the United States on National Security Grounds*, 11 MICH. J. INT'L L. 926, 968 (1990) (noting that the statutory scheme that authorizes the president to act under provisions of section 232 is analogous to Exon-Florio).

If the holding in *Algonquin* applies to Exon-Florio, then the statute grants tremendous power to the president to intervene unilaterally in the international investment arena, but with some outer limits to presidential authority. *See Algonquin*, 426 U.S. at 571 (holding that although the president may raise license fees on imported oil, the statute does not permit "any action the president might take, as long as it has even a remote impact on imports") (emphasis in original); *see also Independent Gasoline Marketers Council, Inc. v. Duncan*, 492 F. Supp. 614, 618 (D.D.C. 1980) (holding that section 232 cannot support a conservation fee imposed on imported oil because its effects are too remote to reduce consumption). Three factors supported the determination in *Independent Gasoline Marketers Council, Inc. v. Duncan*: (1) the slight impact of the conservation fee on import levels, (2) the broad controls the conservation fee imposed on domestic goods to achieve that slight impact, and (3) indications that the president attempted an "end-run" around a Congress that refused to pass legislation directly authorizing a gasoline conservation tax. *Id.* If section 232 applies to Exon-Florio, this holding would not authorize the president to take actions for general regulation of mergers, acquisitions, and takeovers, in either international or purely domestic transactions. Nevertheless, the statute would permit presidential actions having an incidental effect on domestic investment.

The legislative history demonstrates that the suspension and prohibition power of section 232 is not contingent upon securing a court order but instead requires a presidential announcement within 15 days of the conclusion of an investigation. *CONF. REP.*, *supra* note 27, at 927. The statute also authorizes the president to direct the attorney general to seek appropriate relief in the United States district courts in order to implement and enforce Exon-Florio. 50 U.S.C. app. § 2170(c) (1988). Congress intended "appropriate relief" to be a broad term that allows the president flexibility to respond to different circumstances. *See CONF. REP.*, *supra* note 27, at 927 (allowing the president to act against any national security threat a foreign takeover may pose). Through the courts, the attorney general may seek equitable, including injunctive, relief. *Id.* Divestment relief power is subject to the 15 day limitation, and the executive may

used his powers under the law to block transactions on only two occasions. In both cases he indicated that concern about transfers of sensitive weapons technologies motivated his actions.³² There is, however, no guarantee that the government will restrict its use of the Exon-Florio Amendment to this limited purpose in the future.³³ Moreover, future administrations that are less committed to open investment may consider using Exon-Florio to advance different policy goals.

Another problem with the Amendment is that it contains terms that are left open to interpretation. For example, the term "national security" is not defined in the Amendment.³⁴ In addition, Congress specifically exempted from judicial review determinations of what constitutes "credible evidence" and whether other provisions of law are "adequate and appropriate" to protect national security.³⁵

Such vague terms in the statute reflect unresolved congressional debate on the proper construction and implementation of the Amendment. Those advocating the delegation of broad powers to the president often have divergent notions of what the term "national security" covers and envision use of the Amendment's provisions for a large variety

exercise it only in the case of takeovers concluded after the enactment of the Omnibus Trade Act of 1988 and after notification of CFIUS. *Id.*

The attorney general has interpreted the phrase "such action" in subsection 232(b) to mean a continuing course of action, so that once the government imposes restrictions, it is not required to find a new threat to national security in order to change the type of restrictions. *Restriction of Oil Imports*, 43 Op. Att'y Gen. 3, 3 (1975). Similarly, under Exon-Florio, once the president suspends a foreign acquisition for national security reasons, the executive need not make new findings to continue a suspension of activity or change it to a prohibition. CONF. REP., *supra* note 27, at 925. CFIUS should monitor developments to assess the need for changes or continuation of restrictions but need not comply with the procedural and timing requirements for initial investigations and findings. *Id.*

32. See Farnsworth, *U.S. Stops Japanese Acquisition: Officials Oppose Sale of General Ceramics for Security Reasons*, N.Y. Times, Apr. 18, 1989, at D1 (reporting that the president temporarily blocked Tokuyama's proposed purchase of General Ceramics); see also A. Rosenthal, *Bush, Citing Security Law, Voids Sale of Aviation Concern to China*, N.Y. Times, Feb. 3, 1990, at A1 (reporting that President Bush voided the sale of an aviation concern to China for national security reasons).

33. *Foreign Acquisitions and National Security: Hearing Before the Subcomm. on Commerce, Consumer Protection and Competitiveness of the House Comm. on Energy and Commerce*, 101st Cong., 2d Sess. 16 (1990) (statement of Michael Skarzynski). At the oversight hearing on the implementation of Exon-Florio, a Commerce Department representative advocated an all-encompassing definition of national security. *Id.* "National security," he stated, "is ultimately dependent on economic strength and vitality." *Id.*

34. See Nance & Wasserman, *supra* note 31, at 968 (explaining the absence of a definition for national security in the Exon-Florio Amendment).

35. 50 U.S.C. app. § 2170(d) (1988).

of purposes.³⁶ Others, however, anticipate using the provision only for defense related purposes in attempts to block the "hemorrhage" of critical military technologies to unfriendly states.³⁷ Such groups aim to prevent "Libyans in three-piece suits"³⁸ from destroying the military industrial base of the United States through takeovers of American firms. Others place a more economic focus on "national security" and advocate using the legislation to address the "devastation" of competitiveness of the United States in world markets.³⁹ This group would also use the Amendment to address the difficulty of achieving a reciprocal trade policy.⁴⁰

In the United States business community, commentators have expressed concern that the ambiguity of the national security standard could lead to unpredictable application of the Amendment.⁴¹ Some authorities have expressed the fear that those advocating the aggressive use of Exon-Florio may stretch the Amendment's purpose just as lawyers creatively apply the Racketeering Influenced and Corrupt Organizations Act to prosecute activity bearing little resemblance to traditional "organized crime."⁴²

Such uncertainty concerning whether the government will interfere with an acquisition could inhibit transactions and prevent the most productive use of economic resources.⁴³ Consequently, many parties have requested that the executive branch specify circumstances where it will restrict foreign investors' acquisitions.⁴⁴ The executive branch, however, has resisted enacting policies that limit the president's ability to deal with unforeseeable situations.

36. Nance & Wasserman, *supra* note 31, at 968-73 (discussing the broad interpretation of national security).

37. See *Acquisitions Hearing*, *supra* note 21, at 42-43 (statement of Sen. Riegle, Jr.) (lambasting the United States' debt).

38. See *id.* at 24 (statement of Robert Mercer, Chairman of the Board and Chief Executive Officer, Goodyear Tire and Rubber Co.) (speculating that a enemy of the United States might use means more cost effective than war to destroy the United States).

39. See *id.* at 10 (statement of Sen. Exon) (decrying the condition of United States competitiveness in the world market).

40. See *id.* at 13 (statement of Sen. Breaux) (detailing methods other countries use to investigate foreign investors).

41. Schumacher, *The Exon-Florio Amendment: From Enactment to Practice*, 10 INVESTMENT U.S.A., No. 12, at 19, 21 (Dec. 1988).

42. *Id.*

43. See 134 CONG. REC. H2321 (daily ed. Apr. 21, 1988) (statement of Rep. Craig) (discussing the Exon-Florio Amendment's negative effect on American businesses).

44. Nance & Wasserman, *supra* note 31, at 972 n.205 (describing comments submitted to the Treasury Department on the proposed mergers, takeover, and acquisition regulations).

This article challenges the premise that it is necessary for the president to maintain unfettered discretion to block international transactions under the Exon-Florio Amendment in order to preserve the national security of the United States. Part I explores the scope of presidential authority to define what constitutes a national security problem under the Exon-Florio Amendment. Part II demonstrates that law outside of the Amendment is both "adequate and appropriate" to handle threats to national security interests that may arise as a result of a foreign acquisition. Part III discusses international agreements that prevent use of the Exon-Florio Amendment to protect economic interests affecting national security. Part IV explores how implementation of the Exon-Florio Amendment could minimize the uncertainties that distort the free flow of capital in international investment markets and how the provision could supplement existing law that protects national security.

I. THE NATIONAL SECURITY STANDARD

The term "national security" is a critical component of the Amendment's statutory construction. "National security" appears several times in the Exon-Florio provision to define its parameters, to describe the standard of review, and to identify essential points for the exercise of executive discretion in applying the law.⁴⁵ Neither the Exon-Florio Amendment, the Defense Production Act, nor the regulations implementing the law, however, define "national security."⁴⁶

Congress intentionally left "national security" undefined in order to provide the president with broad discretion to evaluate threats and to take appropriate measures in response to them.⁴⁷ By leaving the term undefined, Congress did not intend to grant the president *carte blanche*

45. 50 U.S.C. app. § 2170(a) (1988). The statute provides that the purpose of investigation is to determine "the effects on national security" of mergers, acquisitions, and takeovers of United States firms by foreign entities. *Id.* In order to suspend or prohibit these activities under the statute, the president must first find that "there is credible evidence that leads [the president] to believe that the foreign interest exercising control might take action that threatens to impair the national security . . ." *Id.* § 2170(d)(1). Second, the president must find that other provisions of law do not "provide adequate and appropriate authority for the president to protect the national security . . ." *Id.* § 2170(d)(2). The president must evaluate "requirements of national security" when determining the factors to consider in applying the statute. *Id.* § 2170(e). United States capacity to meet those requirements is among the factors that Congress suggests the president may consider. *Id.* § 2170(e)(3). Finally, the objective of the president's actions under the statute should be to ensure that foreign control "will not threaten to impair the national security." *Id.* § 2170(c).

46. Proposed Treasury Regulations, *supra* note 27, at 29,746.

47. CONF. REP., *supra* note 27, at 926.

to interfere with foreign direct investment in the United States.⁴⁸ Congress provided little guidance, however, to indicate what limitations it did intend to place on the president. The following section explores the text of the statute as well as the legislative history to determine the nature and limitations of presidential power under Exon-Florio.

A. STATUTORY CONTEXT

1. *Factors for Application of Exon-Florio*

Subsection 2171(e) of the Exon-Florio Amendment provides the only explicit guidance given to the president for applying the national security standard.⁴⁹ It details three factors that the president "may" consider "among other factors" when the president applies the provision.⁵⁰

The first factor allows consideration of "domestic production needed for projected *national defense* requirements."⁵¹ With this provision, Exon-Florio amends the Defense Production Act definition of national defense to include "programs for military and atomic energy production or construction, military assistance to any foreign nation, stockpiling, space, and directly related activity."⁵² In this context, "projected national defense requirements" could involve both future peacetime needs and potential mobilization requirements in the event of war. Thus, the first factor addresses the maintainance of an adequately prepared military industrial base.

The second factor that is listed in subsection 2170(e) is "the capability and capacity of domestic industries to meet national defense requirements, including the availability of human resources, products, technology, materials, and other supplies and services . . ."⁵³ This provision considers the availability of capital, labor, and material inputs necessary for the maintenance of a sound industrial defense base.⁵⁴ The inputs listed, however, are used not only in defense industries, but are also used in the non-defense sectors of the economy.⁵⁵ Hence, intervention to preserve these industrial inputs could occur in response to overall trends in the domestic economy, as well as to threats to inputs specific to certain defense production.⁵⁶

48. *Id.*

49. 50 U.S.C. app. § 2170(e) (1988).

50. *Id.*

51. *Id.* § 2170(e)(1) (emphasis added).

52. 50 U.S.C. app. § 2152(d) (1988).

53. *Id.* § 2170(e)(2) (1988).

54. *Id.*

55. CONF. REP., *supra* note 27, at 927.

56. *Id.*

The third factor listed in subsection 2170(e) that the president may examine is "the control of domestic industries and commercial activity by foreign citizens as it affects the capability and capacity of the United States to meet the requirements of national security."⁵⁷ Although this language is general, it does incorporate the national security standard. Under the rule of *ejusdem generis*, because these general terms follow words that have a specific meaning in subsection 2170(e)(1)-(2), the non-specific words in subsection 2170(e)(3) should apply only to factors of the same general "kind or class" as the preceding subsections.⁵⁸

The general words in this section, however, include the national security standard and, therefore, make it impossible to interpret the enumerated factors in subsection 2170(e) as limitations on the national security standard. By including ambiguity in subsection 2170(e)(3) and the conditional language in the opening sentence of subsection 2170(e), Congress suggests that the executive should consider other factors that implicate national security concerns beyond those specified in subsection 2170(e). Analysis of the statutory origins of the national security standard reinforces this contention.⁵⁹

2. *Similarity to the Trade Expansion Act of 1962*

Much of the language in the Exon-Florio Amendment resembles language in subsection 232(b) of the 1962 Trade Expansion Act. Subsection 232(b) provides that if the secretary of the Treasury Department finds an "article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security,"⁶⁰ the president may take action "to adjust the imports of [the] article and its derivatives so that . . . imports [of the article] will not threaten to impair the national security."⁶¹ Subsection 232(c) of the Trade Expansion Act provides the president with a list of factors to consider when implementing subsection 232(b) that includes the factors enumerated in subsection 2170(e) of Exon-Florio.⁶²

No federal cases have addressed directly the scope of the national security standard in subsection 232(b) of the Trade Expansion Act. In dicta, however, the Supreme Court has remarked that, in subsection

57. 50 U.S.C. app. § 2170(e)(3) (1988).

58. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47.17 (4th ed. 1984 & Supp. 1990).

59. 19 U.S.C. § 1862(b) (1988).

60. *Id.*

61. *Id.* § 1862(c).

62. *Id.* § 1862(d).

232(b), national security is a "narrower criterion [which] stands in stark contrast [to a] broad . . . national interest"⁶³ standard. Nevertheless, the Court implicitly recognized that increased foreign competition and its long term potential to retard the maintenance, development, and expansion of domestic production of natural resources necessary to protect national security interests fell fairly within the domain of national security.⁶⁴ It is then reasonable to assume that Congress borrowed language from section 232 because it viewed the effect of foreign direct investment on national security as similar to the effect of foreign imports. It is also reasonable to assume then that in adopting the language of section 232, Congress intended to apply the national security standard in a manner similar to its application in section 232.

3. *Purposes of the 1988 Trade Act*

Congress enacted the Omnibus Trade Act of 1988 to strengthen United States trade laws, improve the development and management of United States trade strategy, and, through these actions, improve global living standards.⁶⁵ The legislation also contains findings that outline problems related to productivity and competitiveness of American firms and industries, the international monetary system, and the condition of the domestic economy.⁶⁶ Under this Act "the highest priority of the United States government"⁶⁷ is the pursuit of policies "to prevent future declines in the U.S. economy and standard of living, [and] . . . to guarantee the continued vitality of the technological [and] industrial base[s] of the United States."⁶⁸ Because courts often interpret statutes in light of their overall purposes,⁶⁹ courts could interpret the Trade Act to support a broad economic definition of national security.

63. *Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 569 (1976). The Court also contrasted the "more limited authorization" of the national security standard with the "open-ended nature" of criteria based on "public policy, or interest served and other pertinent facts." *Id.* at 559-60 n.10.

While the national security standard of Exon-Florio appears narrower than the "national interest" standard, some may interpret the standard to apply to the potential for foreign competition to harm the long-term productive capacity of domestic defense industries because the language in the two statutes is analogous.

64. *Id.* at 562-63.

65. 19 U.S.C. § 2901 n.(b) (1988).

66. *See id.* § 2901 n.(a) (reprinting findings and purposes of trade, customs, and tariff laws).

67. *Id.*

68. *Id.*

69. *See Consumers Union of United States, Inc. v. Kissinger*, 506 F.2d 136, 141 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975) (finding the purpose of the Trade Expansion Act of 1962 to be stimulation of United States economic growth and expansion of foreign markets for United States products).

