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Canadian Investment in the United States: U.S. Restrictions on Foreign Investment

*by Barry Michael Fisher**

I. Introduction

Foreign direct investment has played an important role in the development of the economics of both the United States and Canada. In the early days of the Republic, foreign investment capital was strongly encouraged and assisted in the construction of roads, bridges, canals, the transnational railway system, the Louisiana Purchase and the financing of the Erie Canal. For purposes of this analysis, foreign direct investment is defined as "investments by business enterprises subject to the jurisdiction of the United States in which foreign persons hold, directly or indirectly, a controlling interest."[1] Controlling interest is deemed to exist for corporations where twenty-five percent or more of the voting shares are beneficially held by the foreign person.

Early investment in the United States was, as in Canada, largely in the form of debt and minority ownership.[2] The large amounts of capital necessary to fund the development of the nation were sometimes viewed as a mixed blessing. Foreigners were barred from acting as directors of the first United States banks. To obtain advantageous duty treatment, ships were required to be built in the United States and to be wholly-owned by Americans as early as 1789. The Alien Land Law of 1887 barred foreigners from owning land in federal territories.

Much of the national interest legislation that will be analyzed in this paper was generated during a period of ardent nationalism between World War I and World War II. The Trading with the Enemy Act, which presently serves as the basis for the Foreign Assets Control Regulations, and provides for the confiscation of enemy alien property, was enacted during World War I. The Act was used extensively in World War II to seize the assets of German and Japanese nationals.

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[1] Definition used by the United States Department of Commerce for statistical purposes. A 10% standard is used for both the Securities Exchange Act of 1934 and the Foreign Investment Study Act of 1974.

[2] For a history of the role of foreign investment and the development of U.S. policy, see Note, *An Evaluation of the Need for Further Statutory Controls on Foreign Direct Investment in the United States*, 8 VAND. J. TRANSNAT'L L. 147, 152-57 (1974); Note, *Foreign Direct Investment in the United States: Possible Restrictions at Home and a New Climate for American Investment Abroad*, 26 AM. U.L. REV. 109, 112-114 (1976) [hereinafter cited as Note, *Restrictions*].

As the United States economy blossomed after World War II, the United States became a net exporter of capital and an advocate of the free flow of international investment dollars. Most of the bilateral treaties of friendship, commerce and navigation, designed to encourage international investment and trade by assurances of national treatment and protection, were entered into in this post-war period. Legislation in this period, such as the Economic Co-Operation Act of 1948, the Mutual Security Act of 1954, the Foreign Assistance Acts of 1961 and of 1969, all sought to provide a system of investment guarantees for overseas investment by U.S. nationals. In 1962, the so-called "Hickenlooper Amendment" was enacted to provide a mechanism for the suspension of assistance to any country that had taken actions deemed adverse to U.S. investment interests. In the 1960's, the development of chronic balance of payments problems led to legislation, such as the Interest Equalization Act, to limit capital outflows from the United States and to encourage inflows.[3]

II. FOREIGN INVESTMENT IN THE UNITED STATES IN THE LAST DECADE

By the early 1970's, this balance of payments problem led to a depressed U.S. dollar and an undervaluation of U.S. corporate securities. The level of foreign direct investment in the United States, which had grown at an annual rate of 4.1 percent from 1962 to 1967, and 8.6 percent from 1968 to 1972, blossomed to 38.3 percent and 22.3 percent in 1973 and 1974, respectively.[4] A primary reason for the increase was the investment potential of petrodollar reserves generated by the 1973 oil price increase. The 1973 oil shock precipitated a U.S. government review of its policy towards foreign direct investment.[5]

The concern over significant increases in the level of foreign direct investment in the United States resulted in several congressional hearings[6] and legislative initiatives.[7] The realization that the reporting base for Department of Commerce figures from the preceding benchmark survey in 1959 were out-of-date and that the data on foreign investment in real estate and agricultural facilities was almost non-existent, led to the enactment of the Foreign Investment Study Act of 1974.[8] The Foreign

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[3] A.B.A. COMMITTEE TO STUDY FOREIGN INVESTMENT IN THE UNITED STATES, A GUIDE TO FOREIGN INVESTMENT UNDER UNITED STATES LAW, CL. 1 (1979) [hereinafter cited as GUIDE].

[4] Ricks, *The Future of Foreign Direct Investment in the United States*, in REGULATION OF FOREIGN DIRECT INVESTMENT IN CANADA AND THE UNITED STATES 179 (Fry & Radebaugh eds. 1983).

[5] Niehuss, *Foreign Investment in the United States: A Review of Government Policy*, 15 VA. J. INT'L L. 65, 81 (1975).

[6] *E.g.*, *Hearings Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing and Urban Affairs*, 93d Cong., 2d Sess. (1974).

[7] *E.g.*, H.R. 8951, 93d Cong., 1st Sess. (1973); and H.R. 11, 265, 93d Cong., 1st Sess. (1974).

[8] Foreign Investment Study Act of 1974, 15 U.S.C. § 786 (1982).

Investment Study Act of 1974 authorized a comprehensive report which concluded that no adjustment in traditional U.S. policy was needed at that time, but recommended legislation designed to improve data collection on a continuing basis.[9]

Although there was no perceived need for legislation to restrict foreign direct investment, a Committee on Foreign Investment in the United States (CFIUS) was established by Executive Order.[10] Among the significant responsibilities of CFIUS are:

1. Providing guidance on arrangements with foreign governments for advanced consultation on prospective major foreign government investments in the United States; and

2. The review of investments in the United States which, in the judgement of CFIUS, might have major implications for United States' national interests.

To carry out its responsibility for monitoring foreign investment in the United States and for co-ordinating the implementation of U.S. policy, CFIUS reports its findings on its reviews of investments with major policy implications. Unlike FIRA, it is not a monitoring body and does not have authority to approve or disapprove any foreign investment. In practice, CFIUS has limited its reviews to government controlled investments.[11]

Acting on the Foreign Investment Study Act of 1974 report recommendations, the United States Congress subsequently enacted the International Investment Survey Act of 1976,[12] which empowers the President to establish and maintain a regular information collection program with respect to foreign investment in the United States and U.S. investment abroad. Because of the potentially deleterious consequences of disclosure of the sources of foreign investment, several investors sought to avoid the reporting requirements, a strengthening of reporting regulations has been advocated.[13]

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[9] FOREIGN DIRECT INVESTMENT IN THE UNITED STATES: REPORT OF THE SECRETARY OF COMMERCE TO THE CONGRESS IN COMPLIANCE WITH THE FOREIGN INVESTMENT STUDY ACT OF 1974 233-240 (1976).

[10] Exec. Order No. 11,858, 40 Fed. Reg. 20,263 (1975), as amended by Exec. Order No. 12,188, 45 Fed. Reg. 989 (1980).

[11] *The Adequacy of the Federal Response to Foreign Investment in the United States*, H.R. REP. No. 96-1216, 96th Cong., 2d Sess. 173 (1980). The Twentieth Report by the Committee on Government Operations was very critical of the operation of CFIUS. The report specifically criticized:

1. CFIUS' exclusion of review of private (non-governmental) investments and portfolio investments;
2. Untimely and inadequate consultations with foreign governments;
3. The lack of criteria defining "major implications for U.S. national interests"; and
4. The authority of the U.S. Government to prevent undesirable investment.

[12] International Investment Survey Act of 1976, 22 U.S.C. § 3101 (1982).

[13] Note, *International Investment Survey Act: The High Cost of Knowledge*, 14 LAW &

Between 1975 and 1982, foreign direct investment in the United States increased by more than 1,000 percent. From 1970 to 1982 alone, the United States attracted $86 billion in new foreign direct investment, compared with $13 billion for the period 1879 to 1970.[14] In 1982, the foreign direct investment position in the United States increased thirteen percent to $101.8 billion, compared with a record thirty-two percent increase in 1981.[15] Although the rate of increase had declined, it was only moderately smaller than the increases in 1980 and 1981 ($13.9 and $12.0 billion, respectively) and larger than those in any year before 1979.[16] Between 1979 and 1981, foreign direct investment flows into the United States increased significantly, not only in absolute amounts, but relative to U.S. direct investment abroad. In 1981 and 1982, inward foreign direct investment was $24.2 billion more than outward direct investment.[17]

Although the 1982 figures are lower than those of 1981 due to high borrowing costs and depressed corporate earnings, the 1982 figures continue to reflect the most current trend towards significant levels of foreign direct investment in the United States which began in 1978, growing an average of twenty-five percent each year.[18]

The reason for this surge in foreign direct investment in the United States has been well documented. Despite fluctuations in the relative value of the U.S. dollar and the strength of the U.S. stock and real estate markets, the United States remains attractive to foreign investors because of its unparalleled economic and political stability, the size and homogeneity of its domestic markets, its raw materials, and the level of its technological advances. An additional factor has been the unprecedented growth of the multinational corporation. Investment by multinationals, in fact, accounts for nearly half of all foreign investments in the U.S. domestic economy.[19]

POL'Y IN INT'L BUS. 481, 493 (1982). The Note concludes that any such toughening would bring the Department of Commerce's reporting requirement enforcement efforts into conflict with the statutory caveat that the information gathering process have a "minimum burden on business" and not deter foreign direct investment.

[14] Ricks, *supra* note 4, at 1.

[15] Chung & Fouch, *Foreign Direct Investment in the United States in 1982*, 63 SURV. OF CURRENT BUS. 31 (Aug. 1983) [hereinafter cited as Chung]. The increase in the position was less in 1982 than in 1981 because capital inflows were smaller— $10.4 billion compared with $23 billion.

[16] *Id.*

[17] Bale, *The U.S. Federal Government's Policy Towards Foreign Direct Investment*, in REGULATION OF FOREIGN AND DIRECT INVESTMENT IN CANADA AND THE UNITED STATES 29 (Fry & Radebaugh eds. 1983).

[18] Scholl, *The International Investment Position of the United States in 1982*, 63 SURV. OF CURRENT BUS. 42 (Aug. 1983).

[19] H.R. REP. No. 1216, 96th Cong., 2d Sess. 9-10 (1980).

III. U.S. Policy and Regulation of Foreign Direct Investment

The traditional policy of the U.S. Government towards foreign direct investment in the United States is neither to promote nor discourage inward or outward investment flows or activities.[20] This investment policy is based on four stated premises:

1. International investment will generally result in the most efficient allocation of economic resources if it is allowed to flow according to market forces;
2. There is no basis for concluding that a general policy of actively promoting or discouraging international investment would further the U.S. national interest;
3. Unilateral U.S. Government intervention in the international investment process could prompt counteractions by other governments with adverse effects on the U.S. economy and U.S. foreign policy; and,
4. The United States has an important interest in seeking to assure that established investors receive equitable and non-discriminatory treatment from host governments.

Notwithstanding the Administration's position that the United States accords foreign investors the same fair, equitable and non-discriminatory treatment it believes governments should accord foreign investment under international law, the complex U.S. legal system and extensive regulatory framework have erected a number of barriers to foreign direct investment. These restrictions were enacted at various times, and their rationale and impact vary accordingly.[21] The documented increase in foreign direct investment has been cause for the reconsideration of U.S. policy, but to date the policy lives uncomfortably with a host of domestic laws.[22] In addition to specific laws which regulate foreign direct investment there are a number of U.S. laws of general application which have a particular impact upon the foreign investor.

IV. Specific Federal Regulation of Investment and Activities by Foreigners

Laws can restrain foreign investment in several ways through, for ex-

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[20] Statement by the President released September 9, 1983; *see also* Inouye, *Political Implications of Foreign Investment in the United States*, 27 Mercer L. Rev. 597 (1976); Mundheim & Heleniak, *American Attitudes Toward Foreign Direct Investment in the United States*, 2 J. Comp. L. & Security Reg. 221 (1979).

[21] Elmer & Johnson, *Legal Obstacles to Foreign Acquisitions of U.S. Corporations*, 30 Bus. Law. 681, 698 (1975) conclude: "Occasional fevers of nationalism and legitimate concerns for national security have created a number of restrictions and a few bars to alien takeover and ownership of domestic corporations. In addition, poorly drafted statutes encumbered by myriad modifications and amendments have left confusion in several areas."

[22] For an advocacy of a new policy that would attempt to strike a better balance between costs and benefits of foreign investment, *see* Note, *Closing the Open Door to Foreign Direct Investment*, 15 Cornell Int'l L.J. 107 (1982).

ample, outright prohibition, the inability to secure or retain a right of privilege affecting such investment, a requirement of prior approval, or indirect restraint through the imposition of requirements that are difficult, if not impossible, to satisfy. The United States has, however, both constitutional and treaty limitations on its capacity to regulate foreign direct investment that do not apply with equal force, for example, in Canada.

While there are several "national security" exceptions, foreign individuals and corporations receive some measure of protection under the due process and equal protection clauses of the U.S. Constitution.[23] Classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny.[24] The residual power under the U.S. Constitution falls to the states rather than the federal government (as in Canada) and the states thus have relatively greater powers than the provinces. The states also have constitutional limitations on their ability to control foreign investment, and must show a compelling state interest which justifies unequal treatment.[25] It is quite clear that resident aliens enjoy equal protection, and reasonably clear that nonresident aliens physically present in the United States do also, while those outside the United States do not. However, the status of nonresident aliens without property interests remains problematic.[26]

Foreign investors may also seek protection under the national treatment provisions of one of the friendship, commerce and navigation (FCN) treaties to which the United States (but not Canada) is a party, and under which foreign investors are given broad rights to acquire U.S. entities.[27] While this national treatment principle is subject to express excep-

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[23] Darby, *The Guarantees Accorded Foreign Investors*, 26 AM J. COMP. L. 171 (1978).