B. THE LEGISLATIVE HISTORY OF EXON-FLORIO

1. *Judicial Use of the Legislative History of the Exon-Florio Amendment*

Traditionally, courts have recognized foreign policy as an area of "executive discretion in which the judiciary is ill equipped to intervene."⁷⁰ Because the Exon-Florio Amendment involves matters of foreign affairs, the judiciary will be reluctant to exercise discretion and to attribute probative meaning to ambiguous or conflicting historical information. While the executive branch may use legislative history and secondary materials to craft policy under the Amendment, exercise of the executive's interpretive powers must satisfy basic principles of legislative intent.⁷¹ Where the legislative history fails to show that a particular statutory construction is contrary to the will of Congress, for purposes of judicial review, courts often view the expressed legislative intent as mere recommendations, and not as absolute directives to the president.⁷²

Further, Exon-Florio specifically exempts subsection 2170(d) from judicial review.⁷³ The House-Senate conference report advises that the limitation on judicial review applies *only* to subsection 2170(d).⁷⁴ It is possible, therefore, that all matters are reviewable, except for the existence and credibility of evidence of the anticipated national security threat and the question of whether there is judicial authority to take action under other law.⁷⁵

Courts are reluctant to exercise jurisdiction over matters of foreign policy because they lack judicial expertise, capacity, and constitutional

70. See Hayes, *The Boland Amendment and Foreign Affairs Deference*, 88 COLUM. L. REV. 1534, 1535 (1988) (describing this approach as foreign affairs deference). Foreign affairs deference alters the substantive mechanics of statutory interpretation by applying a highly deferential review of the application of law to facts, and the approach defers to the executive's interpretation of statutes absent a clear statement of contrary legislative intent. *Id.* at 1538-40. In foreign affairs, the courts are reluctant to curb activities of the political branches and have developed "special doctrines of deference to them." L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 81-84 (1972). Courts assume ambiguity in the statutory language is a purposeful delegation of interpretive power to the executive. *Id.*; see also *Zemel v. Rusk*, 381 U.S. 1, 17, *reh'g denied*, 382 U.S. 873 (1965) (holding that the executive's broad rulemaking powers are valid under the Passport Act of 1926 because of the executive's authority over matters of foreign affairs); *Haig v. Agee*, 453 U.S. 280, 292 (1981) (affirming the executive's rulemaking powers under the Passport Act of 1926).

71. Hayes, *supra* note 70, at 1538-40.

72. *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 233-34 (1986).

73. CONF. REP., *supra* note 27, at 925.

74. *Id.*

75. *Id.*

authority to handle these disputes.⁷⁶ It would be impossible for the judiciary to review a proposed merger's threat to national security without making judgments about national security requirements, as well as forecasts regarding future developments in foreign affairs. These determinations involve resolution of factual and policy issues that are traditionally considered outside of the judiciary's capacity because the judiciary lacks expertise, standards, and an adequate discovery process to resolve such matters.⁷⁷ Moreover, a court would have difficulty resolving national security standard disputes without expressing disrespect towards the authority of coordinate branches of government.⁷⁸ For these reasons, courts could rule that these issues are non-justiciable political questions and defer to the determinations of the executive.⁷⁹ Although many commentators heavily criticize the political question doctrine, "the doctrine continues to have a 'pervasive influence' on foreign affairs cases."⁸⁰

In line with the doctrines of political question and foreign affairs deference, the Administrative Procedure Act (APA) exempts all adjudicative determinations from its procedural rules to the extent that they involve "the conduct of military or foreign affairs functions."⁸¹ This exemption includes the requirement that adjudicative decisions contain a statement of findings, conclusions, and rationale, as well as provisions for appeal.⁸² Because the Exon-Florio Amendment is part of the Defense Production Act,⁸³ it would appear to be exempt under section 2159 of the APA.⁸⁴ Congress repealed and replaced that provision of the APA,⁸⁵ however, with an entirely new version in 1966.⁸⁶ A private litigant might then argue that the special exemption for the Defense

76. See *Chicago & S. Air Lines v. Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948) (holding that Civilian Aeronautics Board orders pertaining to presidential-approved certificates for overseas or foreign transportation are discretionary executive matters not subject to judicial review).

77. See *Baker v. Carr*, 369 U.S. 186, 217 (1962) (delineating when a political question is exempt from judicial review).

78. *Id.*

79. *Id.*

80. Hayes, *supra* note 70, at 1547-48 (citations omitted).

81. 5 U.S.C. § 554(a)(4) (1988).

82. *Id.* § 557(c). Despite a nexus to foreign affairs, under subsection 554(a)(4), the decisionmaker arguably has a duty to provide "a brief statement of grounds for denial" under subsection 555(e). *Nicholson v. Brown*, 599 F.2d 639, 648 n.9 (5th Cir.), *modified*, 605 F.2d 209 (1979).

83. 50 U.S.C. app. § 2061 (1988).

84. 50 U.S.C. § 2159 (1982). This section provides for continued operation of the APA's earlier section 3 version. The Freedom of Information Act now contains provisions similar to this section. 5 U.S.C. § 552 (1988).

85. Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. § 551 (1988)).

Production Act refers to provisions in the repealed APA, rather than the provision presently in force. Hence, litigants would argue that they enjoy procedural protection under the current APA. Some speculate that parties may attempt to block takeovers through application of APA mechanisms that would allow appeals from CFIUS decisions to impede urgent court rulings.⁸⁷ Even if courts hold that the APA applies, however, a private litigant can derive only minimal procedural protection.

The judiciary relies on legislative history when the terms in statutes are imprecise. When the legislative history is ambiguous, the courts pay less attention to historical information.⁸⁸ There are significant reasons, however, to consider any expression of congressional intent even when the legislative history is unclear. While professing to defer to the executive's interpretation of statutes involving foreign affairs, courts sometimes scrutinize legislative histories in order to "confirm" that the president's interpretation is reasonable.⁸⁹ Occasionally, courts refer to the legislative history when overturning executive actions "contrary to manifest Congressional intent"⁹⁰ that involve statutes concerning national security.⁹¹ Moreover, executive exploitation of minor statutory ambiguities to subvert the intent of legislation angers Congress. This then encourages Congress to engage in micromanagement of foreign policy and to promulgate far more specific statutory language than is actually necessary.⁹² Annual reauthorization of the Defense Production Act⁹³ provides Congress with an excellent opportunity to add more pre-

86. Pub. L. 89-554, 80 Stat. 632 (1966) (codified as amended at 5 U.S.C. §§ 551-559 (1988)).

87. *New Foreign Trade Law Said to Offer Weapon against Foreign Takeover Bids*, Daily Rep. Exec. (BNA) No. 215, at A-4 (Nov. 7, 1988).

88. SINGER, *supra* note 58, at § 48.02. Justice Jackson articulated this principle: When we decide from legislative history, including statements of witnesses at hearings, what Congress probably had in mind, we must put ourselves in the place of the majority of Congressmen, and act according to the impression we think history should have made on them That process seems to me to be not the interpretation of a statute, but the creation of a statute.

United States v. Public Utils. Comm'r, 345 U.S. 295, 319 (1953) (Jackson, J., concurring).

89. See *Japan Whaling Ass'n*, 478 U.S. at 234-40 (citing the Pelly Amendment's legislative history in holding that the certification standard does not unconditionally require the Secretary of Commerce to certify each departure from international conservation program limits); see also Hayes, *supra* note 70, at 1543 (referring to the decision in *Japan Whaling*).

90. *Independent Gasoline Marketers Council, Inc. v. Duncan*, 492 F. Supp. 614, 621 (D.D.C. 1980).

91. *Id.* at 620 n.10.

92. Hayes, *supra* note 70, at 1555.

93. 50 U.S.C. app. § 2166 (1988).

cise language to the Exon-Florio provision. Thus, if the executive branch adopts an interpretation clearly inconsistent with congressional intent, Congress can narrow the scope of executive discretion each time it reauthorizes the provision.

The legislative history of the Exon-Florio Amendment provides little insight into the meaning of the term "national security." However, an examination of the circumstances leading up to the introduction of the Amendment, the actions taken and statements made during the legislative debate, and the post-enactment history provide some evidence of legislative intent.⁹⁴

2. Legislative History

a. Conference Committee Materials

The report of the conference committee that resolved differences between the House and Senate versions of the Amendment is the most persuasive source of background information on Exon-Florio.⁹⁵ For the purpose of statutory construction, courts afford floor statements of conference committee members that explain committee actions the same weight as conference committee reports.⁹⁶ These sources provide some support for the contention that Congress intended to limit the breadth of the executive's discretion to decide what constitutes a threat to national security.

In the original House of Representatives version, section 2170 authorized the president to consider not only threats to national security, but also the effects of a foreign takeover on "essential commerce and economic welfare" in deciding whether to exercise powers of suspension and prohibition.⁹⁷ This version also contained a detailed list of additional factors for presidential consideration that closely paralleled the language of subsection 232(c) of the Trade Expansion Act.⁹⁸ The crite-

94. SINGER, *supra* note 58, at § 48.01.

95. See SINGER, *supra* note 58, at § 48.06-.08. In attempting to construe an ambiguous term such as "national security," usually the courts turn first to the history of the Act's passage. *Id.* § 48.04. This provides a rough method by which to determine the relative probative weight of various sources of information in the legislative history that courts can apply to interpret the national security provision in Exon-Florio.

96. *Id.* § 48.14.

97. CONF. REP., *supra* note 27, at 924-25.

98. See *Text of Amendment to HR 3, Omnibus Trade Bill, as Approved March 18, 1987 by House Energy and Commerce Subcommittee on Commerce, Consumer Protection and Competitiveness, and Staff Memorandum Explaining Amendment*, Daily Rep. Exec. (BNA) No. 52, at M-1 (Mar. 19, 1987) (setting forth the House version of Exon-Florio, which virtually tracked subsection 232(c) of the Trade Act except that "national security and essential commerce" was substituted for "national se-

ria for review in the Senate provision were "national security or essential commerce which relates to national security."⁹⁹

The conference agreement later removed all references to "essential commerce" and "economic welfare" and narrowed the list of factors that the president could consider to the more limited language of subsection 2170(e).¹⁰⁰ Further, the report states that the conferees "in no way intend[ed] to impose barriers to foreign investment,"¹⁰¹ nor did they plan to effect "transactions which are outside the realm of national security."¹⁰² These modifications indicate that Congress interpreted the words national security to exclude some of the policy areas that the terms essential commerce and economic welfare encompass. This supports the inference that Congress intends Exon-Florio to apply to cases that primarily involve national defense rather than economic concerns. A reasonable interpretation of section 2170 would give effect to these changes in the statutory language.

Beyond the inferences drawn from modifications Congress made to statutory language, nothing indicates what constraints Congress intended to impose on defining the concept of national security. In fact, the conference report places primary emphasis on removal of limitations on the national security concept. The report notes that Congress intended to construe the term national security broadly "without limitation to particular industries."¹⁰³ The statute authorizes the president to take action "in any industry . . . provided that the facts and circumstances warrant the Presidential findings required under this provision."¹⁰⁴ The statute explains that the factors listed in subsection 2170(e) guide the president's national security determinations, but are not intended to be exclusive, and that the president may expand these factors either through regulations or on a case by case basis.¹⁰⁵ The statute further notes that the term "national defense," as used in subsection 2170(e), has been "correctly interpreted in the past to include

curity" and "control of industries by foreign citizens" was substituted for "foreign competition" and "excessive imports").

99. CONF. REP., *supra* note 27, at 925.

100. See 50 U.S.C. app. § 2170(e) (1988) (outlining factors for the president to consider). These factors are: (1) domestic production needed for national defense, (2) capability and capacity of domestic industries to meet national defense needs, and (3) foreign citizens' control of domestic industries needed to meet national security requirements. *Id.*

101. CONF. REP., *supra* note 27, at 926.

102. *Id.*

103. *Id.* at 906.

104. *Id.*

105. *Id.* at 927.

the provision of a broad range of goods and services, as well as technological innovations and economic stabilization efforts."¹⁰⁶

Senator Exon and Congressman Florio, the chief sponsors of the measure, echoed and expanded the conference report's application of a broad definition to the concept of national security.¹⁰⁷ Furthermore, both sponsors asserted that the Fujitsu case, involving the semiconductor industry, is exactly the type of policy problem that the provision should address.¹⁰⁸ Both Congressmen indicated that the concept of national security extends beyond defense industries.¹⁰⁹ National security, for example, would extend to new and emerging technologies, biomedical and health-related innovations, and other goods or services where the loss of domestic control could threaten national security.¹¹⁰ National security also could include the maintenance of sufficient plant equipment, technology, research and development, new and manufactured materials, stockpiles and weapons to protect the nation's health, safety, welfare, and defense.¹¹¹

b. Committee Hearing Sources

The Exon-Florio hearings clarify Congress' intent to give the president authority to act when controversies similar to the Fujitsu-Fairchild merger arise.¹¹² According to Congressman Florio, part of the impetus for the legislation related to the type of concern Secretary of Commerce Malcolm Baldrige expressed to members of the Senate committee.¹¹³ Florio stated:

[W]hen this whole Fujitsu situation evolved . . . there was a deficiency of authority in the Government to take the appropriate controls if it was determined that this was a problem for national security Conceivably you could talk about a takeover that was not involving itself [sic] with a monopolistic situation or even a restraint on trade. Nevertheless, it would still constitute a potential detriment to our critical commerce areas that might be related to national security.¹¹⁴

106. *Id.* at 926-27.

107. Exon Statement, *supra* note 3, at S4833; see Florio Statement, *supra* note 13, at H2320 (affirming the conference report's broad approach to national security in floor statements).

108. Exon Statement, *supra* note 3, at S4833; Florio Statement, *supra* note 13, at H2320.

109. Exon Statement, *supra* note 3, at S4833; Florio Statement, *supra* note 13, at H2320.

110. Florio Statement, *supra* note 13, at H2320.

111. *Id.*

112. *Foreign Takeovers Hearing*, *supra* note 21, at 25-27 (statement of Rep. Florio).

113. *Id.* at 27.

114. *Id.*

Florio indicated that members in Congress believed there was a void in the arsenal of protective devices for these situations.¹¹⁵ When testifying for the bill before the House Committee on Rules, Baldridge suggested that the administration may have lacked the ability to follow through on an effort to block the Fujitsu-Fairchild merger.¹¹⁶ Florio asserted that Exon-Florio would give the president the authority to act under circumstances like the Fujitsu-Fairchild merger.¹¹⁷ Many in Congress and the administration were shocked to discover that the president had so little authority under existing law to respond if foreign takeovers threaten national security.¹¹⁸

Despite this call for broader economic protections, there is support in the congressional hearings for the notion that Congress envisioned limitations on the concept of "national security." Congressman Florio noted in committee hearings that they did not construct the original version of the measure to be a "protectionist initiative . . . designed to keep out investments."¹¹⁹ Senator Exon emphasized that the national security standard "was much more tightly drawn"¹²⁰ than the national interest standard that previously guided CFIUS deliberations. Nevertheless, witnesses widely criticized the essential commerce and economic welfare standards in these earlier versions as vague and ill-defined.¹²¹ The discretion these standards gave the president caused concern that American companies might use the provision to influence the executive branch to block or otherwise delay legitimate transactions for reasons completely unrelated to national security.¹²² Allowing this use would endanger the stability and predictability of the domestic investment climate and future economic growth.¹²³

115. *Id.*

116. *Id.*

117. Florio Statement, *supra* note 13, at H2320.

118. *Id.*

119. *Foreign Takeovers Hearing, supra* note 21, at 28 (statement of Rep. Florio).

120. *Acquisitions Hearing, supra* note 21, at 11 (statement of Sen. Exon).

121. *Foreign Takeovers Hearing, supra* note 21, at 71 (statement of Richard B. Leather).

122. *Id.* at 78 (statement of Robert L. McNeil).

123. See *id.* at 24, 71, 75, 78 (criticizing the factors listed for presidential consideration in the House bill that would require foreign investors to discuss the effects of investments on the industry's economic welfare, the number of jobs created or saved, the amount of tax revenues the investment would generate, or the loss of job skills). Commentators viewed this system as a roll-back to the principle of national treatment for foreign investors and as an example of the type of governmental intervention against which the United States has protested internationally. *Id.* at 18. "Legislation designed to protect U.S. national security interests," in the words of one witness, "is not an appropriate vehicle for competitors and targets of hostile takeovers to thwart their competition." *Id.* at 78; see also *Acquisitions Hearing, supra* note 21, at 62 (statement of Robert L. McNeill, Emergency Committee for American Trade) (ad-

Nevertheless, there is an absence of criticism in the hearing reports of the president's authority under the measure to act when national security is at stake. This indicates that during congressional debates, the term national security had taken on a distinguishable and more limited meaning than "essential commerce and economic welfare."¹²⁴ The elimination of the essential commerce and economic welfare provisions, language that many hearing witnesses opposed, may indicate that Congress intended to give effect to these witnesses' concerns.¹²⁵

During the deliberations, Senator Exon stated that he offered the Amendment to address "primarily military"¹²⁶ interests. While Congress did not assume that national security was an all-encompassing concept, it is clear that legislators generally understood the term to include far more than national defense. Reagan administration witnesses who testified during the debates explicitly rejected an exclusively militaristic definition of national security and explained that CFIUS also considers national security to include "the economic health and well being of the American economy."¹²⁷ For example, administration witnesses suggested that a merger that could lead to the formation of a precious metals cartel would be a proper subject for CFIUS review, even though the Department of Justice would probably analyze the anti-competitive effects of this merger under the Hart-Scott-Rodino Act.¹²⁸ In fact, the only source that appears to define national security exclusively in terms of national defense is a July 1987 constituent newsletter that Senator Exon prepared that refers to an early version of the measure.¹²⁹ These off-the-record statements, however, do not have any value in formal statutory interpretation.¹³⁰

Aside from non-record statements, there are indications that the legislation originally addressed technology transfer and defense industrial base issues.¹³¹ By the time Congress issued the conference committee

dressing the fact that the president must declare a national emergency under IEEPA, declarations that presidents are reluctant to make "because of the castigation that might be involved toward other countries").

124. *Foreign Takeovers Hearing*, *supra* note 21.

125. Proposed Treasury Regulations, *supra* note 27, at 29,746.

126. *Acquisitions Hearing*, *supra* note 21, at 12.

127. *Foreign Takeovers Hearing*, *supra* note 21, at 27 (statement of J. Michael Farren, Deputy Under Secretary for International Trade, Department of Commerce).

128. *Id.* at 32.

129. See Exon, *Foreign Takeovers May Jeopardize National Security*, Exon Diary, July 13, 1987 (on file with *The American University Journal of International Law and Policy*) (proposing to limit application of the Amendment to takeovers affecting national security).

130. SINGER, *supra* note 58, at § 48.12.

131. See Florio, *Florio Named Conferee on Nation's Trade Bill by House Speaker Jim Wright*, News Release, Aug. 7, 1987, at 2 (reporting that Congressman Florio

report, however, statements about the purposes of the provision did not emphasize the national security implications of technology transfers.¹³² This shift in emphasis resulted from assurances of "administration officials" that export control laws and other legislation would be sufficient to handle any technology transfer problems that might arise.¹³³ These assurances apparently led to the exclusion of provisions that covered licenses for use of patented technologies and joint ventures from the final version of the provision.¹³⁴ There is no reference, however, to any decision to exclude technology transfer issues from the reach of the provision in the public record. As a result, the president might still use the Exon-Florio Amendment to address technology transfer concerns that other legislation does not cover.

C. THE "CREDIBLE EVIDENCE" REQUIREMENT

Some commentators assert that the Exon-Florio "credible evidence" requirement, which must lead "the president to believe that a foreign interest exercising control might take action that threatens to impair the national security,"¹³⁵ creates a substantial hurdle to the exercise of executive discretion under the national security standard.¹³⁶ For instance, some have interpreted this to require evidence that directly implicates the foreigner involved in the transaction or that otherwise meets an objective standard for substantial materiality or persuasiveness.¹³⁷ There is nothing in the statute or the legislative history, however, to indicate that the credible evidence requirement activates any formal evidentiary standards.¹³⁸

believes the problems encountered with Toshiba's sale of national defense technology to the Soviet Union will recur if the country does not take steps to defend against foreign takeovers that threaten national security).

132. See Exon Statement, *supra* note 3, at S4833 (stating that "certain industries and technologies . . . must remain under foreign control . . . if the United States is to maintain its national security"). It is difficult, however, to read into this remark any specific intent with respect to technology transfer issues.

133. Telephone interview with Christopher McLean, legislative assistant to Sen. Exon (Feb. 20, 1989); see also *Acquisitions Hearing*, *supra* note 20, at 5 (statement of Malcolm Baldrige, Secretary of Commerce) (asserting that the Export Administration Act would prevent technology transfer problems).

134. Telephone interview with Christopher McLean, *supra* note 133; see *Acquisition Hearings*, *supra* note 20, at 6-7 (statement of Sen. Danforth) (asserting that a "chilling effect on international capital flows" would occur).

135. 50 U.S.C. app. § 2170(d)(1).

136. See Nance & Wasserman, *supra* note 31, at 972-73 (stating that the "credible evidence" requirement demands that the president "make a sophisticated calculation of both the actions of a specific person . . . and the effects of those actions upon the national security of the States").

137. *Id.*

138. 50 U.S.C. app. § 2170(d) (1988).

One problem with requiring evidence is that predictions about parties' future actions in international business and politics are speculative. Reliable intelligence about hostile or potentially harmful intentions of the foreigners initiating direct investment would be difficult to obtain. In the Fujitsu-Fairchild case, for example, there was no evidence of any plan to restrict or discontinue production of critical semiconductor components used for national defense purposes.¹³⁹ The merger raised considerable national security concerns in Congress, however, because Congress believed that the motivation to restrict production could exist and that the Fairchild acquisition would create opportunities for anti-competitive behavior.¹⁴⁰ It would be unreasonable to interpret the "credible evidence" requirement in a way that prevents presidential action in the type of case that motivated Congress to pass the Exon-Florio provision.

The statutory requirement itself links the president's beliefs with evidence and does not create a preponderance of the evidence standard.¹⁴¹ Use of the phrase "might take action"¹⁴² combined with an explicit exemption of this subsection from judicial review¹⁴³ indicates that Congress intended to delegate broad discretion to the president to decide what information is significant. Thus, requiring the president to demonstrate more than conjecture about a potential national security threat probably would constitute an unreasonable invasion of executive discretion. The president then can satisfy the "credible evidence" requirement as long as it is reasonable to infer from the facts that a national security risk exists.

D. SCOPE OF DISCRETION UNDER THE STANDARD

According to statutory analysis, the national security standard takes into account direct threats to the military industrial base and defense preparedness.¹⁴⁴ Hence, the long term effects of foreign competition on the availability of inputs for defense production, on the health of defense industries, and even on the overall state of the economy of the United States, may be within the realm of national security. Similar

139. See Hansan, *supra* note 14, at 670-74 (detailing the history of the Fujitsu-Fairchild case).

140. See Alvarez, *supra* note 21, at 56 (discussing congressional focus on the Fujitsu merger attempt).

141. See 50 U.S.C. app. § 2170(d)(2) (1988) (emphasizing that the International Emergency Economic Powers Act gives the president adequate and appropriate authority to protect national security).

142. *Id.*

143. *Id.* § 2170(d).

144. *Id.* § 2170(d)(1).

language in section 232 of the Trade Expansion Act, however, suggests that "national security" is more limited in scope than the "national interest" standard.¹⁴⁵ The further removed a policy concern is from defense industrial base issues, the more it appears to belong in the broader "national interest" domain. Nevertheless, linkage in the statute between broad economic concerns and the health of the defense industrial base make this distinction difficult to infer. It is necessary, therefore, to look at sources outside of the statutory language to understand the national security standard.

The legislative history suggests that Congress intended to place limitations on the president's discretion to define national security threats.¹⁴⁶ For example, as stated previously, Congress excluded some policy areas involving essential commerce and economic welfare from the national security definition.¹⁴⁷ This could support an argument, therefore, that Congress intended Exon-Florio to apply to cases primarily involving national defense rather than to cases of economic concerns. Nevertheless, the main thrust of the legislative history is to construe the term national security broadly to include more than national defense.¹⁴⁸ The imposition of the "credible evidence" requirement does nothing to alter the breadth of presidential discretion. Congress' alteration or exclusion of broader language in finalizing the law most likely would not be sufficient to overturn a presidential decision to block a takeover for non-military reasons provided that there is some nexus between the president's objective and national security.¹⁴⁹ When other legislation does not cover economic and technology transfer concerns, the president may use Exon-Florio where there is a reasonable nexus to national security.¹⁵⁰ If the nexus is lacking, there may be a constitutional challenge to the president's power to block the takeover.¹⁵¹ Given the variety of definitions of national security, however, it is difficult to imagine a situation where the president could not find a nexus.

145. 19 U.S.C. § 1862 (1988).

146. Alvarez, *supra* note 21, at 77.

147. *Id.* at 76-77, 102.

148. *Id.* at 71-72.

149. *Federal Energy Admin.*, 426 U.S. at 569.

150. 50 U.S.C. app. § 2170(d) (1988).

151. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (finding the president not constitutionally authorized to seize and operate a steel mill in the name of national security).

II. ADEQUACY OF OTHER PROVISIONS OF LAW

In order to exercise power under subsection 2170(d)(2), the president must certify that provisions of law other than the International Emergency Economic Powers Act (IEEPA)¹⁵² and Exon-Florio do not "in the President's judgment provide adequate and appropriate authority for the President to protect the national security. . . ."¹⁵³ While IEEPA gives the president broad discretion to regulate and block foreigners' acquisitions of United States firms,¹⁵⁴ the president may hesitate to declare a national emergency, as required in IEEPA proceedings,¹⁵⁵ even if the merger implicates national security issues. Exon-Florio serves as an intermediate measure to handle less "unusual and extraordinary"¹⁵⁶ threats than IEEPA contemplates.¹⁵⁷

No other laws of the United States besides Exon-Florio contain provisions for restricting foreign direct investment that could damage the economy. United States law does provide remedies, however, for transactions that result in unreasonable concentrations of market power.¹⁵⁸ There are specific statutory and regulatory provisions designed to protect traditional national security interests such as United States defense industry preparedness and the security of key technologies.¹⁵⁹ Sectoral controls and laws prohibiting "trading with the enemy" also prevent foreign direct investment which could threaten national security interests.¹⁶⁰ Provisions covering export controls, protection of classified information, and defense industries, do not prohibit foreign direct investment, but instead prohibit foreign investors' actions that might impair national security.¹⁶¹ Together, these provisions give the executive powerful authority to address security concerns without resorting to Exon-Florio.

152. See 50 U.S.C. § 1701 (1988) (noting the permissible exercise of presidential authority to protect national security).

153. 50 U.S.C. app. § 2170(d)(2) (1988).

154. *Id.* § 1702(a)(1)(B); see also *Acquisitions Hearing*, *supra* note 21, at 34 (statement of Sen. Breaux) (stating that the government has used the IEEPA to prevent United States investment abroad, but it has never employed IEEPA to prevent foreign investment in the United States).

155. 50 U.S.C. § 1701(a) (1988).

156. *Id.*

157. 50 U.S.C. app. § 2170(d)(2) (1988).

158. See 15 U.S.C. §§ 1, 2, 18, 45 (1988) (addressing unreasonable restraints of trade).

159. See *Trading with the Enemy Act*, 50 U.S.C. app. §§ 1-44 (1988) (dealing with the protection of national security interests).

160. *Id.*

161. *Id.*

A. ANTITRUST PROVISIONS

The antitrust provision used most frequently to regulate mergers, acquisitions, and takeovers is section 7 of the Clayton Act.¹⁶² Section 7 prohibits acquisition of stock or assets where "the effect of such acquisition may be [to] substantially lessen competition. . . ."¹⁶³ The government has applied it to a variety of business arrangements such as tender offers, joint ventures, and a number of asset acquisitions including patents, patent licensing agreements, trademarks, and distribution rights.¹⁶⁴ The government also may challenge a merger under sections 1 or 2 of the Sherman Act,¹⁶⁵ as either a restraint of trade or a monopoly or may initiate a challenge against a merger under section 5 of the Federal Trade Commission Act as an unfair method of competition.¹⁶⁶ The legal standard for analyzing mergers under each of these statutes is identical.¹⁶⁷

Courts analyze major antitrust cases involving foreign acquisition of United States "persons" in the same way they analyze mergers between two domestic firms.¹⁶⁸ In situations where foreign firms with large market power join forces with concentrated American industry, the Federal Trade Commission (FTC) or the Department of Justice may intervene to prevent the new entity's market dominance.¹⁶⁹ In recent years, however, the government has relaxed enforcement of the antitrust laws, particularly with respect to "vertical" and "conglomerate" mergers.¹⁷⁰

Some commentators suggest that the president might use Exon-Florio in situations in which there is fear of foreign market concentration in the United States but when the government deems implementation of the Clayton Act inappropriate under the relaxed antitrust standards that now prevail.¹⁷¹ An executive policy decision not to exercise

162. HILLS, *supra* note 27, at § 3.03.

163. 15 U.S.C. § 18 (1988).

164. HILLS, *supra* note 27, at § 3.02.

165. 15 U.S.C. §§ 1-2 (1988).

166. 15 U.S.C. § 45 (1988).

167. HILLS, *supra* note 27, at § 3.03.

168. See FUGATE, FOREIGN COMMERCE AND THE ANTI-TRUST LAWS §§ 10.14, 10.17 (3d ed. 1982) (demonstrating similarities among cases of mergers between international firms and mergers among domestic companies).

169. *Id.* § 10.17 (quoting an address by R. McLaren entitled "Competition and Foreign Commerce of the United States," at the College of William and Mary in Williamsburg, Va., Oct. 16, 1970).

170. HILLS, *supra* note 27, at § 3.01.

171. See *Acquisitions Hearing*, *supra* note 21, at 30-31 (statement of Joe Parkinson, Chairman and Chief Executive Officer, Micron Technology, Inc.) (emphasizing the need to prevent foreign takeovers of United States corporations).

its enforcement power under the Clayton Act, however, does not alter the requirements for presidential certification under subsection 2170(d)(2).¹⁷² Any concentration of market power resulting from a foreign acquisition that could "threaten to impair the national security"¹⁷³ would also substantially lessen competition under the terms of the Clayton Act. Even though the government may not invoke the Clayton Act, that Act still provides the president with "adequate and appropriate authority"¹⁷⁴ to prevent threats to the national security from concentrated market power. Thus, the use of Exon-Florio for antitrust purposes probably would violate subsection 2170(d)(2) certification requirements.¹⁷⁵

B. EXPORT RESTRICTIONS

The Export Administration Act¹⁷⁶ and the Arms Export Control Act¹⁷⁷ require validated licenses to export certain categories of technological information, equipment, arms and munitions abroad. Depending on the sensitivity of the information involved, these restrictions may apply to allies of the United States, as well as to proscribed destinations such as the Soviet Union.¹⁷⁸

An "export" may occur not only when there is a physical transfer of technical data over national frontiers, but also at any time there is a transfer of technical data, equipment, or materials to a foreign national with the intent to export.¹⁷⁹ Companies must have licenses in order to transfer controlled technology to a foreign parent.¹⁸⁰ During the acquisition process, therefore, the statutes may require a company to sequester its technical operations from the foreign parent.

These export restrictions, together with the sectoral controls outlined below, are sufficient to inhibit the most damaging transfers of technol-

172. 50 U.S.C. app. § 2170(d)(2) (1988).

173. 15 U.S.C. § 18 (1988).

174. 50 U.S.C. app. § 2170(d)(2) (1988).

175. *Id.* §§ 2158-70. Some scholars (suggest that use of Exon-Florio in this manner would cause OECD member states and other foreign countries to accuse the United States of maintaining a double standard in antitrust law to prevent foreign investment.).

176. 50 U.S.C. app. §§ 2401-13 (1988).

177. 22 U.S.C. § 2778 (1988). The government enforces this Act pursuant to the International Traffic In Arms Regulations. 22 C.F.R. §§ 120.1-.25 (1989).

178. *Id.*

179. *Id.*

180. 50 U.S.C. app. § 2404(e) (1988).

ogy and materials.¹⁸¹ The mere existence of a legal prohibition, however, may be insufficient to prevent acquisitions designed to facilitate diversions of technologies critical to the military. Foreigners' efforts to gain technological intelligence include the establishment of "front" companies in non-communist countries that divert high technology goods to proscribed destinations.¹⁸² Exon-Florio may provide a useful tool to prevent the use of acquired companies by foreign governments for intelligence purposes, and a means for the United States to gather information about foreign intelligence operations.

C. DEFENSE INDUSTRIAL SECURITY PROGRAM

Under the Department of Defense Industrial Security Program (DISP), the government may impose restrictions on defense contractors subject to foreign ownership, control, or influence who are performing classified contracts.¹⁸³ These limitations are set forth in Department of Defense regulations enacted pursuant to the National Security Act of 1947.¹⁸⁴ If the government determines that foreign interests own five percent or more of a firm's securities, hold significant positions within the firm, have agreements, understandings, arrangements, or debts with the firm, provide income to the firm,¹⁸⁵ or have access to classified information, the government may deny a contractor's facility clearance.¹⁸⁶ This clearance is a prerequisite to the contractor's gaining access to classified information and, therefore, to its ability to perform classified contracts.

The government may allow clearance requirement exceptions if the firm wishing to perform classified contracts meets certain criteria. The DISP may require restructuring so that units performing sensitive work

181. See *Acquisitions Hearing*, *supra* note 21, at 5 (statement of Malcolm Baldrige, Secretary of Commerce) (stating that the Export Administration Act sectoral controls are firmly in place).

182. *Transfer of Technology: Hearings Before the Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 98th Cong., 2d Sess. 277 (1984) (prepared statement of Richard N. Perle, Assistant Secretary for International Security Policy, Department of Defense).

183. 32 C.F.R. § 2-201(a) (1988). The Code defines a "classified contract" as "any contract that requires or will require access to classified information by the contractor or his employees in the performance of a contract." *Id.* § 1-201.34.

184. 50 U.S.C. § 401 (1988).

185. See Department of Defense Industrial Security Regulations, 32 C.F.R. § 2-202 (1988) (noting that any income from a communist country is sufficient to activate this clause but that a company must derive more than 10% of gross income from a non-communist foreign source to bring it under the restrictions).