[24] *See generally* Graham v. Richardson, 403 U.S. 365 (1972); *In re Griffiths*, 413 U.S. 717 (1973).

[25] Sugarman v. Dougall, 413 U.S. 634 (1973).

[26] Liebman & Levine, *Foreign Investors and Equal Protection*, 27 MERCER L. REV. 615 (1976).

[27] *E.g.*, the FCN Treaty with Japan provides that:

> Nationals and companies of either Party shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial and other business activities within the territories of the other Party, whether directly or by agent or through the medium of any form of lawful juridical entity. Accordingly, such nationals and companies shall be permitted within such territories: (a) to establish and maintain branches, agencies, offices, factories and other establishments appropriate to the conduct of their business; (b) to organize companies under the general company laws of such other Party, and to acquire majority interests in companies of such other Party; and (c) to control and manage enterprises which they have established or acquired. Moreover, enterprises which they control, whether in the form of individual proprietorships, companies or otherwise, shall, in all that relates to the conduct of the activities thereof, be accorded treatment no less favourable than that accorded like enterprises controlled by nationals or companies of such other Party.

Treaty & Protocol between the United States of America and Japan, Oct. 30, 1953, United tions for certain types of vital activities (e.g. communications), and may be further qualified by protocols and escape clauses (e.g. national security) that accompany the FCN treaties, and while most are terminable on one year's notice, their existence does provide all foreign investors with some comfort that U.S. policy is not likely to change significantly in the short run.[28] An additional limitation is that the United States is a party to the Organization for Economic Cooperation and Development (OECD) Code of Liberalization of Capital Movements. While it has been argued that the Code has the force of a treaty under international law,[29] it is subject to a U.S. reservation[30] and qualifications such as clauses of derogation which authorize member nations to refrain from liberalization for various "economic and financial" reasons.[31] This too augurs for some measure of stability in U.S. policy.[32]

In light of this existing policy, this section will examine, within these constitutional and treaty limitations, some of the most frequently cited U.S. legislation that affects foreign investors.[33] It makes no attempt to be comprehensive, and omits for purposes of this paper the complex web of federal and state banking regulations which are too broad to be considered here, and such otherwise important areas as labor relations and product liability. The analysis is divided into six categories.

States-Japan, art. VII, 4 U.S.T. 2063, 2069; T.I.A.S. No. 2863.

[28] *See generally* J. Niehuss, *supra* note 5, at 68.

[29] Note, *The Rising Tide of Reverse Flow: Would a Legislative Breakwater Violate U.S. Treaty Commitments?* 72 MICH. L. REV. 551, 579 (1974).

[30] The U.S. reservation applies to direct investment in the United States by nonresidents and reads as follows: The reservation applies only to certain statutory provisions which prohibit immediate direct investments by aliens in enterprises engaged in fresh water shipping, domestic radio communications and domestic air transport, or which limit to twenty-five percent alien participation in corporations engaged in such enterprises, and which place certain other requirements on investments by aliens in enterprises engaged in coastal shipping, hydroelectric power production, other forms of communications and the utilization or production of atomic energy.

[31] Code of Liberalization of Capital Movements § 7.

[32] Note,*Restrictions, supra* note 2, at 139; *see generally* GUIDE, *supra* note 3, at 22-31.

[33] For a more comprehensive analysis of specific federal regulation of foreign direct investment, see *Report to the Congress on Foreign Direct Investment in the United States,* 7 U.S. DEPT. OF COMM. App. K (Apr. 1976); *see also* U.S. DEP'T OF THE TREASURY, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES: A SUMMARY OF FEDERAL LAWS BEARING ON FOREIGN INVESTMENT IN THE UNITED STATES (Sept. 1979); FOREIGN INVESTMENT REVIEW AGENCY, BARRIERS TO FOREIGN INVESTMENT IN THE UNITED STATES (1982); Vila, *Legal Aspects of Foreign Direct Investments in the United States,* 16 THE INT'L LAW. 1 (1982); R. HOUCK & N. CAYWOOD, LEGAL ENVIRONMENT FOR FOREIGN DIRECT INVESTMENT IN THE UNITED STATES (2d ed. 1981); American Bar Association Conference on European Investment in the United States, October 28-29 (1983); PRACTISING LAW INSTITUTE, FOREIGN INVESTMENT IN THE UNITED STATES No. 384 (S. Singer Chair. 1982); J. MARANS, P. WILLIAMS, A. MIRABITO, FOREIGN INVESTMENT IN THE UNITED STATES: LEGAL ISSUES AND TECHNIQUES (1977).

A. *Transportation*

1. Shipping

For a merchant shipping vessel to be entitled to U.S. registry, it was required to be wholly owned either by citizens of the United States or by one or more domestic corporations whose president or other chief executive officer and board chairman are U.S. citizens, and a majority of the number of directors necessary to constitute a quorum could not be foreign citizens.[34]

Coastal and fresh water shipping of freight or passengers in the United States must be done in vessels built and registered in the United States which are owned by United States citizens.[35] For a corporation to register a ship in the United States, the corporation's principal officer must be a United States citizen and seventy-five percent of its shares owned by United States citizens.[36] There are exceptions for incidental shipping by foreign-controlled manufacturing and mining companies,[37] and for inter-coastal transportation of empty items such as cargo vans, containers, and tanks where the country of registry grants reciprocal privileges to U.S. vessels.[38]

Without the prior approval of the U.S. Secretary of Commerce, only U.S. citizens may acquire an interest in or charter a vessel owned in whole or in part by a U.S. citizen and documented under U.S. law.[39] During war or a national emergency proclaimed by the President, foreign controlled enterprises may not acquire or charter, without approval of the U.S. Secretary of Commerce, U.S. flag vessels, vessels owned by a United States citizen or shipyard facilities, or a controlling interest in corporations owning such vessels or facilities.[40]

Except for military supplies or products exported pursuant to a U.S. government loan to foster such exports, at least one-half of the cargo procured or financed by the U.S. Government or an instrumentality thereof is required, except in certain circumstances, to be transported on privately owned U.S. flag vessels.[41] Foreign citizens may not act as captains of or serve in certain positions as officers, or in certain circumstances as crew on vessels documented under the laws of the United States.[42] Foreign controlled entities could not obtain special government loans for the financing or refinancing of the cost of purchasing, constructing or operat-

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[34] 46 U.S.C. § 11 (1976) (repealed 1981).
[35] 46 U.S.C. § 689 (1976).
[36] 46 U.S.C. § 802 (1976 & Supp. V 1981)
[37] 46 U.S.C. § 883-1 (1976 & Supp. V 1981).
[38] 46 U.S.C. § 883 (1976 & Supp. V 1981).
[39] 46 U.S.C. § 808 (1976 & Supp. V 1981).
[40] 46 U.S.C. § 835 (1976 & Supp. V 1981).
[41] 46 U.S.C. § 1241 (1976 & Supp. V 1981).
[42] 46 U.S.C. §§ 221, 1132 (1976 & Supp. V 1981).