186. *Id.*

are kept separate through a voting trust agreement.¹⁸⁷ Such agreements transfer legal stock title and all management prerogatives to an American board of directors in an irrevocable conveyance of foreign stock owners' voting rights to the American proxy holders.¹⁸⁸ The government also may grant exceptions where foreign owners holding less than fifteen percent of the voting stock agree not to interfere with policies and practices related to performance of classified contracts, and as a condition of continued work, do not contest denial of access to classified information.¹⁸⁹

The DISP is one of the most powerful tools available to the executive branch for blocking mergers.¹⁹⁰ On several occasions, when firms engaged in defense contracting became targets of takeover attempts, the Department of Defense has invoked the DISP to classify sensitive technologies, or require production of important military products to take place in the United States.¹⁹¹ In some cases this caused foreign firms to withdraw buyout offers. In other cases the DISP required new owners to continue production of important military goods in domestic facilities, and to reassign classified work to entities within the United States which were not subject to foreign control.¹⁹² The DISP will provide "adequate and appropriate" authority to deal with most mergers raising technology transfer concerns, making the use of Exon-Florio inappropriate in such cases.¹⁹³

187. See Hansan, *supra* note 14, at 667 (discussing the DISP voting trust agreement procedure, which insulated United States facilities from foreign influence).

188. *Id.*; Pavelic & Lopatkiewicz, *Federal Restrictions on Participation by Foreign Investors in Defense and Other Government Contracts*, in DISTRICT OF COLUMBIA BAR MANUAL: FOREIGN INVESTMENT IN THE UNITED STATES: LEGAL ISSUES AND TECHNIQUES 295-96 (2d ed. 1978).

189. See *Foreign Takeovers Hearing*, *supra* note 20, at 17 (statement of J. Michael Farren, Deputy Under Secretary for International Trade, Department of Commerce) (explaining the security controls available under current DISP provisions). These requirements are modified under Industrial Security Agreements with the United Kingdom and Canada. 32 C.F.R. §§ 2-117(c), 2-201(c)(2) (1988).

190. *Acquisitions Hearing*, *supra* note 21, at 18 (statement of Malcolm Baldrige, Secretary of Commerce). See Pavelic & Lopatkiewicz, *supra* note 188, at 278 (providing a detailed discussion of Defense Industrial Security Regulations).

191. *Foreign Takeovers Hearing*, *supra* note 21, at 21-22.

192. See *id.* (statement of David C. Mumford, Assistant Secretary for International Affairs, Department of the Treasury) (cataloguing various CFIUS cases that have resulted in modification or termination of various investment proposals).

193. See 50 U.S.C. app. § 2170(d)(2) (requiring the president to find that other laws are not "adequate and appropriate" before implementing Exon-Florio).

D. DEFENSE PRODUCTION ACT

Titles I and III of the Defense Production Act authorize the president to require firms essential to the defense industrial base to accept and perform contracts.¹⁹⁴ It is possible that, as a condition to granting the contract, the president could require the firm to reject a merger, acquisition, or takeover that would result in foreign control. Moreover, if necessary for national defense, the Act allows the president to override foreign owners' decisions to ensure that production goals meet the needs of national security.¹⁹⁵ The Exon-Florio conference report states that the provision should not diminish the extraordinary existing power of the president to intervene in matters of defense production.¹⁹⁶

E. TRADING WITH THE ENEMY ACT

The Trading with the Enemy Act¹⁹⁷ makes it illegal for anyone in the United States to engage in any form of trade with an "enemy"¹⁹⁸ or an "ally of [an] enemy"¹⁹⁹ of the United States during wartime without a license from the president.²⁰⁰ This bars any enemy or enemy ally from exercising control in or gaining financial benefit from any previous holdings in domestic corporations, or from making investments in the United States without presidential approval.²⁰¹ The statutory definition for the terms "enemy" and "ally of enemy" includes "any individual, corporation, or other body resident in, or doing business with residents of a nation with which the United States is at war, or anybody, regardless of nationality, whom the president declares to be within the term 'ally of enemy'"²⁰²

The Trading with the Enemy Act was the primary legislation through which the president exercised emergency economic powers before promulgation of the IEEPA.²⁰³ Congress amended the Trading with the Enemy Act in 1977 so that the president could make use of its provisions only during time of war, not simply through a declaration of

194. 50 U.S.C. app. §§ 2071, 2091 (1988).

195. *Id.*

196. CONF. REP., *supra* note 27, at 926.

197. 50 U.S.C. app. § 1 (1988).

198. *Id.* § 3(a).

199. *Id.*

200. *Id.*

201. *See id.* §§ 2-5 (describing the impetus behind the Trading with the Enemy Act and its provisions).

202. *Id.* § 2.

203. *Id.* § 1.

national emergency.²⁰⁴ The law as amended, however, allows the president to continue trade sanctions and restrictions against countries that were effective in 1977.²⁰⁵ Under the residual authority of the Trading with the Enemy Act, prohibitions on stock transfers and other transactions necessary for foreign investment still exist against North Korea, Cambodia, Vietnam, and Cuba.²⁰⁶

The United States has not declared war officially since World War II. Consequently, the president has been unable to restrict foreign investment through use of the Trading with the Enemy Act. Should the United States go to war or persons from the small group of countries listed above try to acquire domestic companies, the government should respond to hostile investments through the Trading with the Enemy Act instead of Exon-Florio.²⁰⁷

F. SECTORAL CONTROLS

The United States Code contains several statutory provisions that restrict, limit, or regulate foreign investment in industrial sectors associated with national security. Each has a unique history, and they are scattered throughout the Code. This section identifies sectoral controls related to enterprises that raise the most important security concerns, but does not detail all Code provisions that may affect transactions.²⁰⁸

A number of sectoral control provisions involve communications. For instance, the Communications Act of 1937 provides that corporations may not hold licenses for the operation of radio stations that aliens directly or indirectly control and sets capital stock percentage limits on alien ownership and voting power.²⁰⁹ The statute authorizing the privatization of Communications Satellite Corporation (COMSAT) forbids foreign ownership of more than twenty percent of COMSAT's voting

204. Pub. L. No. 95-223, 91 Stat. 1625 (1977) (codified as amended at 50 U.S.C. app. § 5(b)(1) (1988)).

205. *Id.* at 1625.

206. 31 C.F.R. §§ 500, 515 (1989).

207. 50 U.S.C. §§ 2158-70 (1988).

208. See Grimes & Williams, *Limitations Imposed by the Constitution and Treaties of the United States on the Treatment of Foreign Direct Investment*, in DISTRICT OF COLUMBIA BAR MANUAL: FOREIGN INVESTMENT IN THE UNITED STATES: LEGAL ISSUES AND TECHNIQUES 20 (2d ed. 1979) (discussing existing sectoral controls).

209. 47 U.S.C. §§ 310(a)-(b) (1988).

stock.²¹⁰ The law also prohibits foreign ownership or control of companies with telegraph or cable lines in Alaska.²¹¹

Other sectoral controls address national security concerns involving space assets and nuclear materials. The government may revoke licenses to operate private land remote-sensing-space systems²¹² for failure to meet any "terms, conditions or restrictions"²¹³ that the Secretary of Commerce imposes, or for failure to comply with "any national security concerns."²¹⁴ In addition, the government may suspend or revoke licenses granted to corporations for commercial space launch operations if necessary to protect "any national security interest or foreign policy interest of the United States."²¹⁵ Further, the Nuclear Regulatory Commission may not issue licenses for nuclear power production or the handling of nuclear materials to any corporation "if the Commission knows or has reason to believe it is owned, controlled or dominated by an alien, a foreign corporation or foreign government."²¹⁶ These statutes would address expeditiously national security threats from foreign investment involving atomic science or space activities. In addition, sectoral controls regulate foreign ownership of significant interests in industries that historically have raised important industrial base issues. The Shipping Act of 1916,²¹⁷ prohibits, in times of war and national emergency, the transfer of a controlling interest in an American corporation that owns ships, shipyards, drydocks, ship-building, or ship-repairing facilities to anyone who is not a citizen of the United States.²¹⁸

210. *Id.* § 734(d). This statute applies a 20% limitation on investment to persons described in section 310(a). *Id.* Pub. L. No. 93-505, § 2, 88 Stat. 1576 (1974) amended the Communications Act of 1934 subsection 310(a) (codified as amended at 47 U.S.C. § 310(a)). The amendment substituted language defining persons affected as foreign governments and their representatives for language that also included aliens, their representatives, and foreign-controlled corporations. *Id.* Title 47 of the United States Code, subsection 310(b) now includes this language. There is nothing in the record to indicate that Congress intended this amendment to affect the COMSAT investment restrictions. Indeed, the reshuffling of these categories appears to be a congressional error. There is no case law prescribing the proper application of these restrictions. While this error exists, it remains unclear whether the COMSAT investment restrictions apply to non-governmental foreign persons.

211. 47 U.S.C. § 17 (1988); *see* 40 U.S.C. §§ 781-82 (1988) (outlining transfer provisions and national defense considerations for government-owned long-lined communications within and to Alaska).

212. 15 U.S.C. § 4243(a)(1) (1988).

213. *Id.*

214. *Id.*

215. 49 U.S.C. app. § 2609(a) (1988).

216. 42 U.S.C. § 2133(d) (1988).

217. 46 U.S.C. app. § 801 (1988).

218. *See* 42 U.S.C. app. § 802 (1988) (requiring that a corporation, partnership, or association own a controlling interest in the company to be a citizen of the United States).

unless the Secretary of Transportation approves the transfer.²¹⁹ Also, the aeronautics industry excludes foreign controlled corporations from military aircraft, aircraft parts and accessory design competitions, and places foreign controlled corporations at a substantial competitive disadvantage.²²⁰

Other sectoral controls directed at economic and policy goals beyond the military context could apply to national security issues. For example, there are specific statutory restrictions on foreign acquisitions of air carriers that focus more on safety and competition concerns than on national security issues.²²¹ They could apply, however, to security issues such as military airlifts, smuggling, or terrorism. In addition, countries that do not allow United States citizens to hold public land leases for exploitation of mineral resources may not benefit from stock holdings or control of leases that permit mining of United States lands.²²² Enforcement of this provision could increase if there is a shortage in defense-related minerals.

Historically, the government of the United States has chosen to protect national security interests through specific sectoral controls rather than through broad sweeping statutes such as Exon-Florio.²²³ The international business community derives certainty from a regulatory scheme that reflects an effort to define which industrial sectors are particularly sensitive and that designs procedural mechanisms for foreign investment in these industries.²²⁴ Presently, key trading partners of the United States rely on similar sectoral controls in their own bodies of law to ensure that investment in their countries remains consistent with their own national security interests.²²⁵ Reservations in existing inter-

219. 46 U.S.C. app. § 835(b) (1988).

220. 10 U.S.C. § 2272(f) (1988).

221. 49 U.S.C. § 1378(a)(4) (1988).

222. 30 U.S.C. § 181 (1988).

223. See *Acquisitions Hearing*, *supra* note 21, at 5 (statement of Malcolm Baldrige, Secretary of Commerce) (observing that many laws grant the president authority to act to protect national security).

224. See *id.* at 48 (statement of Richard Darman, former Deputy Secretary of Treasury) (stating that overly-broad language may alienate foreign trading partners).

225. OFFICE ON JAPAN, OFFICE OF THE ASSISTANT SECRETARY FOR INTERNATIONAL ECONOMIC POLICY, DEPARTMENT OF COMMERCE, JAPANESE INVESTMENT POLICY 1 (1983) (on file with *The American University Journal of International Law and Policy*) (noting that Japan restricts foreign investments for security reasons in broadcasting, telecommunications, aviation, rail transportation, and electric utilities, and prohibits foreign entry in the manufacture of biologics, narcotics, arms, and munitions). Japanese sectoral controls extend to protect economic interests in areas such as agriculture, forestry, fisheries, mining, leather, and petroleum manufacturing and marketing. *Id.*; see generally, Crabb, *The Reality of Extralegal Barriers to Mergers and Acquisitions in Japan*, 21 INT'L LAW. 97 (1987); Reynolds, *Foreign Investment in Japan: The Legal and Social Climate*, 18 TEX. INT'L L.J. 175 (1983).

national agreements, moreover, recognize United States domestic sectoral controls, thereby reducing the likelihood that their use could create diplomatic tension.²²⁶

G. THE STRENGTH OF OTHER EXISTING LAW

Before the enactment of Exon-Florio, existing law resolved merger and acquisition national security concerns to the satisfaction of the United States government, and no president had ever needed to invoke emergency powers.²²⁷ The Defense Production Act addressed all threats to the domestic industries' ability to meet emergency defense needs,²²⁸ while sectoral controls limited foreign participation in key industries. Antitrust laws prevented the formation of foreign controlled monopolies in industries important in meeting defense needs. Export control laws, the Defense Industrial Security Program, and some sectoral controls prevented secrets and sensitive technologies from falling into the wrong hands when corporate ownership changed. The Trading with the Enemy Act precluded acquisitions by the most threatening adversaries.²²⁹ Before Congress passed Exon-Florio, most in the executive branch believed existing laws and regulations were sufficient to handle threats from foreign direct investment.²³⁰ Experience had demonstrated that existing law would be inadequate only in rare situations.

Congress, however, does not limit use of Exon-Florio to situations where other law is inadequate. Use of the word "appropriate" in subsection 2170(d)(2) gives the president discretion to decide whether to invoke Exon-Florio when considering a problem acquisition. Moreover, presidential determinations under this subsection are not subject to judicial review.²³¹ Given the increasing interest in restricting foreign investment, former methods of resolving national security issues may not be indicative of future trends in this area.

226. ORGANIZATION FOR ECON. COOPERATION AND DEV., CODE OF LIBERALIZATION OF CAPITAL MOVEMENTS, Annex B: Reservations to the Code on Liberalization of Capital Movements, at 96 (1986) [hereinafter CAPITAL MOVEMENTS CODE].

227. See *Foreign Takeovers Hearing*, *supra* note 21, at 18 (statement of J. Michael Farren, Deputy Under Secretary for International Trade, Department of Commerce) (stating that the the Exon-Florio Amendment would discourage foreign investment).

228. 50 U.S.C. app. § 2061 (1988).

229. 50 U.S.C. app. § 1 (1988).

230. See *Acquisitions Hearing*, *supra* note 21, at 5 (statement of Malcolm Baldrige, Secretary of Commerce) (asserting that other existing law would serve the same ends as the Exon-Florio Act).

231. 50 U.S.C. app. § 2170(d) (1988).

IV. TREATY OBLIGATIONS

Subsection 2170(h) of Exon-Florio provides that the executive branch should not construe the provision "to alter or affect any existing power . . . provided by any other provision of law."²³² In its discussion of this subsection, the joint conference committee explained that "the Conferees do not intend to abrogate existing obligations of the U.S. pursuant to treaties, including Treaties of Friendship, Commerce, and Navigation."²³³ Congress intended to restrict the president's application of Exon-Florio to uses consistent with the commitments of the United States under international law.²³⁴ The United States is a party to numerous bilateral treaties and agreements that contain clauses prohibiting barriers to international investment.²³⁵ These treaties govern investment relationships with the United States' most important allies and largest trading partners.²³⁶ To explain the effects of treaties on Exon-Florio, this section uses several important examples: Friendship, Commerce, and Navigation (FCN) Treaties, and the Organization for Economic Cooperation and Development (OECD) Capital Movements Code.

A. LEGALLY BINDING TREATIES: FCN

Friendship, Commerce, and Navigation (FCN) treaties are among the most common and the most important bilateral treaties prohibiting barriers to international investment that the United States has entered into in the post-World War II period.²³⁷ They establish a basic framework for relations in a number of areas including international investment. The United States-Japan FCN, for example, gives parties from both countries "national treatment with respect to engaging in all types

232. *Id.* § 2170(h).

233. CONF. REP., *supra* note 27, at 927.

234. *Id.* Immediately following discussion of the effect of international obligations, the conference report notes that "[t]he normal rules of statutory interpretation govern this section." *Id.*; see Grimes & Williams, *supra* note 208, at 20 (noting well-established United States jurisprudence that recognizes valid treaties and agreements over prior inconsistent federal law).

235. *Data File: Treaties Establishing Most Favored Nation or National Treatment Status* (Results of search of all unclassified treaties in computer database, Office of the Assistant General Counsel for International Affairs and Intelligence, United States Department of Defense, Washington, D.C., May, 1989) (on file with *The American University Journal of International Law & Policy*); see Alvarez, *supra* note 21, at 112 n.607 (discussing the extent of United States trading partners' foreign investment screening authority).

236. *Id.*

237. See Grimes & Williams, *supra* note 208, at 21 (estimating that the United States has entered into 130 FCN treaties with foreign states).

of commercial, industrial, financial and other business activities within the territories of the other Party, . . . [including permission] (b) . . . to acquire majority interests in companies of such other Party”²³⁸ In this context, “national treatment” affords foreign companies the same right to acquire interests in domestic companies that other United States companies enjoy.²³⁹ Other treaties provide most-favored-nation treatment to the entities within foreign states.²⁴⁰ Thus, foreign companies from a signatory nation have the same right to purchase interests in domestic companies that the United States grants to the companies of any third country. The distinction disappears, however, if the United States affords “national treatment” to any third country in this context because it must give similar treatment to the signatories of treaties containing most-favored-nation clauses.²⁴¹

Most FCNs and related treaties contain standard exemptions covering defense production and the essential security of parties.²⁴² The United States-Nicaragua FCN, for example, provides that:

[t]he present Treaty shall not preclude the application of measures: . . .

(c) regulating the production of or traffic in arms, ammunition and implements of war, or traffic in other materials carried on directly or indirectly for the purpose of supplying a military establishment;

(d) necessary to fulfill the obligations of a Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests; . . .²⁴³

Nations could invoke these exceptions in order to give less favorable treatment to foreign investors in situations that threaten national security or defense production. Depending on the language of the treaty, assertion of an “essential security interest” might be sufficient to escape treaty provisions that bar restrictive investment practices. The General Agreement on Tariffs and Trade²⁴⁴ does not prevent any party from taking action that the party “*considers necessary* for protection of its

238. Treaty of Friendship, Commerce, and Navigation, Apr. 2, 1953, United States-Japan, art. VII(1), 4 U.S.T. 2063, 2069 [hereinafter FCN-Japan].

239. *Id.* art. XXII, at 2079.

240. See Alvarez, *supra* note 21, at 16-56 (providing a detailed analysis of international investment obligations of the United States).

241. *Id.* (discussing United States policy of rejecting reciprocity in trade investment agreements).

242. E.g., *United States Diplomatic and Consular Staff in Teheran*, 1980 I.C.J. Pleadings Ann. 50, 235.

243. Treaty of Friendship, Commerce, and Navigation, Jan. 21, 1956, United States-Nicaragua, art. XXI 1(c)-(d), 9 U.S.T. 449, 465 [hereinafter FCN-Nicaragua].

244. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. 5, 6, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT].

essential security interests . . ."²⁴⁵ The OECD Code of Liberalization of Capital Movements contains similar language.²⁴⁶ Other treaties, however, including the Japan and Nicaragua FCNs provide for "necessary" measures, but do not allow parties to escape from their obligations by simply declaring that they consider it necessary.²⁴⁷

Under most FCNs, parties submit their disputes to the International Court of Justice (ICJ).²⁴⁸ The ICJ has jurisdiction to resolve cases where treaty language does not specify that the parties may decide what is necessary to protect their essential security interests.²⁴⁹ In *Nicaragua v. United States*,²⁵⁰ the government of Nicaragua charged that the United States had violated its obligations under a bilateral FCN by imposing a trade embargo and mining Nicaraguan harbours. The ICJ applied a reasonableness standard to determine the level of risk to essential security interests and to evaluate "whether the measures presented as being designed to protect these interests are not merely useful but 'necessary.'"²⁵¹ Applying this standard, the ICJ found that the United States could not justify a trade embargo or other actions²⁵² as necessary to protect its essential security interests²⁵³ and declared that the United States had breached its obligations under the United States-Nicaragua FCN.²⁵⁴

The United States refused to recognize the ICJ's jurisdiction over the issues presented in the *Nicaragua* case and refused to comply with the unfavorable judgment.²⁵⁵ Non-compliance was possible because the president arguably has power under the United States Constitution to

245. *Id.* art. XXI(b) (emphasis added).

246. CAPITAL MOVEMENTS CODE, *supra* note 226, art. 3, at 14.

247. *E.g.*, FCN-Nicaragua, *supra* note 243, at 465; FCN-Japan, *supra* note 238, at 2079.

248. *E.g.*, FCN-Nicaragua, *supra* note 243, at 467; FCN-Japan, *supra* note 238, at 2080.

249. *See* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 116-17 (Judgment June 27) (finding the activities of the United States to violate international law).

250. *Id.*

251. *Id.* at 117.

252. *Id.* at 22. Nicaragua also claimed that the United States participated in the mining of Nicaraguan ports and acts of sabotage against ports and oil installations. *Id.*

253. *Id.* at 309 (Schwebel, J., dissenting).

254. *Id.* at 148. This occurred despite the president's finding that "the policies and actions of the Government of Nicaragua constitute[d] an unusual and extraordinary threat to the national security and foreign policy of the U.S.," when he imposed a trade embargo under the International Emergency Economic Powers Act. Exec. Order No. 1253, 50 Fed. Reg. 18,629 (1985).

255. *See* Reisman, *Has the International Court Exceeded its Jurisdiction?*, 80 AM. J. INT'L LAW 128 (discussing the United States' rejection of I.C.J. jurisdiction in the *Nicaragua* case).

take measures contrary to the terms of the treaty.²⁵⁶ Further, both Nicaragua and the ICJ lacked adequate mechanisms to enforce the judgment against the United States.

In a case arising under Exon-Florio, however, the terms of the statute circumscribe the president's power to take action contrary to treaty obligations of the United States²⁵⁷ and express congressional intent.²⁵⁸ Moreover, if a president's actions exceed the authority granted under Exon-Florio and cause harm to private parties, injured parties can seek relief in United States district courts.²⁵⁹ This Exon-Florio language limits the executive's ability to abrogate treaty obligations considerably more than the IEEPA does.

Neither United States courts nor the ICJ have ever articulated standards to determine when international investments threaten the "essential security interests" of a state that is a signatory to a FCN or similar treaty. Courts are not likely, however, to adopt a standard that renders treaty obligations meaningless. If a transaction threatens general economic interests, courts most likely would rule that the proper remedy is to withdraw under the termination provisions of the treaty.²⁶⁰

B. LEGALLY ESCAPABLE TREATIES: THE OECD CAPITAL MOVEMENTS CODE

The OECD Capital Movements Code²⁶¹ is one of the most significant international investment agreements allowing states to determine for themselves when they consider their essential security interests threatened. Under the multilateral treaty creating the OECD, the United States recognized "that the further expansion of world trade is one of the most important factors favouring the economic development of countries and the improvement of international economic relations

256. See Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1569 (1984) (stating that the president "can denounce a treaty when he deems it in the national interest to do so, even when such denunciation is a breach of international law"). If the president acts in this manner, the United States is responsible for the breach of international law, but the treaty is no longer law in the United States. *Id.* at 1568.

257. 50 U.S.C. app. § 2170(h) (1988).

258. CONF. REP., *supra* note 27, at 927.

259. See *id.* at 925 (stating that only the actions of the president under subsection 1(d) are exempt from judicial review).

260. See Inter-American Convention on Treaties of 1928, art. 17, reprinted in E. PLISCHKE, *INTERNATIONAL RELATIONS: BASIC DOCUMENTS* (1953) (describing the conclusion of treaty-making).

261. CAPITAL MOVEMENTS CODE, *supra* note 226.

...²⁶² Accordingly, the United States agreed to pursue efforts "to reduce or abolish obstacles to the exchange of goods and services . . . and extend the liberalization of capital movements . . ."²⁶³ These efforts have included taking the lead in the promulgation of the Code of Liberalization of Capital Movements and subsequent negotiations on international investment practices.²⁶⁴

Analysis of provisions concerning protection of the essential security interests of signatories must take into consideration the entire scheme of the Code. All members adhering to the Code²⁶⁵ agree to "progres-

262. Convention on the Organization for Economic Cooperation and Development, Dec. 14, 1960, Preface to Treaty, 12 U.S.T. 1728, 1731, T.I.A.S. No. 4891, 888 U.N.T.S. 179 [hereinafter OECD Convention].

263. *Id.* art. II(d), 12 U.S.T. 1728, 1733.

264. See Richardson, *United States Policy Toward Foreign Investment: We Can't Have It Both Ways*, 4 AM. U.J. INT'L L. & POL'Y 281, 291, 299 (1989) (discussing the United States' leading role in negotiating for the liberalization of investment practices among nations).

265. See OECD Convention, *supra* note 262 (listing members of the OECD). Members of the OECD are: Australia, Austria, Belgium, Canada, Denmark, Finland, France, the Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. *Id.* As of March 1982, only Canada had not agreed to adhere to the Convention. *Id.*

Although Canada is not a party to the Convention, the United States-Canada Free-Trade agreement dictates national treatment for investors between the United States and Canada with respect to acquisition of business enterprises, divestiture prohibitions, and minimum ownership prohibitions. Canada-United States Free-Trade Agreement, art. 1602, *reprinted in* 27 I.L.M. 2, 374 (1988). The agreement requires substantial changes in Canada's investment screening provisions and provides for a progressive increase in the gross asset threshold for foreign acquisitions in Canada. *Id.* Annex 1607.3. The parties expect this agreement to reduce obstacles to the free flow of capital into Canada. The agreement is monumental because foreign investors already control 40% of Canada's manufacturing capacity. See *Foreign Takeovers Hearing*, *supra* note 21, at 16 (statement of J. Michael Farren, Deputy Under Secretary for International Trade, Department of Commerce).

Subsection 2170(h) does not permit use of Exon-Florio to block an acquisition from Canada because it would violate the terms of the agreement. Moreover, it would give Canada reason to derogate from the investment provisions in the treaty—a development that would seriously disadvantage the United States, which enjoys high levels of direct investment in Canada. *Id.* Provisions of the agreement, however, do not apply to measures affecting government procurement investments or the provision of transportation services. United States-Canada Free Trade Agreement, art. 1601, para. 2. Use of Exon-Florio for defense production along with application of most sectoral controls, therefore, would not violate the terms of the agreement.

By its terms, subsection 2170(h) only applies to any "existing" power under any provision of law, and the conference report discusses only "existing" United States international obligations. CONF. REP., *supra* note 27, at 927. The government could argue that this statutory restriction only applies to treaties in effect at the time of the passage of Exon-Florio. The United States-Canada agreement did not enter into force until January 1, 1989, four months after passage of the Amendment. Nevertheless, the United States-Canada agreement, (a properly ratified treaty) supercedes prior inconsis-

sively abolish . . . restrictions on the movements of capital"²⁶⁶ and "to avoid introducing any new exchange restrictions on the movements of capital or the use of non-resident owned funds and . . . to avoid making existing regulations more restrictive."²⁶⁷ Members specifically agree to "grant any authorization required for the conclusion or execution of transactions"²⁶⁸ absent specific reservation, including direct investments "which give the possibility of exercising an effective influence on the management . . . in the country concerned by non-residents by means of . . . acquisition of full ownership of an existing enterprise [or] participation in a new or existing enterprise."²⁶⁹ The Code promotes foreign direct investment so vehemently that the United States must specifically reserve the right to limit foreign direct investment through sectoral controls.²⁷⁰ Consequently, countries have used the Code to deter broad national security restrictions on investments and to limit sectoral controls.

Absent exceptional circumstances, use of Exon-Florio against a fellow OECD member would be a substantial departure from the international norms that the Code established, despite the presence of the essential security clause. It also would create negative consequences for future domestic leaders who want to negotiate for more liberal foreign investment laws. Policy, rather than obligation, would guide use of Exon-Florio against the few foreign states that have not entered into investment agreements with the United States. Most foreign direct investment in the United States, however, comes from nations with which the United States has open investment agreements.²⁷¹

If the United States uses the Exon-Florio Amendment to pursue broad economic goals, it will conflict with most general investment agreements. Further, where FCNs allow the ICJ to determine the existence of threats to a party's essential security interests, applying broad economic definitions of national security under Exon-Florio probably would breach the agreements, in direct violation of congressional intent. With the OECD Capital Movements Code and similar agree-

tent federal law in accordance with established constitutional doctrine. Grimes & Williams, *supra* note 208, at 20.

266. OECD Convention, *supra* note 262, art. 1(a).

267. *Id.* art. 1(e).

268. *Id.* art. 2(a).

269. CAPITAL MOVEMENTS CODE, *supra* note 226, at Annex A: Liberalization Lists of Capital Movements, List A, Part I, at 27.

270. *Id.* Annex B: Reservations to the Code of Liberalization of Capital Movements, Part I, at 96.

271. See Alvarez, *supra* note 21, at 13 (emphasizing that the United States has urged the elimination of foreign investment barriers); Richardson, *supra* note 264, at 291, 299 (describing the role of the United States in reducing investment barriers).

ments that allow parties to determine for themselves what constitutes essential security interests, resorting to Exon-Florio could completely undermine the function of these agreements.

IV. POLICY CONSIDERATIONS

Despite significant limitations on executive discretion, Exon-Florio gives the president power to investigate, suspend, or prohibit acquisitions in a wide variety of situations. Some business and policy leaders advocate aggressive use of the legislation. They believe it can help solve problems such as the "devastation"²⁷² of the ability of the United States to compete in world markets, the need for a more reciprocal trade policy,²⁷³ the export of critical defense technologies,²⁷⁴ and the specter of "Libyans in three-piece suits"²⁷⁵ destroying the defense industrial base of the United States through participation in Wall Street takeover deals.

There are important policy reasons for which the president should refrain from using Exon-Florio to restrict acquisitions. The business community has expressed concern that the ambiguity of the national security standard could lead to its use in unpredictable circumstances.²⁷⁶ As previously noted, uncertainties about whether the government will interfere with an acquisition inhibits transactions and prevents the most productive use of available economic resources.²⁷⁷ The executive branch, however, has resisted enacting regulations that would limit the president's ability to handle unforeseeable security threats.²⁷⁸

272. *Acquisitions Hearing*, *supra* note 21, at 10 (statement of Sen. Exon).

273. *Id.* at 13 (statement of Sen. Breaux).

274. *Id.* at 42-43 (statement of Sen. Riegle, Jr.).

275. *Id.* at 24 (statement of Robert Mercer, Chairman of the Board and Chief Executive Officer, Goodyear Tire and Rubber Co.).

276. *See* Schumacher, *supra* note 41, at 22 (noting that the multi-agency involvement mandated by the statute could lead to uncertainty in the business community about how each agency will interpret its provisions).

277. *Id.* Businesses cannot begin merger plans if an agency will oppose the transaction a few months later. *Id.* Review by so many agencies also increases the time required before a merger is approved.

278. *See* Hayes, *supra* note 67, at 1546 (explaining that an administration's statements and actions in the early stages of implementing a statute are particularly significant in establishing precedent for the law's application); *see also* Haig v. Agee, 453 U.S. 280, 306 (1981) (*citing* Zemel v. Rusk, 381 U.S. 1, 12 (1964)) (stating that consistent executive construction and legislative reenactment of the statute may permit the inference that the legislature ratified the executive's interpretation even in the absence of consistent practice or explicit legislative authorization). Once a policy or practice of evaluating acquisitions emerges in any given case, it will be more difficult not to evaluate other cases with the same criteria. *Id.* Similarly, once the executive applies inconsistent criteria to examine acquisitions, courts will circumscribe the freedom of the government to intervene on the disfavored grounds. *Id.* at 300-06.

Congress provided direction by requiring the president to consider three factors when implementing the Exon-Florio Amendment: (1) domestic production capacity; (2) preventing the erosion of the defense industry of the United States; and (3) foreign control of United States technologies.²⁷⁹ Discussed below are the policy implications of using the Exon-Florio Amendment for these purposes and for a potential fourth purpose, which Congress did not discuss: economic coercion.

A. PROTECTION OF DOMESTIC ECONOMIC HEALTH AND GENERAL WELFARE

Many individuals and organizations in the American business community could benefit from the government's use of Exon-Florio for economic protectionism. Accordingly, after the passage of Exon-Florio, CFIUS received numerous petitions from businesses expressing concerns about the national security implications of mergers they were trying to block for pecuniary reasons.²⁸⁰ Indeed, special interests with specific economic agendas were a large source of support for the measure in Congress.²⁸¹

One of the reasons some businesses advocate the use of Exon-Florio is that current trends in foreign direct investment present problems for the domestic economy. Overseas, exports from the United States must compete for the same foreign money as United States assets. Some sources suggest that undervaluation of United States assets in global markets causes the United States to sell its capital assets faster than it sells its products.²⁸² A difference between selling assets and capital is that while businesses often reinvest profits from exports to build productive capacity in the United States, foreign-owned firms repatriate approximately seventy-nine percent of the profits earned to foreign parent companies.²⁸³ Thus, current foreign direct investment trends

279. 50 U.S.C. app. §§ 2170(e)(1)-(3) (1988).