ing commercial fishing vessels or gear.[43] Foreign controlled enterprises may not purchase vessels converted by the government for commercial use or surplus war built vessels at a special statutory price.[44]

B. *Communications*

1. Radio and Television Licensing

Foreign governments and their representatives may not hold any radio station license.[45] Aliens and their representatives, foreign registered and foreign-owned corporations may not hold licenses for broadcast or common carrier radio stations. For this purpose a corporation is considered foreign-owned if any director or officer is an alien, or if more than twenty percent of its capital stock is owned by aliens, a foreign government or a foreign registered corporation.[46] A United States corporation which is foreign controlled may not hold a broadcast or common carrier license if the Federal Communications Commission finds the denial of the license to be in the public interest. A corporation is considered to be foreign controlled for this purpose if a controlling corporation has an alien officer, or if more than twenty-five percent of its directors are aliens, or more than twenty-five percent of its stock is owned by foreign interests.[47] Aliens cannot obtain operators' licenses for broadcast radio stations.[48]

2. Telegraph Merger Authorizations

The Federal Communications Commission was prohibited from approving a merger among telegraph carriers which would result in more than twenty percent of the capital stock of a carrier being owned, controlled or voted by an alien, a foreign corporation, a foreign government entity, or a corporation of which any officer or director was an alien, or of which more than twenty percent of the capital stock was owned, controlled or voted by an alien, a foreign government or a foreign corporation.[49]

3. Communications Satellite Corporation

No more than twenty percent of the shares of a Communications Satellite Corporation which are offered to the public may be held by aliens, foreign governments, foreign-owned, registered or controlled

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[43] 16 U.S.C. § 742c(b)(7) (repealed 1982). 46 U.S.C. §§ 1401, 1402 omitted (1976).
[44] 50 U.S.C. app. § 1737 (1976 & Supp. V 1981).
[45] 47 U.S.C. § 310(a) (1976).
[46] 47 U.S.C. § 310(b)(1-3) (1976).
[47] 47 U.S.C. § 310(b)(4) (1976).
[48] 47 U.S.C. § 303(2), (3) (1976).
[49] 47 U.S.C. § 222(d) (1976) (repealed 1981).

corporations.[50]

C. *Aviation*

A foreign controlled enterprise substantially engaged in the business of aeronautics may not acquire control of a U.S. air carrier and a foreign air carrier or person controlling a foreign air carrier may not acquire control of any U.S. company substantially engaged in the business of aeronautics without approval of the Civil Aeronautics Board. Ownership of ten percent or more of the voting securities or capital of an air carrier gives rise under the Aviation Act to a presumption of control. Only an entity which is a U.S. citizen can be a U.S. air carrier and carry persons, property or mail as a common carrier for compensation or hire between points within the United States. A corporation is a U.S. citizen only if seventy-five percent or more of its voting securities are owned and controlled by U.S. citizens, and the President and two-thirds or more of the management and Board of Directors are U.S. citizens.[51] Registration of aircraft is limited to those owned by citizens, resident aliens and domestic corporations.[52]

D. *Energy and National Resources*

1. Atomic Energy

Aliens, foreign governments, foreign corporations and affiliates thereof cannot be issued a license for the operation of atomic energy utilization or production facilities. Determinations as to ownership and control are made on a case-by-case basis.[53]

2. Pipelines and Mineral Leasing

Except insofar as an alien's home country grants reciprocal rights to United States citizens, no alien or U.S. domestic corporation with alien shareholders may acquire rights of way for oil pipelines or acquire any interest therein, or acquire leases or interests therein for exploiting coal, oil, oil shale, natural gas and similar minerals on federal lands other than the outer-continental shelf.[54] Access to hard mineral deposits such as uranium in lands belonging to the federal government is open only to citizens of the United States, those who have declared an intention to become citizens and corporations incorporated under domestic law.[55] Leases for the development of geothermal steam and associated resources may be

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[50] 47 U.S.C. § 734(d).
[51] 49 U.S.C. §§ 1301(3),(16), 1372, 1378, 1508(b) (1976 & Supp. V 1981).
[52] 49 U.S.C. § 1401 (1976 & Supp. V 1981).
[53] 42 U.S.C. § 2133, 2134 (1982).
[54] 30 U.S.C. §§ 181, 185(a), 352 (1982); 43 C.F.R. § 3502. 1-1 (1983).
[55] 30 U.S.C. § 22 (1982).

issued only to U.S. citizens and domestic corporations.[56]

3. Land

Disposal of public lands to any non-citizen or to corporations not subject to laws of the United States is prohibited.[57] Foreign controlled enterprises operating in the United States may not obtain special government emergency loans for agricultural purposes after a natural disaster or government loans to individual farmers or ranchers to purchase or operate family farms.[58] Only U.S. citizens may locate and patent mining claims.[59]

E. Defense

It is difficult for foreign controlled corporations (less so for Canadian corporations) to obtain security clearances necessary to carry out a contract involving classified information. Both a facility clearance and individual clearances for personnel who may have access to classified information are required. Generally, facilities which are under foreign ownership, control or influence are ineligible for facility clearances, and foreign nationals are ineligible for individual clearances.[60]

F. Government Procurement and Programs

1. Procurement

The Buy-America Act requires that U.S. government agencies to acquire for public use only materials produced or manufactured in the United States. These provisions do not apply where the agency head determines that it would be inconsistent with the public interest or that the cost of domestic articles is unreasonable, nor do they apply to items purchased for use outside the United States or to items not produced in the United States in sufficient and reasonably available commercial quantities and of satisfactory quality.[61]

The Berry Amendment, which has been added to the Defense Appropriations Act annually since 1953, restricts the Department of Defense from procuring articles of food, clothing, cotton, silk, synthetic fabric or speciality metals which are not produced in the United States.[62]

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[56] 30 U.S.C. § 1015 (1982).

[57] 43 U.S.C. § 1717 (1982).

[58] 7 U.S.C. §§ 1922, 1941 (1982).

[59] 30 U.S.C. § 22, 71 (1982).

[60] Exec. Order No. 10,450, 3 C.F.R. 936 (1949-53 compliation, order issued 1953); Exec. Order No. 10,865, 3 C.F.R. 398 (1959-63 compliation, order issued 1960); Exec. Order No. 11, 652, 3A C.F.R. 154 (1972 compilation, order issued 1972).

[61] 41 U.S.C. § 10(a)-(d) (1982); 41 C.F.R. 1-6, 104-4 (1983).

[62] *E.g.*, Pub. L. No. 95-457, § 824, 95 Stat. 1231, 1248 (1978).

2. Insurance and Loan Programs

a. Overseas Investment Insurance Programs

Aliens, foreign enterprises and foreign controlled domestic enterprises are ineligible to purchase Overseas Private Investment Corporation insurance or guarantees. However, foreign corporations, partnerships or other associations, wholly owned by one or more United States citizens, corporations, partnerships or associations are eligible.[63]

b. Loan Guarantees for Electric Vehicles

Aliens, foreign corporations and foreign-controlled corporations are ineligible for government loan guarantees to encourage the commercial production of vehicles powered by electric motors or a combination of electric motors and other power sources. A corporation, partnership, firm or association is deemed a citizen or national of the United States only if a controlling interest is owned by citizens of the United States. The citizenship requirement for corporations, partnerships, firms or associations may be waived if a controlling interest is owned by citizens of countries which are participants in the International Energy Agreement.[64]

3. Custom House Brokers

In order to obtain a custom house broker's license a person must be a citizen of the United States. In order to obtain a license to operate a corporate, association or partnership custom house brokerage business, at least two of the officers or partners of the firm must be licensed custom house brokers.[65]

V. Laws of General Application to Foreign Direct Investors

In addition to the restrictions, limitations and prohibitions set forth in the preceding section, there are a number of U.S. laws of general application to both foreign and domestic investors, but which may have a proportionally greater impact on the foreign investor who is unprepared for the application of such laws. In addition to the taxation laws which are the general theme of this program and which are dealt with in greater specificity elsewhere, there are four general areas of U.S. law which, in particular, merit the attention of Canadian investors.

A. *Antitrust Laws*

Because the constitutional nexus for U.S. antitrust law is the trade

[63] 22 U.S.C. § 2198(c) (1982).
[64] 15 U.S.C. § 2509 (1982); 46 U.S.C. § 802 (1976 & Supp. V 1981).
[65] 19 U.S.C. § 1641 (1982).

and commerce clause of the United States Constitution rather than the criminal power, because of the general litigous nature of the United States judicial system, and because of the severity of the civil penalties for violation of the U.S. antitrust laws, potential impact of the antitrust laws should be seriously considered by any foreign investor.

Section 7 of the Clayton Act[66] prohibits a direct or indirect corporate acquisition of shares or assets of a corporation where the effect of such acquisition may be to substantially lessen competition or tend to create a monopoly in any line of commerce in any section of the United States. This section has been broadly construed by U.S. courts and applies to acquisitions, mergers and joint ventures involving actual or potential competitors in the U.S. market.

Sections 1 and 2 of the Sherman Act[67] prohibit monopolization and attempts to monopolize, and contracts, combinations and conspiracies "in restraint of trade or commerce among the several States, or with foreign nations." The effects of the Sherman Act are not restricted to activity within the United States, but also extend to foreign activities which have an anti-competitive effect on United States commerce.[68] This theory has resulted in complaints in the extraterritorial application of the U.S. antitrust laws.[69]

In addition, the Federal Trade Commission Act[70] prohibits deceptive acts such as false advertising, deceptive sales approaches, and product misrepresentations, and can be used to prosecute these anti-competitive acts both before and after a transaction is consummated.

Under the Hart-Scott-Rodino Antitrust Improvement Act of 1976,[71] if an acquisition or sale of assets or voting securities, a merger or a formation of a joint venture falls under certain statutory criteria, it may not be completed until detailed reports have been filed with the Federal Trade Commission and the Antitrust Division of the Department of Justice, and a waiting period has expired. The Act is triggered where: 1) the annual net sales or total assets of either the acquired or acquiring person are $10 million U.S. or; 2) the amount of net sales or total assets of the other party to the transaction are $100 million U.S. or more; and 3) as a result of the transaction the acquiring person will hold fifteen percent or more of the assets or voting securities of the acquired person or an aggregate total amount of assets and voting securities of the acquired person in ex-

[66] 15 U.S.C. § 18 (1981).

[67] 15 U.S.C. §§ 1, 2 (1981).

[68] Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976) (the Court of Appeals for the 9th circuit set standards for the exercise of the extraterritorial application of the Sherman Act).

[69] U.S. policy on the international application of antitrust laws is set fourth in the ANTITRUST DIVISION OF THE UNITED STATES DEPARTMENT OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS (January 26, 1976, *revised* March 1, 1977).

[70] 15 U.S.C. § 45 (1981).

[71] 15 U.S.C. § 18a (1981).

cess of $15 million U.S. These tests include sales and assets both within and without the United States and consolidate all affiliates.

The Federal Trade Commission Act established the Federal Trade Commission with the power to investigate the organization, business, conduct practices and management of most corporations engaged in interstate commerce.[72] If the acquisition for ownership of an export trade corporation has the effect of restraining trade or substantially lessening competition within the United States, the Federal Trade Commission has the power to forbid such acquisition or ownership.[73]

Regulations have established a Business Review Procedure of the Antitrust Division of the Justice Department,[74] pursuant to which the foreign investor may request the Division to state its enforcement intentions with respect to the investment. The resulting tradeoff is between some indication of the Division's enforcement intention and the extensive disclosure of information required to obtain such a statement of intention. A considerable amount of the factual information required to be disclosed becomes public information thirty days after a review letter is issued.[75]

B. *Securities Laws*

Unlike Canada, in the United States the corporation laws are, with very limited exceptions, subject exclusively to state regulation, whereas the federal regulation of offering of securities to the public is regulated by both federal and state law.

U.S. federal securities laws create problems for a foreign direct investor, particularly where the foreign acquiring company uses its own securities as consideration for the purchase of the U.S. business enterprise, or where the acquiring company purchases the stock of a publicly held U.S. corporation. To the extent that the foreign issuer raises funds from the offering of securities to the public, the issue, in most cases, must be registered under the Securities Act of 1933.[76] Once a public offering has been made, the issuer remains subject to stringent proxy solicitation rules under section 14 of the Securities Exchange Act of 1934,[77] and the short-swing profit disgorgement rules of section 16 thereof.[78] Canadian issuers are exempt from the registration requirements where total assets do not exceed three million dollars and there are fewer than five hundred security holders, where information required to be publicly disclosed under the laws of Canada has been submitted to the Securities and Exchange Commission, and where such information is voluntarily distributed to its se-

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[72] 15 U.S.C. § 46(a) (1981).
[73] 15 U.S.C. § 63 (1981).
[74] 28 C.F.R. § 50.6 (1983).
[75] 28 C.F.R. §§ 50.6, 50.10(a), (b) (1983).
[76] 15 U.S.C. § 77 (1982).
[77] 15 U.S.C. § 78n (1981).
[78] 15 U.S.C. § 78p (1981).

curity holders. Recent rule changes, however, require Canadian issuers with securities quoted on NASDAQ to comply with the registration requirements of the Securities Exchange Act of 1934.[79]

Several Canadian corporations have run afoul of the disclosure requirements triggered by sizeable acquisitions of U.S. publicly traded securities. Section 13(d) of the Securities Exchange Act of 1934 requires an investor, who has acquired more than five percent of the beneficial ownership of any class of equity securities registered under Section 12 of that Act, to file with the Commission certain information including citizenship and investment intention. Section 14(d) requires an investor making a tender offer for more than five percent of the equity securities of a corporation to file specified information with the Commission simultaneously with the commencement of the tender offer.