280. Schumacher, *supra* note 41, at 22.

281. *Foreign Takeovers Hearing*, *supra* note 21, at 33. T. Boone Pickens, a well-known maverick in the leveraged buy-out trade, became a strong supporter of the provision when Consolidated Gold Fields, a British firm with South African ties, acquired a substantial interest in Newmont Mining Company with management's support. *Id.* Mr. Pickens engaged in a hostile takeover attempt of Newmont with plans to dismantle Newmont and liquidate its assets after he achieved corporate control. *Id.* Not surprisingly, after Congress passed Exon-Florio, one of the first requests for an investigation under the provision involved this particular merger. *Id.*

282. *Foreign Investment in the U.S.: Hearing Before the Subcomm. on Int'l Economic Policy and Trade of the House Comm. on Foreign Affairs*, 100th Cong., 2d Sess. (1988) [hereinafter *Foreign Investment Hearing*] (statement of Dr. Susan Tolchin, public administration professor George Washington University).

283. *Id.*

threaten the trade balance and weaken the ability of the domestic industrial base to reinvest in future domestic productive capacity.

Despite the outcry for protectionism from businesses, the official policy of the United States supports an open international investment environment.²⁸⁴ The premise of this policy is that in order to foster global development, the government should not create trade barriers or promulgate measures that distort international capital and investment flows.²⁸⁵ The Secretary of Commerce stated during the Exon-Florio hearings that "[i]nternational investment is an important source of capital which can stimulate international trade, and encourage specialization in goods and services in those countries that are most efficient and keep the cost of capital down."²⁸⁶ The executive order implementing Exon-Florio reaffirms this policy, noting that the executive should conduct actions under the new law in a manner that furthers the objectives of the United States, including "opening international markets [and] strengthening international institutions."²⁸⁷

This policy of encouraging the unimpaired flow of international investment is consistent with the economic needs of the United States as it wrestles with trade and budget deficits. To remain competitive, the United States must take advantage of foreign capital in order to expand its production facilities. Without foreign capital, the United States does not have the resources to meet the needs of a growing economy. Foreign direct investment helps the United States accumulate funds necessary to purchase exports and to finance its fiscal debt without causing staggering inflation.²⁸⁸

A preferable source of foreign funds, however, is earnings generated by sales of products and services that originate in the United States. This is because foreign sales of domestic products do not diminish reinvestment of production profits, while sales of productive assets divert profits overseas. Given the present weak economy of the United States, cash infusions from foreign direct investment are necessary to prevent interest rates from climbing substantially as the federal government

284. *Acquisitions Hearing*, *supra* note 21, at 2 (statement of Malcolm Baldridge, Secretary of Commerce).

285. *Id.* at 19.

286. *Foreign Takeovers Hearing*, *supra* note 21, at 15-16 (statement of J. Michael Farren, Deputy Under Secretary for International Trade, Department of Commerce).

287. Exec. Order No. 12,661, 3 C.F.R. 618, 624 (1989), *reprinted in* 19 U.S.C. § 2901 (1988).

288. *See Foreign Investment Hearing*, *supra* note 282 (statement of Elliot Richardson, Association for Foreign Investment in America) (unofficial transcript).

competes with the private sector for fewer financial resources.²⁸⁹ The damage that would result from higher interest rates would be more harmful to the domestic economy than any reduced reinvestment of profits that may result from foreign ownership of businesses based in the United States.²⁹⁰ Furthermore, foreign direct investment has the benefit of introducing new technology and management skills to the United States that could improve productivity and expand employment.

Accordingly, governmental interference with private transactions through the use of measures like Exon-Florio in efforts to reverse trends in global investment may be a cure that would prove much more damaging than the disease. As an assistant secretary for the Treasury Department recently explained, "[c]ountries which have elaborate arrangements to screen foreign investment have suffered major reductions in investment flows and the related economic advantages which foreign investment brings."²⁹¹ For instance, a policy of governmental intervention in acquisitions for reasons other than the prevention of the formation of trusts could undermine confidence in United States securities on global markets.²⁹² This in turn could artificially reduce the price of American securities, thereby increasing the probability of foreign takeover attempts because domestic parties lose interest in continuing the affected businesses' operations. Hence, the executive branch should be wary of creating "a public predisposition to look for reasons to hinder foreign investors engaged in complex market transactions."²⁹³

Another benefit of foreign direct investment is that it may keep failing American firms alive. Foreign bidders often try to acquire businesses that are financially troubled—as was the case in the Fairchild merger attempt.²⁹⁴ Unless there is an intentional manipulation of investments for illegitimate reasons, foreign investors endeavor to maximize profits from their investments in the United States.²⁹⁵ In most situations, foreign parents find it advantageous to operate acquired United States firms so that they may benefit from diversification as well as lower operating costs in the United States.²⁹⁶ Economic condi-

289. Richardson, *Destiny Isn't Going out the Window: Buying of America is in Control and Helps Industry, Finance*, L.A. Times, July 31, 1988, § 5, at 5.

290. *Id.*

291. *Foreign Takeovers Hearing*, *supra* note 21, at 24 (statement of David C. Mulford, Assistant Secretary for International Affairs, Department of the Treasury).

292. *Id.*

293. *Id.*

294. *Id.*

295. Gross, *The Americanization of Honda*, Bus. Wk., Apr. 25, 1988, at 90.

296. See Richardson, *supra* note 264, at 288 (interpreting increased foreign investment in America to reflect that there are economic incentives for such investment).

tions may prevent domestic bidders from keeping a firm operational. Consequently, blocking a foreign acquisition could lead to bankruptcy or sale to a highly leveraged domestic buyer who may break up the firm's capital assets to pay off debts on the investment.²⁹⁷ In most cases, allowing foreigners to continue operating the firm is more beneficial to the United States economy than ceasing the firm's operations.

In addition, unfettered governmental intervention in foreign investments could cause foreign governments to retaliate against prospective investors from the United States and domestic firms already operating abroad.²⁹⁸ The United States would face considerable losses from such retaliation. American investors currently have approximately \$1.2 trillion invested abroad, while foreign private and governmental interests have approximately \$1.6 trillion invested in the United States.²⁹⁹ United States "persons," moreover, hold significantly more investments involving direct ownership of interests in businesses abroad, than do foreign investors in the United States.³⁰⁰ In addition, the United States is by far the largest foreign investor in countries that account for most direct investments in the United States.³⁰¹ Thus, the United States risks losing tremendous opportunities if those countries adopt restrictive policies towards United States investments.

Furthermore, maintaining an open investment policy has long term value, even if economic circumstances make this policy temporarily disadvantageous. Changes in global economic trends will invariably increase the benefits derived from the ability of the United States to invest freely abroad. The United States sets a good example internationally by not altering its free-investment policy in response to

297. See *Acquisitions Hearing*, *supra* note 21, at 19 (statement of Malcolm Baldrige) (noting that foreign investment brought vital capital into the United States).

298. *Id.* at 16 (statement of J. Michael Farren, Deputy Under Secretary for International Trade, Department of Commerce).

299. C. AHO & M. LEVINSON, *AFTER REAGAN: CONFRONTING THE CHANGED WORLD ECONOMY* (1988).

300. *Foreign Investment Hearing*, *supra* note 282 (statement of Elliot Richardson, Association for Foreign Investment in America) (unofficial transcript).

301. *Id.* The British are the largest foreign investors in the United States with \$75 billion, almost 29% of total direct foreign investment. *Id.* American investment constitutes 50% of all foreign direct investment in the United Kingdom. *Id.* The Dutch are the second largest investing in the United States with \$47 billion, almost 20% of total foreign investment. *Id.* By contrast, in 1987, American investment comprised 40% of foreign investment in the Netherlands. *Id.* The Japanese are now the third largest investor in the United States with \$33.4 billion, 12.7% of total direct investment. *Id.* American investors are the third largest investor in Japan with 44.1% of the total foreign investment in 1987. *Id.* Canada is the fourth largest investor in the United States with \$21.3 billion, 8.3% of the total foreign investment. *Id.* In 1987, American investment in Canada comprised 72% of its total foreign investments. *Id.*

short-run economic circumstances. Hence, reciprocal relationships that respect the principal of free investment are natural in a world economy that is increasingly more interconnected.³⁰²

The United States has been a leader in the global movement to remove barriers to international investment.³⁰³ At present, the United States is planning a campaign to reduce and eliminate barriers to investment that trading partners, particularly developing countries, maintain.³⁰⁴ This includes initiatives to forge an agreement on trade-related investment measures (TRIMS) during the Uruguay round of the GATT, to strengthen the OECD's national treatment instrument, and to generate bilateral discussions.³⁰⁵ The Omnibus Trade Act that contains Exon-Florio anticipates the continued leadership of the United States in the elimination of barriers to international investment that distort international trade.³⁰⁶ The United States would have difficulty negotiating for more open investment policies in other countries if the United States restricts foreign businesses' access to the United States.³⁰⁷ Use of Exon-Florio for protection of economic interests of the United States would damage the credibility of the United States on investment issues³⁰⁸ and may cause the United States to lose its leadership position in this area.³⁰⁹ The United States has no convincing policy rationale to justify deviation from open investment principles in order to realize short-term economic goals. The government would make a serious mistake in stretching the concept of national security in the Exon-Florio Amendment to promote a protectionist agenda.

B. ECONOMIC COERCION

While protectionist strategies attempt to directly benefit the economy of the country employing them, economic coercion strategies operate

302. *Foreign Takeovers Hearing*, *supra* note 21, at 69-70 (statement of Richard B. Leather).

303. *Acquisitions Hearing*, *supra* note 20, at 19 (statement of Malcolm Baldrige, Secretary of Commerce).

304. *See id.* at 54 (1987) (statement of Robert McNeill, Emergency Committee for International Trade) (discussing the objectives of the United States in the Uruguay Round).

305. *Id.* at 16 (statement of J. Michael Farren, Deputy Under Secretary for International Trade, Department of Commerce).

306. 19 U.S.C. § 2902(b)(1) (1988).

307. *Foreign Investment Hearing*, *supra* note 282 (statement of Elliot Richardson, Association for Foreign Investment in America).

308. *Acquisitions Hearing*, *supra* note 21, at 18 (statement of Malcolm Baldrige, Secretary of Commerce).

309. *Foreign Takeovers Hearing*, *supra* note 21, at 16 (statement of J. Michael Farren, Deputy Under Secretary for International Trade, Department of Commerce).

indirectly through the application of pressure on the economies of foreign governments or other foreign entities. Coercive strategies seek to withhold the economic benefits derived from foreign investment until the foreign investor agrees to make some economic or political concession. Thus, the government could use Exon-Florio as a strategy to pressure foreign governments into modifying investment, trade, or other policies that concern the United States. For example, the United States has employed economic sanctions to increase diplomatic leverage in many situations, including the emigration of Soviet Jews, South Africa's apartheid policies, the democratization of Panama and Nicaragua, and Iraq's conquest of Kuwait.³¹⁰

Arguably, resorting to economic coercion will rarely be necessary to protect national security. Nevertheless, the broad nature of the national security standard in Exon-Florio would permit the use of coercive strategies under Exon-Florio. Although the IEEPA also permits institution of investment restrictions, Exon-Florio provides a useful intermediate measure that allows more flexibility and responsiveness than the blanket restrictions typically imposed under IEEPA.³¹¹

An example of the use of Exon-Florio for economic coercion is President Bush's decision to block the sale of Mamco Manufacturing, Inc., a Seattle based company specializing in aircraft parts, to a military-related agency of the Chinese government.³¹² Although the president justified the decision on technology security grounds,³¹³ announcement of the decision coincided with the president's decision to veto a congressional act that granted one-year visa extensions to Chinese students studying in the United States.³¹⁴ While President Bush rejected the visa extension to avoid disrupting relations between the United States and China, he did not want China to interpret the veto as United States complacency towards China's human rights violations in the Tianamen Square incident.³¹⁵ In this situation, Exon-Florio provided a mechanism to communicate dissatisfaction with China's policies and to

310. Scott, *U.S.-Soviet Trade 1970-1982: Twelve Years a Hostage to Politics and Unrelated Foreign Policy*, in COMMON SENSE IN U.S.-SOVIET TRADE 23 (1983).

311. See, e.g., Exec. Order No. 12,205, 3 C.F.R. 248 (1981) (prohibiting transactions with Iran).

312. Rosenthal, *Bush, Citing Security Law, Voids Sale of Aviation Concern to China*, N.Y. Times, Feb. 3, 1990, at A1. The People's Republic of China Ministry of Aerospace Industry owns the China National Aero-Technology Import and Export Corporation, the prospective purchaser. *Id.* at 9.

313. *Id.*

314. Wu Dunn, *China Bitterly Protests Sanctions by Congress*, N.Y. Times, Feb. 3, 1990, at 9.

315. Wilhelm, *Purchase Will End China's Control of MAMCO*, 14 PUGET SOUND BUS. J. 1 (1990).

quiet domestic criticism of President Bush's weak response to China's human rights abuses. As an intermediate measure, the president's actions sent a somewhat ambiguous signal to the Chinese government, often a necessary tactic in the foggy world of diplomacy. In cases of more serious disagreement such as the United States' dispute with Iraq, Exon-Florio adds a weapon to the economic warfare arsenal of the United States to destabilize unfriendly regimes and to make examples of them to other foreign states.³¹⁶

Historically, the trading partners of the United States have been less open to foreign direct investment than the United States. Some of the countries have laws and regulations providing their governments with broad authority to restrict investment for reasons related to national security. For example, Japan may suspend, request modifications, or request extended periods to review foreign investments that "might imperil the national security, disturb the maintenance of public order, . . . hamper the protection or safety of the public, . . . adversely and seriously affect business enterprises engaging in a line of business similar or related to the one in which the direct investment . . . is to be made, or the smooth performance of [its] national economy."³¹⁷ Great Britain, France, Canada and other countries have similar laws.³¹⁸ Some suggest using Exon-Florio to retaliate against countries using these laws as barriers to United States investments.³¹⁹ Indeed, Exon-Florio may provide some leverage in bilateral and multilateral negotiations to restrict definitions of "national security" in laws similar to Exon-Florio that exist in other countries.

Nevertheless, laws in other countries are often much less of a barrier to foreign direct investment than is commonly believed in the United States. In Japan, for example, legal and regulatory restrictions no longer present major barriers to foreign direct investment.³²⁰ The Japanese government does not use and is unlikely to use its broad powers to restrict foreign investment because the Japanese have liberalized their investment policy under the OECD Capital Movements Code and similar international agreements.³²¹ The major challenge to United States investment in Japan results from long-nurtured "insider" relationships

316. Scott, *supra* note 310, at 24.

317. See 50 U.S.C. app. § 2170(e)(2) (1988) (discussing factors the president may consider in reviewing certain mergers, acquisitions, and takeovers).

318. *Acquisitions Hearing*, *supra* note 21, at 9, 13 (statement of Malcolm Baldrige, Secretary of Commerce).

319. *Foreign Takeovers Hearing*, *supra* note 21, at 27-28 (statement of Rep. Florio).

320. Richardson, *supra* note 264, at 305.

321. *Id.*

between Japanese industry and government as well as the strong cultural preference for buying from Japanese companies and establishing business relationships with them.³²²

Accordingly, caution should dictate the use of Exon-Florio for diplomatic coercion or retaliation. Other governments are influenced by economic, political, and social forces that clamor for the protection of their assets from foreign direct investment similar to those that demand protection in the United States. Strong-arm tactics using the "privilege" of investment in the United States to force foreign nations to open their markets could foster protectionist tendencies in the international community. Moreover, use of Exon-Florio as a diplomatic "stick" will not necessarily be effective or achieve desired results. Economic coercion often stiffens the resolve of nations and makes political compromise more difficult.³²³

The recent imposition of punitive sanctions against Toshiba Machine Company and Kongsberg Trading Company³²⁴ is indicative of a new trend in the economic policy of the United States. Rather than punishing foreign states, the government directs these sanctions at specific corporations acting contrary to the policy goals of the United States. As large multinational enterprises become more powerful, the ability to take actions against national security interests of the United States will increase. Therefore, Exon-Florio may prove to be a useful tool in the imposition of corporate-specific sanctions.

As explained in detail above, economic coercion strategies also may undercut the obligations of the United States under international agreements. However, these strategies are less likely than a protectionist investment policy to threaten the entire framework of international investment law because they are directed towards specific countries and organizations. If the policy of a foreign government or organization becomes objectionable, withdrawal or renegotiation of bilateral agreements governing investment may occur. The United States, however, should consider the consequences of departure from open investment policies when the target state is a party to multilateral agreements such as the OECD Code.³²⁵

322. Crabb, *The Reality of Extralegal Barriers to Mergers and Acquisitions in Japan*, 21 INT'L LAW. 97 (1987); Reynolds, *Foreign Investment in Japan: The Legal and Social Climate*, 18 TEX. INT'L L.J. 175 (1983).

323. Scott, *supra* note 310, at 24.

324. Exec. Order No. 12,661, 54 Fed. Reg. 5, 780 (1989).

325. See CAPITAL MOVEMENTS CODE, *supra* note 226, at 46 (requiring OECD members to promote open investment policies).

In short, any use or allusion to use of economic coercion under Exon-Florio in international relations should be made delicately and with coordination among allies and between federal agencies. Nevertheless, the use of economic coercion through Exon-Florio is an option for the president to consider when examining alternative punitive sanctions against foreign states and corporations.

C. PROTECTING THE DEFENSE INDUSTRIAL BASE

In the debates concerning the defense industrial base, the alleged dangers of international direct investment fit into two broad categories. First, there is the danger that specific foreign investors would suddenly halt key defense production causing a crisis or hampering efforts of the United States to respond in the event of a crisis.³²⁶ Second, overall foreign direct investment might gradually erode the net industrial capacity of the United States. This, in turn, could impede the ability of the United States to meet peacetime modernization goals or slow down industrial mobilization in the event of war.³²⁷

At present, the first of these alleged dangers is not significant. United States industry remains sufficiently competitive, diversified, and resilient to handle even the most carefully coordinated schemes of international investors. Foreign direct investment represents only approximately five percent of all United States corporate assets,³²⁸ and specific sectoral controls prevent foreign direct investment in many strategic industries.³²⁹ Foreign owners cannot transfer factories, minerals in mines, and physical plants to other countries overnight; they can only sell or close them. If there are limited supplies of a good that the firm produces, and a high demand for the good in the economy, whoever owns the firm would have adequate incentives to maintain production. Therefore, if assets are sold, the new buyers would presumably continue production. The IEEPA and the Defense Production Act could address attempts to close key production facilities during a crisis.³³⁰ Under these laws, the United States government can, if neces-

326. M. TOLCHIN & S. TOLCHIN, *BUYING INTO AMERICA: HOW FOREIGN MONEY IS CHANGING THE FACE OF OUR NATION* 219, 261-64 (1988).

327. *Id.*

328. See Richardson, *supra* note 264, at 5 (arguing that there is only nominal foreign investment in corporate assets of the United States).

329. *Id.* Sectoral controls severely regulate, limit, and prohibit foreign direct investment in communications, nuclear power, aviation, COMSAT, LANDSAT, water-borne transportation, and radio broadcasting. *Id.*

330. See, e.g., IEEPA, 50 U.S.C. § 1701 (1988).

sary, seize control of industrial production facilities and maintain the requisite production levels.

The same economic factors that prevent sudden shut down of key defense production also reduce the risk of gradual erosion of the overall defense industrial base. If a slow decline in industrial capacity occurred, however, it would be difficult to resort to emergency powers or the Defense Production Act to prevent the closing of operations or the conversion of operations to non-strategic uses, absent a crisis.³³¹ A firm's movement from a strategically important industry would provide financial incentives for other firms to fill in the gaps left in the market, but there would be some delay before a new firm could take over production. Although serious danger to national security from temporary gaps in industrial capacity is improbable, it may be prudent, nevertheless, for the government to monitor developments in this area.

The government can evaluate risks from foreign acquisitions to the long term health of the defense industrial base through analysis of three interrelated factors that are similar to the factors outlined in subsection 2170(e) of Exon-Florio: (1) the significance of the product of the United States entity being acquired for defense purposes;³³² (2) the amount of time, resources, and effort required for remaining domestic industry to fill in gaps in defense production if the acquired firm discontinues a particular type of production;³³³ and (3) the relative probability that a foreign investor could and would take action that might result in the discontinuance of a particular product line.³³⁴

Subjective factors such as individual service priorities, defense production particular to a local economy, parochial interests of the defense community, and differences of opinion about goals, strategies, and tactics often influence assessments of the importance of particular types of defense-related production.³³⁵ As a result, defense production priorities are not easily ordered or rated, but vary with different strategists' projections of future defense requirements.³³⁶ Any attempt to precisely define or codify defense priorities would be needlessly contentious and the results quickly would become obsolete.

331. Defense Production Act, 50 U.S.C. app. § 2158 (1988).

332. See 50 U.S.C. app. § 2170(e)(1)-(3) (1988) (listing factors the president may consider to prevent foreign takeovers of domestic businesses for national security reasons).

333. *Id.* § 2170(e)(2).

334. *Id.* § 2170(e)(3).

335. See generally W. KAUFMAN, DEFENSE IN THE 1980's (1981) (noting the differences between President Carter's and President Reagan's defense strategies).

336. *Id.*

Nevertheless, in order to apply Exon-Florio effectively, the government must roughly rank the importance of certain types of production. If the government accords all defense production the same level of importance, the president might unnecessarily exercise powers in some situations, yet fail to take necessary precautions in others. Assessments should be based on realistic analysis of the roles that given products play in actual defense plans; if in a given case the primary concern is mobilization requirements, then the executive should analyze present operational plans with consideration of the probability that world events will require them to be activated. If the primary concern is modernization, the executive's analysis should concentrate on the actual strategic consequences of delays in meeting production goals. If the primary concern is readiness or endurance, the executive should use both static and dynamic models to determine whether gaps in production could have any appreciable effects and, if so, the actual military significance of these effects. If the primary concern is research and development, analysis should include the probability of whether investigations will enhance the affordability, dependability, and performance of weapons systems.³³⁷

In most cases, agency analysts considering whether to block an acquisition will limit their evaluations of the importance of the firms' defense production to those firms that provide products either directly to the military or to suppliers of components and materials used to make products that the military uses.³³⁸ The most significant problems of interpretation are likely to arise, however, when the president applies Exon-Florio to businesses that are not exclusively devoted to national defense purposes, but are nevertheless important to national security. This would include, for example, the acquisition of assets related to strategic resources such as petroleum.

In a case recently brought before the CFIUS, for example, four members of Congress requested an investigation of the bid of a Saudi government-owned corporation for a fifty percent share of certain Texaco, Inc. operations.³³⁹ The proposed acquisition involved refineries, ter-

337. See U.S. DEP'T OF DEFENSE, CRITICAL TECHNOLOGIES PLAN 5 (Mar. 15, 1989) [hereinafter DOD Plan] (discussing the need for high performance and high quality critical technologies) (on file with *The American University Journal of International Law and Policy*). This analysis might also consider new military capabilities, projections of the effect of foreign control on availability of certain technologies for military production, and consequences of delaying incorporation of technologies into weapons support systems.

338. Tolchin, *Crucial Technologies: 22 Make the U.S. List*, N.Y. Times, Mar. 17, 1989, at D1.

339. Daily Rep. for Execs. (BNA) (Dec. 21, 1988).

minals, service stations, and franchises in twenty-three southwestern states.³⁴⁰ The lawmakers' main criticisms of the proposed acquisition, however, did not concern Texaco's ability to supply the military. Instead, they complained that the acquisition would give the Saudis influence over United States downstream oil operations because they would be able to fix low crude oil prices while earning increased profits at the gasoline refining and marketing levels.³⁴¹ Hence, the main concern about the proposed merger, the competitiveness of American oil companies, was economic, not military, in nature.

Oil is so important to the American economy that the government often views any threat to its supply at reasonable prices as a danger to the security interests of the United States.³⁴² Promulgation of the Carter Doctrine, which implicitly threatens the use of military force against any power that interferes with the free flow of oil from the Persian Gulf, demonstrates how far the United States will go to protect its petroleum interests.³⁴³ Military measures of foreign governments that disrupt functions of United States domestic oil producers or decrease the supply of gasoline necessarily involve national security issues. For instance, the government has implemented section 232 of the Trade Act of 1962 several times to regulate imports of foreign oil for national security reasons.³⁴⁴ Policy, therefore, should not preclude the use of statutes designed to protect national security interests when acquisitions lead to monopolistic control of resources.

To prevent foreign acquisitions that will lead to control of resources key to national security, the United States has specific programs to improve its leadership in these industrial sectors.³⁴⁵ There is concern within the Department of Defense that foreign control of United States industries benefitting from such programs might undermine defense industrial policy goals. There is particular concern about foreign acquisi-

340. *Id.*

341. *Id.*

342. See Brezezinski, *The True U.S. Interest in the Gulf*, Wash. Post, Aug. 16, 1990, at A23 (indicating that potential loss of oil supplies is the primary cause of the conflict in the Gulf).

343. See *id.* (discussing the promulgation of the Carter Doctrine).

344. See, e.g., *Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 569 (1976) (justifying the use of section 232 for national security reasons).

345. See NATIONAL SECURITY AND INTERNATIONAL AFFAIRS DIVISION, U.S. GENERAL ACCOUNTING OFFICE, BRIEFING REPORT TO SEN. JOHN HEINZ, INDUSTRIAL BASE: DEFENSE-CRITICAL INDUSTRIES 5 (Aug. 1988) (identifying support programs for industries critical to the Department of Defense) (on file with *The American University Journal of International Law and Policy*). To enhance and support defense-critical industries, Department of Defense programs include projects involving semiconductors, gas turbine engines, machine tools, and bearings. *Id.*

tions of semiconductor manufacturing firms.³⁴⁶ Such firms are beneficiaries of the United States SEMATECH program. SEMATECH is a consortium of semiconductor manufacturers that the Department of Defense funds "to conduct research and development on advanced semiconductor manufacturing techniques"³⁴⁷ and to adapt manufacturing techniques "to a variety of semiconductor products."³⁴⁸ Nevertheless, if companies benefitting from these programs continue to supply defense needs from United States-based production facilities, the defense industrial base of the United States improves regardless of whether the firms are domestically or internationally owned. Yet the possibility that a foreign owner may reap financial benefits from United States government subsidies is an economic, not a military concern.³⁴⁹ Analysts should avoid confusion among military production, economic, and technology transfer issues, to reduce uncertainty in the evaluation of acquisition cases.

The amount of time, effort, and resources required for domestic industry to fill gaps in defense production caused by closure or conversion of an acquired firm's operations varies with the type of production involved. In most industries, substitutes are readily available in the marketplace, and existing firms can either increase production or revamp plant facilities to fill supply gaps. Substitutions are easiest to obtain where the firm's production does not involve advanced technologies or where production closely resembles goods used in the civilian sector. Where goods require sophisticated equipment for production, utilize leading-edge technologies, or are unique, alternative suppliers may need lead time and substantial investment to fill supply gaps.

Because modern warfare involves increasingly sophisticated equipment, the Department of Defense uses numerous products that would require significant lead time to develop new supply sources. Consequently, when a firm that produces sophisticated technological merchandise for the Department of Defense becomes the target of foreign direct investment, the Department of Defense should have the information needed to evaluate what is necessary to develop a second source. When foreign investment targets defense subcontractors, the Department of Defense should be aware of other firms that produce their own subcomponents (captive producers), as well as those that produce sub-

346. See *id.* at 39 (identifying SEMATECH as a contributor to critical defense industries).

347. *Id.*

348. *Id.*

349. See *Acquisitions Hearing*, *supra* note 21, at 5 (noting the protection that export control laws afford against hostile foreign takeovers).

components for sale to industry (merchant producers). The Department of Defense should also examine the impact of any delays on operational plans and strategic requirements.

Determining the probability that a foreign investor might discontinue a particular product line requires an exploration of the foreign investor's motivation for investing. First, the analysis should discover any affiliations between the foreign investor and foreign governments or groups that may plan to manipulate the investment holdings for reasons other than profit maximization. Investigators, however, rarely would uncover evidence of a foreign firm's intent to politically manipulate investments. Nevertheless, indications that a firm may not have a long term commitment to a production industry can be inferred from an analysis of the history of its operations. If the firm does not appear to possess sufficient market share, capital, or technical expertise to weather the vagaries of the industry, or a corporate culture conducive to the production line, there is reason to question the corporation's long term intentions. In addition, some corporations may have economic incentives to discontinue profitable lines of production. This could occur, for example, when a foreign firm trades profits for market power where the acquired firm sells unique goods used in the production processes of a firm in competition with the foreign parent.³⁵⁰

Yet, even if there are indications that a new parent may have reasons to manipulate production, CFIUS may conclude after negotiations that the new owners intend to honor commitments under current and future defense-related contracts. Further, trustee arrangements under the DISP could increase the likelihood that foreign owners will operate the firm in a manner consistent with the interests of the United States. To ensure that the United States would not exercise its Exon-Florio powers, the investors could agree to meet specific production goals, upgrade capital equipment, undertake new hiring, or take other actions to improve the probability of continued operations. Parties could enforce these agreements in court under traditional contract theory, promissory estoppel, third-party beneficiary theory or under the ethics requirements of the Federal Acquisition Regulations. Escrow accounts also could insure parties against a breach. CFIUS regulations that formal-

350. See *Acquisitions Hearing*, *supra* note 21, at 28-29 (statement of Joe Parkinson, Chairman and Chief Executive Officer, Micron Technology, Inc.) (testifying that the Japanese employ questionable trade practices targeting American businesses). Another strategy the Japanese may employ combines unfair trade practices with targeted corporate acquisitions in an effort to dismantle American competition. *Id.* Some allege that Japanese companies used these strategies to overpower United States DRAM manufacturers between 1985 and 1987. *Id.*

ize a process for entering these agreements could increase the likelihood of judicial enforcement.³⁵¹

The possibility that foreign investment will result in the flight of industrial research, development, and engineering facilities overseas is of particular concern to policy makers.³⁵² Some fear that a foreign firm would move its research and development operations abroad, retaining only production facilities in the United States.³⁵³ Relocation of research facilities abroad could diminish the technological lead time necessary for the United States to maintain military superiority.³⁵⁴ Yet, there is no reason to assume that in general, foreign firms would be more likely than United States firms to relocate facilities, unless it would promote economic efficiency or attract more talented personnel.³⁵⁵ Some have voiced concerns that cultural differences may cause certain countries to make non-economic decisions, but this ignores the economic motivations that inspired the initial investment.³⁵⁶

Measuring the overall possible negative implications of foreign direct investment involves weighing relative risks. Limiting the pool of investors to United States citizens also presents risks. For instance, a foreign investor with solid capital might be more likely to continue operation of a United States-based facility in operation than an American buyer attempting a leveraged buy-out with uncertain financing.³⁵⁷ It may be preferable to have a foreign entity gain control of a United States firm

351. There are risks, however, in formalizing this process. Foreign investors may interpret the requirement to enter agreements as a vehicle for governmental intervention into investment deals. This could cause foreign investors to lose confidence in the security of new investment in United States industry.

352. See Burgess & Richards, *Does Foreign Investment in U.S. Pose a Threat?*, Wash. Post, Oct. 23, 1990, at C1 (noting concern in the Bush administration over the loss of innovative technology through foreign acquisitions).

353. Address by Congressman Les Aspin, The Johns Hopkins University School of Advanced International Studies: Foreign Policy Institute, Seminar on *Foreign Ownership of U.S. Defense Industries and National Security* (Mar. 15, 1989) [hereinafter Les Aspin Address].

354. DOD Plan, *supra* note 337, at 9.

355. Address by Theodore Moran, The Johns Hopkins University School of Advanced International Studies: Foreign Policy Institute, Seminar on *Foreign Ownership of U.S. Defense Industries and National Security* (Mar. 15, 1989).

356. Address by Richard Danzig, The Johns Hopkins University School of Advanced International Studies: Foreign Policy Institute, Seminar on *Foreign Ownership of U.S. Defense Industries and National Security* (Mar. 15, 1989).

357. See *Acquisitions Hearing*, *supra* note 21, at 32 (statement of Robert Mercer, Chairman and Chief Executive Officer, Goodyear Tire and Rubber Co.) (arguing that corporate raiding tactics erode the United States defense industrial base and threaten the national security of the United States). If this assertion is correct, domestic takeover attempts in other circumstances could pose similar security problems. Hence, use of Exon-Florio to address hostile corporate takeovers would discriminate unfairly against foreign investors and violate the principal of national treatment.

or operation than to have it scrapped and sold piecemeal by a leveraged buy-out "green-mail" specialist. Current exchange rates aid the foreign investor through increased financial benefits to foreign firms that serve United States markets through domestic production rather than through imports. Another risk of government intervention in investment decisions is that prices of defense products may increase due to increased efficiency costs.³⁵⁸ Moreover, permitting foreign investment helps prevent situations requiring more drastic government intervention to preserve ailing industries.³⁵⁹

Because laws of the United States contain adequate provisions to prevent most threats to the industrial base, there is no reason to resort to use of Exon-Florio, especially in light of the perceptions of increased risk that such use may create among international investors. This is particularly true when Exon-Florio involves asserting an "essential security interest" under international agreements. Any investment large enough to raise industrial base concerns is likely to implicate some international agreement. In rare cases, a security threat may be great enough to override these concerns. Observers, however, should view claims about the magnitude of such security threats with skepticism.

D. PREVENTING HARMFUL TECHNOLOGICAL OUTFLOWS

As explained above, the legislative history of Exon-Florio indicates that technology transfer was not a major concern of the Amendment after the Reagan administration demonstrated to Congress that export control laws were sufficient to prevent harmful technological outflows.³⁶⁰ Nevertheless, the statute does not contain any language limiting the president's authority to use Exon-Florio in unforeseen circumstances where existing legislation does not adequately address technology transfer problems.