In addition to the federal securities laws concerned primarily with full, complete and accurate disclosure, each state has its own securities or anti-fraud statute which often adds the more burdensome requirement that the offer of such securities to the public within that state be "fair." Thus, disclosure of the risks involved in a particular offering may be adequate to satisfy the standards of federal securities laws and still run afoul of the particular requirements of individual states. Notwithstanding significant constitutional challenges on the basis of the commerce clause and preemption grounds, several states continue to formulate their own tender offer statutes which provide cumbersome restrictions to foreign investors.[80]

C. *Immigration Laws*

In addition to the non-immigrant visa categories traditionally used by foreign investors (H-1 Visas for Persons of Outstanding Merit and Ability in the Arts and Sciences, H-2 Training Visas, and L-1 Intra-company Transfer Visas), there are two applications of particular importance to Canadian investors. The first is that non-immigrants entering the United States who have an unabandoned residence in Canada, and who enter the United States temporarily for a lawful business purpose (B-1 Business Visitor), are not required to obtain a visa. Canadians need only carry a declaration on the employer's letterhead that the individual is entering the United States temporarily for a lawful business purpose, has an unabandoned residence in Canada, and will continue to be paid by the Canadian employer during his visitation to the United States.

The second consideration of importance to Canadians is the non-applicability of the trader and treaty investor provisions of the Immigration Naturalization Act, insofar as Canada is not a party to any treaty of commerce and navigation with the United States. Thus, Canadians cannot

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[79] Fisher, *Securities: New U.S. Reporting Requirements*, 2 LEGAL ALERT 330 (1984).

[80] *E.g.*, OHIO REV. CODE ANN. § 1704.041 (Baldwin 1971).

obtain immigration status on the basis of an investment alone.

VI. State Regulation of Foreign Direct Investment

Several states have provisions which restrict the activities of foreign investors.

A. *Land*

Some states restrict or encumber the ability of non-citizens and non-resident aliens to own real estate within particular states, restrict the ownership capabilities of foreign (including Canadian) corporations, restrict the acquisition of state-owned land, and restrict the use of land.[81]

B. *Insurance*

State law almost exclusively governs the activities of insurance companies, including foreign companies. All states have extensive statutory provisions that define the out-of-state insurers that may be admitted and the conditions under which they may operate. Generally, foreign insurers are required to satisfy more stringent admission standards that are imposed on insurers formed outside the state but within the United States. In addition, foreign insurers are sometimes subjected to more stringent or different requirements before they are permitted to write insurance in a particular state than are imposed on insurers formed in other states of the United States.

The states generally have not enacted extensive provisions regarding the organization and operation of insurance companies themselves, but have left such matters to the individual state corporation statutes. Several states, however, require meetings of insurance companies formed within the particular state to be held therein, and a number of others have enacted citizenship or residency requirements for incorporators and directors.[82]

VII. Reporting Requirements

The United States federal government prescribes a myriad of reporting requirement forms to be filed by foreign investors. Of those statutes, the International Investment Survey Act of 1976[83] and the Agricultural Foreign Investment Disclosure Act of 1978[84] are highlighted herein. The administration of the statutes is the responsibility of the Bureau of Economic Analysis of the United States Department of Commerce.

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[81] *See* FOREIGN INVESTMENT REVIEW AGENCY, BARRIERS TO FOREIGN INVESTMENT IN THE UNITED STATES 34 (1982).

[82] *Id.* at 41.

[83] 22 U.S.C. § 3101 (1982).

[84] 7 U.S.C. §§ 3501-3508 (1982).

A. *Form B-13: Establishment, Acquisition or Purchase of the Operating Assets of a United States Business Enterprise by a Foreign Person*

The major source of information in the Bureau of Economic Analysis reporting system of foreign investment in the United States is Form BE-13, which is to be filed generally within forty-five days after a foreign person establishes, or directly or indirectly acquires, more than a ten percent voting interest in a U.S. business enterprise. This is supplemented every five years by a more detailed "benchmark" survey on Form BE-12 and by interim reports on Form BE-15. The most recent benchmark survey was conducted in the year 1980, with the results published in early 1983. The next benchmark survey will be in 1987 to coincide with the outward investment survey to be conducted in that year.

These reporting forms ask for information concerning foreign "direct investment in the United States," which means ownership or control of ten percent or more of the voting securities of an incorporated or unincorporated U.S. business enterprise by a foreign person. Much like Canada's Foreign Investment Review Act, a foreign person includes an associated group, which means two or more persons, who by the appearance of their actions, by agreement or by understanding, exercise their voting priviliges in a concerted manner to influence the management of the business enterprise. Ownership by a foreign person of a direct investment in a U.S. business enterprise makes that enterprise a "U.S. affiliate" of that foreign person.

The forms also elicit information as to the type of transaction involved, the new U.S. affiliate, if any, that results from the transaction, the affiliate's capital structure, its foreign parents and other owners, the identity of the U.S. business enterprise that has been acquired, and the existing U.S. affiliate that made the acquisition. Selected financial and operating data about the acquired business must be presented. Where land is involved, information concerning the acreages and book values relating to various land use categories is required. The form also includes a summary of various incentives and services provided by state and local governments in connection with the investment.

The following are exemptions from the Form BE-13 filing requirements:

1. In the case of a U.S. business enterprise acquired by an existing U.S. affiliate of a foreign person which then merges the acquired business into its own operations, no filing is required if: (i) the total cost of the acquisition is less than $1 million, and (ii) the acquisition does not involve more than 200 acres of U.S. land;

2. Acquisitions of real estate by foreign persons exclusively for personal use and not for profit-making purposes need not be reported. A U.S. residence which is the owner's primary residence that is leased while the owner is outside the U.S. but which the owner intends to reoccupy is considered held for personal use; and

3. The acquired or newly established business is a U.S. affiliate of a foreign person, but (i) the U.S. affiliate does not own more than 200 acres of U.S. land, and (ii) on a fully consolidated basis, each of the following three items for the U.S. affiliate is between negative $1 million and positive $1 million:

a) total assets;

b) sales or gross operating revenues excluding sales taxes; and

c) net income after provision for U.S. income taxes.

B. *Form BE-14: U.S. Persons Who Assist or Intervene in Acquisitions of U.S. Businesses or Who Create U.S. Businesses in Joint Ventures with Foreigners*

Form BE-14 is required to be filed by a U.S. person who a) assists or intervenes in the sale to, or purchase by, a foreign person (or a U.S. affiliate of such foreign person) of a ten percent or greater voting interest in a U.S. enterprise, including real estate, or b) enters into a joint venture with a foreign person to create a U.S. business enterprise. Intermediaries, and in certain circumstances, attorneys and accountants, may also be required to file.

A U.S. person is required to report on Form BE-14 with respect to a transaction only when such person knows of the foreign involvement. A U.S. person need not ascertain the foreign status of a person involved in a transaction unless the U.S. person has reason to believe that the acquiring party may be a foreign person. The purpose of this form is to confirm that Form BE-13 has been filed. If so, this form is not required.

C. *Form BE-607: Industry Classification Questionnaire*

Form BE-607 elicits information as to the industry classification in which each U.S. affiliate of a foreign person belongs. This form is to be filed, together with the Form BE-13, when a U.S. affiliate is organized or acquired by a foreign person, and is to be filed again each time the industry classification of such U.S. affiliate changes.

D. *Form BE-15: Interim Survey of Foreign Direct Investments in United States*

Reports on Form BE-13 are updated on approximately an annual basis by Form BE-15. Certain financial information and lists of all consolidated and non-consolidated U.S. affiliates is required. The exemption criteria are the same as under Form BE-13, except that the dollar threshold is $5 million instead of $1 million.

E. *Form BE-605: Transactions of a U.S. Affiliate with Foreign Parent*

Form BE-605 is a quarterly report required to be filed by each U.S. affiliate with respect to transactions with its foreign parent or parents during the period. This report includes the foreign parents' share of net income (loss), and net realized or unrealized capital gains (losses), and dividends and fees between the U.S. affiliate and its foreign parent, and a summary of intercompany account balances at the end of the period.

Form BE-605 need not be filed if each of the following three items of the U.S. affiliate is between negative $5 million and positive $5 million:

a) total assets;

b) annual sales or gross operating revenues excluding sales taxes; and

c) annual net income after provision for income taxes.

F. Form ASCS-153: Agricultural Foreign Investment Disclosure Act Report

The Agricultural Foreign Investment Disclosure Act of 1978 requires that any foreign person who acquires or transfers any interest (except a mortgage or other security for debt) in agricultural land must submit a report to the Agricultural Stablization Conservation Service of the Department of Agriculture. For this purpose "foreign person" includes foreign nationals, foreign entities, foreign governments, and any person (other than an individual or government) which is created or organized under the laws of any U.S. jurisdiction in which a greater than five percent interest is directly or indirectly held by one or more such foreign persons. If a report is filed by a foreign person other than a government or individual, then its report must also include the name and address of all foreign persons individually holding five percent or more interest in it.

The term "agricultural land," for purposes of the statute, is defined as any land located in the United States that is used for agricultural, forestry or timber production purposes, excepting land not exceeding one acre which produces only agricultural, forestry and timber sales of less than $1,000 per year and products for personal and household use of the holders of interests therein.

G. Form BE-12: Benchmark Survey

The International Investment Survey Act of 1976 prescribes a benchmark survey to be conducted every five years with respect to foreign direct investment in the United States. Foreign portfolio investments (less than ten percent interests) in the United States are also surveyed every five years by the Department of Treasury.

H. Confidentiality

The International Investment Survey Act of 1976 generally prohibits disclosure of information obtained from reports filed under that Act except to officers and employees of the U.S. federal government, and governmental advisors and consultants, and imposes criminal penalties on violators. Furthermore, information on such reports may not be used for purposes of taxation, investigation and regulation by officers and employees of the government. The Bureau of Economic Analysis has declined to furnish information to outsiders (including foreign states and their representatives) who make requests pursuant to the Freedom of Information Act. By way of contrast, the report filed under the Agricultural Foreign Investment Act of 1978 is open to public inspection.

I. Penalties

The International Investment Survey Act of 1976 has a mandatory filing requirement. Failure to file the required report or to comply with any order, rule or instruction under the Act may result in a civil penalty of up to $10,000.00. Restraining orders and injunctions to compel compliance are also contemplated. Criminal penalties which may include a $10,000.00 fine and up to a year imprisonment may be imposed upon directors, officers, employees and agents of violators.

On the other hand, the Agricultural Foreign Investment Disclosure Act of 1978 contemplates only civil penalties for failure to file, but these civil penalties can be extensive, up to twenty-five percent of the fair market value of the agricultural land. A late filing penalty of one-tenth of one percent of the fair market value up to the twenty-five percent maximum may also be assessed. Incomplete and inaccurate filings are also subject to this maximum penalty.

VIII. Recent and Pending Legislative Proposals Affecting Foreign Direct Investment

In addition to the specific and general application laws discussed herein, significant increases in the level of foreign direct investment have led to a rethinking of U.S. policy on the issue. Concerns have been expressed about the viability of free trade in light of foreign government subsidization programs.[85] Hearings before subcommittees of the House of Representatives have received studies from government departments indicating that the federal government's system for collecting foreign direct and portfolio data is "loophole" studded and often shrouded in secrecy. Subcommittees have submitted that U.S. laws and policies must begin to distinguish between foreign investment that provides new venture capital, creates new jobs, or rehabilitates older cities or enhances international relations, and foreign investment that results in the export of profits, jobs, taxes, capital, and that permits control by a foreign government of scarce natural resources and high technology, that lessens national and international competition for valuable products and services, or that increases the ability of foreign governments to influence foreign and even

[85] Alexander, *Upsurge in Protectionism: Subsidies, Tariffs and Voluntary Agreements Erode Free Trade*, Time Magazine, May 9, 1983, at 66.

domestic policies.[86]

At least in partial response to these developments, a number of legislative proposals regarding foreign direct investment have been made. Among them, H.R. 2371 was proposed by Representative Bryant to amend the Securities Exchange Act of 1934 to provide uniform margin requirements in transactions involving the acquisition of securities of certain United States corporations by non-United States persons where such acquisition is financed by non-United States lenders, and to specify a private right of action for violation of margin requirements. Hearings were held and a Report issued by the Committee on Energy and Commerce on an identical predecessor Bill in the 97th Congress, 1st Session, H.R. 4145. The Report recommended passage of the Bill, finding that foreign persons enjoy an undue advantage in financing transactions to acquire control of U.S. corporations because neither they nor the foreign financial institutions that lend funds for such transactions are subject to the same credit limitations as U.S. lenders and borrowers. By citing the undertaking of Prime Minister Trudeau in 1980 to broaden the mandate of the Foreign Investment Review Act, and spurred by certain attempts by Canadian corporations to acquire U.S. entities in hostile takeover bids, the Report makes clear exactly whose activities the Bill is to effect.

Among other Bills in the 97th Congress aimed specifically at Canada were S.1429, a bill to amend the Securities Exchange Act of 1934 to make the margin requirements for domestic purchasers of securities applicable to foreign purchasers of securities in certain significant transactions involving the United States securities markets, and S.1436, a bill to amend the Securities transactions involving the acquisition of securities of certain U.S. corporations by foreign persons where such acquisition is financed by a foreign lender.