Since the enactment of Exon-Florio, the government appears to have found the Amendment far more useful as a measure to deal with the transfer of critical technology to economic and military competitors

358. Les Aspin Address, *supra* note 353.

359. See, e.g., *President Reagan Decides against Action to Limit Imports of Anti-Friction Bearings*, Int'l Trade Rep. (BNA) No. 47, at 1560 (Nov. 30, 1988) (reporting that increased foreign investment in the ball bearing industry helped the Reagan administration to avoid restricting imports of ball bearings under section 232 of the Trade Expansion Act).

360. See *Acquisitions Hearing*, *supra* note 20, at 5 (testimony of Malcolm Baldrige, Secretary of Commerce) (arguing that export control laws provide enough protection against hostile foreign investments).

than with the erosion of the defense industrial base.³⁶¹ In the two instances that the government used Exon-Florio to block foreign takeovers, the government cited sensitive weapons technology transfer concerns to justify its actions.³⁶² The Defense Technology Security Agency has emerged as one of the most important players in the application of Exon-Florio within the Department of Defense. Moreover, the executive order implementing Exon-Florio specifically mentions "preventing the export of strategic goods and technologies to proscribed destinations" as an objective for action.³⁶³

Foreign acquisitions of firms employing sophisticated technology are likely to raise such technology transfer issues. A CFIUS investigation of a sophisticated technology firm, therefore, should evaluate the technology transfer issues raised. This evaluation should consider whether the technology is already available commercially, whether it involves classified information, and whether the purchasing country already has access to the technology. In addition, CFIUS should consider the foreign investor's COCOM³⁶⁴ and export controls compliance records. CFIUS also should evaluate the probability of leaks of military technologies to potential adversaries and other parties whose possession of such technologies might be destabilizing, and the military significance of such leaks. Finally, CFIUS should verify that key personnel are not involved with data collection for hostile intelligence services, industrial espionage, or circumvention of export control regulations.

To aid in analysis, the Department of Defense has prepared reports selecting and describing technologies most essential for long term supe-

361. See Burgess & Richards, *supra* note 352, at C1 (reporting concerns about technology transfers through acquisitions); Les Aspin Address, *supra* note 353. According to Congressman Aspin, to the extent that foreign ownership of United States defense industries is a problem, it is not a problem of the defense industrial base. *Id.* Although defense industries could benefit from Exon-Florio by securing protection from hostile foreign takeovers, the loss of access to foreign capital offsets this benefit. *Id.* Exon-Florio and related measures, therefore, provide better control over outflows of critical technologies. *Id.*

362. See Farnsworth, *supra* note 32, at D1 (reporting the blocked sale of nuclear weapons industry to Japan); see also Rosenthal, *supra* note 32, at A1 (reporting President Bush's refusal to sell an American airplane parts manufacturer to China).

363. Exec. Order No. 12,661, 3 C.F.R. 618, 624 (1989), *reprinted in* 19 U.S.C. § 2901 (1988), 54 Fed. Reg. 5, 784 (Jan. 9, 1989)

364. See Statement of Richard N. Perle, Assistant Secretary of Defense for International Security before the Senate Committee on Governmental Affairs, the Permanent Subcommittee on Investigations (April 11, 1984) (on file with *The American University Journal of International Law and Policy*) (defining COCOM as a multilateral coordinating committee in Paris that controls strategic trade with Warsaw Pact nations). The committee is composed of representatives from Japan and from all NATO members except Spain and Iceland. *Id.*

riority of United States weapons systems.³⁶⁵ These sources assist in evaluating the technology transfer implications of various acquisition proposals. These reports, however, should not substitute for an individual case analysis because no list is completely comprehensive nor can it address the consequences of diverting the technology to different destinations.³⁶⁶ Moreover, consequences of the transfer will differ depending on whether the technology is embodied in written or recorded form, technical equipment, or technical and engineering knowledge.³⁶⁷

Although other laws could address most of the technology transfer problems that a CFIUS investigation discloses, circumstances may arise for which Exon-Florio is more appropriate. For example, export control laws depend on high-technology corporations' good faith compliance with reporting requirements. Where it is doubtful that a foreign parent will comply with export control rules, resorting to Exon-Florio may be preferable.³⁶⁸

Acquisitions need not directly involve high technology or classified assets to create an intelligence or technological security risk. Eastern bloc intelligence services, for instance, have benefited from the use of a variety of legitimate businesses as fronts for intelligence operations. For example, the Soviet Union recently attempted to purchase several banks in the Silicon Valley through a third party.³⁶⁹ Through this acquisition, Soviet intelligence services could have acquired information about defense contractors' and subcontractors' transactions, and, as a result, gained information about the government's financial transactions. This information, in turn, could reveal which types of components comprise leading-edge defense systems. The Soviets also could learn about technological developments through a review of firms' loan applications. More importantly, the Soviets could use the data about employees of high technology firms to undermine their loyalty.

365. See DOD Plan, *supra* note 337, at 5 (discussing the need for high performance and high quality critical technologies); DEPARTMENT OF DEFENSE MILITARILY CRITICAL TECHNOLOGIES LIST (1987).

366. See DOD Plan, *supra* note 337, at 6 (warning that national security ramifications exist although the *Critical Technologies List* may not include certain technologies).

367. Address by James Nelson, The Johns Hopkins University School of Advanced International Studies: Foreign Policy Institute, Seminar on *Foreign Ownership of U.S. Defense Industries and National Security* (Mar. 15, 1989). Unsophisticated application of the *Militarily Critical Technologies List* to export controls has been a source of inter-agency conflict and frustration for United States industry. *Id.*

368. *Differing Views on Exon-Florio Amendment Presented at House Subcommittee Hearing*, 7 Int'l Trade Rep. (BNA) No. 13, at 444 (Mar. 28, 1990).

369. *Foreign Investment Hearing*, *supra* note 274 (statement of Dr. Susan Tolchin, Public Administration Professor, George Washington University) (unofficial transcript).

In addition, damaging data transfers can occur without violating export control laws. For example, suppliers of certain unclassified technological components to key defense industrial sectors and research facilities might acquire knowledge of production levels, as well as research and development directions that they could provide to foreign entities. Contracts to supply such technological components for industrial research and production, however, often include security agreements that prohibit transfer of proprietary data.³⁷⁰ Nevertheless, the mere existence of a private cause of action would probably not deter the activities of foreign governmental and industrial intelligence organizations. Thus, Exon-Florio may have some application to transfers that need stronger security safeguards.

Use of Exon-Florio for technology transfer concerns may provide a useful official rationale for measures that serve diplomatic and political objectives, such as President Bush's decision to block the sale of Mamco Manufacturing to the Chinese government.³⁷¹ Because restrictions on the export of defense related technology are an internationally recognized national security interest, the government may use technology transfer justifications to circumvent investment-related treaties. The government, however, should avoid over-politicizing the technology transfer rationale because this may cause businesses and foreign governments to become increasingly suspicious of its use.

Many of the countries that would raise the greatest technology security concerns if they acquired United States companies, such as the Soviet Union and East European nations, are not parties to open investment treaties with the United States. In these cases, the government could use Exon-Florio to prevent harmful technology transfers without violating international obligations. When treaty obligations are present, however, the government may have difficulty justifying selective prohibitions of foreign acquisitions on the basis of essential security interests. Justifying the use of Exon-Florio in such cases may require divulging in court information about foreign intelligence operations and specific security problems within the acquiring entity. The United States government may be understandably reluctant to divulge such information. When the government considers using Exon-Florio to pre-

370. See Swennen, *Federal Restrictions on Participation by Foreign Investors in Defense and Other Government Contracts*, in *MANUAL OF FOREIGN INVESTMENT IN THE UNITED STATES* 181 (1984) (stating that "classified contracts must contain a clause requiring the contractor to execute a security agreement . . .").

371. See Rosenthal, *supra* note 32, at A1 (noting that political motives may have driven President Bush's decision to block the sale of an American company to the Chinese).

vent technological espionage, therefore, it should evaluate any agreements that allow courts to determine the existence of threats to essential security interests.

CONCLUSION

The term national security as used in the Exon-Florio Amendment lends itself to broad interpretation. Although the congressional debate over Exon-Florio refers to the national security standard almost exclusively in relation to threats to the defense industrial base and defense preparedness,³⁷² the standard may encompass a broad spectrum of other issues including the economic health of the United States, and concerns about technology transfers.³⁷³

The Amendment's requirement that the president must certify that provisions of law other than the IEEPA and Exon-Florio do not "in the President's judgment provide adequate and appropriate security . . ." ³⁷⁴ does not inhibit the legal authority of the president to block acquisitions because of statutory restrictions on judicial review.³⁷⁵ Nevertheless, in almost every foreseeable situation, other existing law should be sufficient to meet national security requirements and would be a preferable tool for dealing with potential threats.

The most significant substantive limitations on executive discretion under Exon-Florio are the international obligations of the United States. Almost all foreign direct investment in the United States is from states with which the United States has agreements providing for national treatment of foreign investment.³⁷⁶ Existing commitments under these treaties are legally binding on the president under the terms of the statute.³⁷⁷ Although these treaties contain exceptions allowing parties to take actions to protect essential security interests, the ICJ may overturn decisions to invoke these exceptions.³⁷⁸

In addition, many individual businesses could benefit from use of Exon-Florio for economic protectionism. Yet in order for the United States to effectively pursue broad economic goals using the Exon-Florio Amendment, it would have to apply an expanded economic definition of national security in disputes with states party to free investment agree-

372. *Foreign Takeovers Hearing*, *supra* note 21, at 25-57 (statement of Congressman Florio).

373. *Id.* at 27 (statement of J. Michael Farren).

374. 50 U.S.C. app. § 2170(d)(2) (1988).

375. *Id.* § 2170(d).

376. Grimes & Williams, *supra* note 208, at 20.

377. CONF. REP., *supra* note 27, at 927.

378. *E.g.*, (*Nicar. v. U.S.*), 1986 I.C.J. 14 (Judgment on the Merits of June 27).

ments.³⁷⁹ In the case of agreements that allow the ICJ to determine whether threats to a party's essential security interests exist, the application of broad economic definitions of national security when using Exon-Florio would probably result in breach of these agreements—in direct violation of congressional intent.³⁸⁰ In the case of agreements that allow the United States to determine whether threats to its essential security interests exist, resorting to broad definitions under Exon-Florio could render open investment agreements meaningless. Moreover, use of Exon-Florio for economic protection could undermine confidence in United States securities on global markets, reduce beneficial investment flows, and increase the probability that firms in need of capital will go out of business. Such use also raises the possibility of foreign government retaliation, and could cause the United States to lose its position of leadership in efforts to open the world's investment markets. Using Exon-Florio to advance broad economic goals under the guise of preventing the impairment of national security would be a mistake.

Similarly, use of Exon-Florio to coerce economic and political concessions from foreign governments could strengthen protectionist tendencies abroad and violate the obligations of the United States under international agreements. If used carefully, however, the Amendment may provide a useful means to get foreign governments to open up their own investment markets and sanction their foreign or domestic policies. Economic coercion strategies are less likely to threaten the entire framework of international investment law than a protectionist investment policy.

There is little risk that foreign investors will suddenly engage in some politically motivated action that interferes with defense production in a crisis. If foreign investors attempt to close facilities or limit production of important military materials in a crisis, the president may seize control of the facilities and require continued production under other existing law. In very rare cases, the threat an investment poses to defense production may be great enough to override concerns about the risk of damage to defense production resulting from the use of Exon-Florio. The executive should view claims about the magnitude of such threats with considerable skepticism. When other United States law is adequate to protect a key industry, there is no reason for the United States to resort to extraordinary measures such as Exon-Florio.

379. Grimes & Williams, *supra* note 208.

380. CONF. REP., *supra* note 27, at 927.

Since the passage of Exon-Florio, technology transfer issues have supplanted defense production issues as the primary problem that the government has sought to address through use of the provision. The main concern is that a foreign company might gain access to militarily or commercially significant technology through direct investment in United States firms.³⁸¹ Other existing law can handle most military risks that might arise directly through the transfer of technology under control of the acquired firm. Existing law does not adequately address unique situations where foreign investors could use United States-based firms as fronts for intelligence gathering operations and seek information about critical military technology.³⁸² Many of the countries that raise the greatest concerns about technology security are not parties to free investment treaties. The government could use Exon-Florio in these cases to prevent harmful technology transfers without running afoul of international obligations.

Finally, the indeterminate language of the Exon-Florio Amendment may serve a useful political purpose for Congress. Now that Congress has authorized this power, presidents can no longer make excuses for failing to take action against controversial foreign investments. Nevertheless, the failure of Congress to provide a definite standard for the president to apply may have serious negative consequences for the economy of the United States and for relations with other states. Congress' failure to clearly articulate the purpose of this law leaves foreign investors and governments uncertain about the policies underlying the law and their implications. This reduces the force of international law protecting free investment and may deter potential investors.

As a matter of policy, the United States government should attempt to define national security with more precision than the legislative history provides. The definition should indicate that the government will apply Exon-Florio in a manner consistent with the United States policy of supporting an open international investment environment. It should focus on minimizing the risks of erosion of the defense industrial base and evaluate technology transfer and counter-intelligence issues that particular investors raise. By phrasing this definition in terms of factors that the government will consider rather than absolute directives, the regulations can avoid limiting the president's ability to protect the national security in future unforeseeable circumstances. At the same time, following a policy that does not allow for arbitrary expansion of the

381. Exec. Order No. 12,661, 54 Fed. Reg. 784 (1989).

382. *Foreign Investment Hearing*, *supra* note 282 (statement of Dr. Susan Tolchin).

national security standard could allay concerns about governmental interference with private transactions, increase international confidence in United States securities, avoid reductions in beneficial investment flows, decrease the probability that American-based firms will go out of business, and strengthen the position of the United States in negotiations that could help open the world's investment markets.

Exon-Florio provides the executive with new authority which fortuitously may prove useful in filling some finite loopholes in the legal scheme preventing harmful technological exports and the degradation of the defense industrial base. The Amendment also gives the president additional methods of exerting diplomatic leverage in contexts where precision in the application of sanctions may be advantageous. Unfortunately, it also provides the power to restrict investment in economically tough times when foreign firms may be politically useful scapegoats. Over two years after its enactment, Exon-Florio remains a solution in search of a problem. So long as its purposes remain so undefined, the potential for its misuse in response to partisan electoral problems is as great as its potential for proper application to legitimate national security concerns.

APPENDIX

The Exon-Florio Amendment

Section 2170. Authority to Review Certain Mergers, Acquisitions, and Takeovers

(a) Investigations

The President or the President's designee may make an investigation to determine the effects on national security of mergers, acquisitions, and takeovers proposed or pending after the date of enactment of this section [Aug. 23, 1988] by or with foreign persons which could result in foreign control of persons engaged in interstate commerce in the United States. If it is determined that an investigation should be undertaken, it shall commence no later than 30 days after receipt by the President or the President's designee of written notification of the proposed or pending merger, acquisition, or takeover as prescribed by regulations promulgated pursuant to this section. Such investigation shall be completed no later than 45 days after such determination.

(b) Confidentiality of Information

Any information or documentary material filed with the President or the President's designee pursuant to this section shall be exempt from

disclosure under section 552 of title 5, United States Code, and no such information or documentary material may be made public, except as may be relevant to any administration or judicial action or proceeding. Nothing in this subsection shall be construed to prevent disclosure to either House of Congress or to any duly authorized committee or subcommittee of the Congress.

(c) Action by the President

Subject to subsection (d), the President may take such action for such time as the President considers appropriate to suspend or prohibit any acquisition, merger, or takeover, of a person engaged in interstate commerce in the United States proposed or pending on or after the date of enactment of this section by or with foreign persons so that such control will not threaten to impair the national security. The President shall announce the decision to take action pursuant to this subsection not later than 15 days after the investigation described in subsection (a) is completed. The President may direct the Attorney General to seek appropriate relief, including divestment relief, in the district courts of the United States in order to implement and enforce this section.

(d) Findings of the President

The President may exercise the authority conferred by subsection (c) only if the President finds that—

(1) there is credible evidence that leads the President to believe that the foreign interest exercising control might take action that threatens to impair the national security, and

(2) provisions of law, other than this section and the International Emergency Economic Powers Act (50 U.S.C. 1701-1706), do not in the President's judgment provide adequate and appropriate authority for the President to protect the national security in the matter before the President. The provisions of subsection (d) of this section, shall not be subject to judicial review.

(e) Factors to be Considered

For purposes of this section, the President or the President's designee may, taking into account the requirements of national security, consider among other factors—

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

(2) the capability and capacity of domestic industries to meet national defense requirements, including the availability of human re-

sources, products, technology, materials, and other supplies and services, and

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

(f) Report to the Congress

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

(g) Regulations

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

(h) Effect on Other Law

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