Title II to S.1429 would have made it unlawful for any Canadian person to acquire, directly or indirectly, by purchase or trade, any voting securities of a United States energy resources corporation if, after such acquisition, more than five percent of any class of voting securities of such corporation would have been so owned. This moratorium would have lasted nine months. The Chairman of the Board of Governors of the Federal Reserve System pointed out that, even if applicable, margin requirements would probably not have reached many of the corporate takeovers which had given rise to these particular bills. In addition, the Administration recognized that the moratorium would not change what it alleged to be discriminatory Canadian energy and investment policies, and might even have been welcomed by the Canadian government as a means of retaining Canadian capital within Canada. With respect to the margin re-

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[86] *Hearing before the Subcommittee on International Economic Policy and Trade of the Committee on Foreign Affairs of the House of Representatives*, 97th Cong., 2d Sess. (February 23, 1982); *The Adequacy of the Federal Response to Foreign Investment in the United States, supra* note 11.

quirements, the Administration questioned the wisdom of attempts to restrict the ability of foreign investors worldwide to make investments in U.S. shares for the sake of restricting Canadian access to U.S. securities markets. In addition, it was recognized that neither would be likely to change Canadian policies, and questions were raised about the practical enforceability of the proposed legislation.

Among the more strident legislative proposals in the 98th Congress are H.R. 942, which would amend the Securities Exchange Act of 1934 to restrict persons who are not citizens of the United States from acquiring more than thirty-five percent of the non-voting securities or more than five percent of the voting securities of any issuer whose securities are registered under that Act, and H.R. 300, which would establish a National Foreign Investment Control Commission to prohibit or restrict foreign ownership, control or management through direct purchase, in whole or in part, of certain domestic issuers of securities. The Commission would prohibit the acquisition of any voting security of an issuer that is substantially involved in an area "essential" to national security and/or economic security and prohibit control of any issuer determined to be substantially involved in an area "important" to national security and/or economic security.

H.R. 318 proposes the creation of a Joint Congressional Committee on Foreign Investment Control in the United States, and H.R. 600 proposes the reorganization, consolidation and expansion of Federal monitoring, analysis, reporting and policy functions with respect to foreign acquisitions of United States businesses and assets in vital and sensitive national interest sectors of the U.S. economy.[87]

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[87] Section 2a of H.R. 600 gives the underpinnings both of this bill and similar legislative proposals:

> The Congress finds that—
>
> 1. Federal efforts to monitor, analyze and report on foreign investment in the United States and its impact on United States national interest are inadequate and ineffective;
>
> 2. The activities of eighteen separate Federal agencies and entities with responsibility for monitoring, policy, analysis, promotion, or regulation with respect to foreign investment in the United States lack coordination and consistency;
>
> 3. Existing Federal statutory and Executive order restrictions on foreign acquisitions in certain industry sectors are piecemeal and haphazard, and do not protect the United States in many vital and strategic national interest sectors of our economy;
>
> 4. United States national interests are becoming dangerously vulnerable to foreign governmental and private investors in certain sectors of our economy as a result of rapidly increasing foreign acquisitions of United States enterprises, assets, and resources; and this has resulted in (A) more and more decisions about the United States economy being made outside the United States; (B) the unintended transfer of sensitive high technology and research capability; (C) the export of finite natural resources; (D) reduced international competition; and (E) increased acquisitions of healthy United States companies rather than the creation of new manufacturing facilities and new jobs; and

The general theme of legislative proposals which have received the support of the Administration in the last two sessions of Congress is "reciprocity." The term has evolved to mean that U.S. trading partners should accord American goods, services and investments the same treatment in the partners' markets that the partners' goods, services and investments receive in U.S. markets. Two such legislative proposals in the 98th Congress are H.R. 1571, to ensure the continued expansion of reciprocal market opportunities in trade, trade in services, and investment for the United States, and H.R. 1974, to amend the Trade Act of 1974 to ensure reciprocal trade opportunities. Reciprocity legislation would counter allegations that the open door policy unfairly allows foreign investors access to U.S. markets that are not so readily available to U.S. investors abroad. This concept also was consistent with the Administration's stated objective of encouraging a reduction in investment barriers. The paradox, however, is that reciprocity will only be successful to the extent that the level of foreign investors will pressure their own governments to remove investment restrictions to U.S. investors. Thus, the reciprocity concept will have little or no effect on countries with restrictive barriers which have little or no investment in the United States, or on those countries which consider the domestic regulation of foreign investors to be more important than foreign regulation of their investors.

If reciprocity legislation affects countries with prohibitive investment regulations, it is likely to have exactly the opposite of the intended effect, that is, an increase rather than a decrease in investment barriers. Additionally, reciprocity unto itself will do nothing to relieve the potentially adverse affects of foreign investment in the United States.[88]

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5. Present Federal policy fails to distinguish between beneficial and harmful acquisitions.

While these findings are reminiscent of discussions that preceded enactment of the Foreign Investment Review Act, against which the United States for a period took great umbrage, the prospects for passage of H.R. 600 at this time appear remote.

[88] In a prepared statement by Elinor G. Constable, Deputy Assistant Secretary for International Finance and Development of the Department of State, *Foreign Investment in the United States: Hearing before the Subcomm. on International Economic Policy*, 97 Cong., 2d Sess. 67-68 (1982), the following problems were noted with proposals to impose strict requirements of reciprocity in the investment field:

> It could produce a difficult administrative task: investors from various countries with diverse investment policies investing in the same U.S. industry could be subject to differing rules, based on each foreign government's policies with respect to their incoming foreign investment. This would be cumbersome and inefficient under our system.
>
> In many instances, a retaliatory policy is unlikely to be effective. This is particularly true for many developing countries which have little if any investment in United States.
>
> Across-the-board reciprocity policies do not adequately take into account the fact that our most serious bilateral investment problems are limited to a handful of countries such as Canada, France, Japan, and Mexico. We need policies which are more selective to address these problems.

The prospects for enactment of any of these legislative proposals in the present session of Congress prior to the November, 1984 election are generally perceived to be remote.

IX. Conclusion

Although traditional United States policy towards foreign direct investment has been neutrality with encouragement, a myriad of complex legislative and regulatory limitations which prohibit, restrict, examine or have a disproportionate impact upon foreign investors has been enacted. These limitations are both in the form of specific legislation concerning the investment activities of aliens, and federal and state laws of general application which may have a disproportionate impact on the alien investor. Aliens are also subject to reporting requirements that carry heavy penalties for inadequate compliance.

A recent surge in foreign direct investment and a downturn in the domestic economy have raised the prospects for legislative initiatives that would circumscribe the traditional open door policy toward alien investors. While, with some possible exceptions, pending legislation does not appear likely to be enacted in the present session of Congress, the tenor of those proposals merits ongoing observation.

Other countries could react to a U.S. retaliatory policy by adopting counter-retaliatory measures, making conditions worse for U.S. investment abroad.