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Amending the Treatment of Defense Production Enterprises Under the U.S. Exon-Florio Provision: A Move Toward Protectionism or Globalism

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Amending the Treatment of Defense Production Enterprises Under the U.S. Exon-Florio Provision: A Move Toward Protectionism or Globalism

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Abstract

Discusses the Exon-Florio Provision of the Omnibus Trade & Competitiveness Act. It gives the President of the United States the power to prohibit or to prevent on a temporary basis a non-U.S. corporation from merging with or acquiring a U.S. corporation when the transaction could potentially impair U.S. national security. The Note examines U.S. legislation that regulates direct investment and argues that the U.S. Congress should amend Exon-Florio in order to focus and strengthen the Provision's application to transactions involving U.S. defense production companies. Part I of this Note sets forth the existing procedural and administrative requirements of Exon-Florio and explains several modifications to the Provision that Congress has recently enacted. Part II outlines additional proposed modifications to Exon-Florio that have been presented before Congress and considers such proposals with respect to a recent case involving the Provision. Part III argues that Congress should amend Exon-Florio in order to focus and confine the Provision's application to national defense. This Note concludes that such modifications would be justifiable because they would define national defense as a narrow exception to the traditional U.S. globalist trade policy and, consequently, benefit all those involved in international mergers, acquisitions and takeovers in the United States.

NOTES

AMENDING THE TREATMENT OF DEFENSE PRODUCTION ENTERPRISES UNDER THE U.S. EXON-FLORIO PROVISION: A MOVE TOWARD PROTECTIONISM OR GLOBALISM?

INTRODUCTION

Direct investment can be defined as significant long-term investment in domestic companies by non-resident entities.[1] The advantages and disadvantages of such investment to the countries in which it occurs have been the subject of much debate.[2] While some countries have chosen to regulate virtually all forms of direct investment, others have decided to regulate only certain industries.[3] Still other countries have taken a more passive approach and refrained from regulating any form of direct investment for fear that such regulation would be construed as protectionist in nature.[4]

In recent years, the number of non-U.S. corporations acquiring or merging with U.S. corporations in the United States

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1. Alan Toulin, *Canada Must Rise to the Investment Challenge*, FIN. POST, Sept. 23, 1992, at 13.

2. *See* Stephen M. Banker, *Protection vs. Globalization; The Regulatory Response to Cross-Border Transactions*, N.Y.L.J., Mar. 25, 1991, at 7. While some commentators have suggested that direct investment stimulates the economy of the particular country in which it occurs because it creates jobs and improves technology, others have suggested that such investment threatens the economic and political viability of the particular country because it permits non-resident investors to reap the benefits of one country's economy and extend such benefits to another economy. *Id.*; *United States Should Have 'Serious Debate' on Foreign Investment Policy, ABA Told*, Int'l Trade Rep. (BNA) 669 (May 1, 1991).

Traditionally, controversy has arisen whenever non-resident companies have made significant investments in domestic industries. *See* Banker, *supra*. Still, one of the more recent areas of debate, particularly in the United States, relates to non-resident entities investing in domestic defense manufacturing companies. *Id.* In any event, all types of direct investment have been the subject of legislation in various countries, including the United States. *Id.*

3. *See generally* Simon MacLachlan & William Mackesy, *Acquisitions of Companies in Europe—Practicability, Disclosure and Regulation: An Overview*, 23 INT'L LAW. 373 (1989); SIMEON & ASSOCIES, MOQUET BORDE & ASSOCIES, DOING BUSINESS IN FRANCE § 1.04[1] (1992).

4. *See Foreign Investment: U.S. Has Uncoordinated Policy, Inadequate Controls on Takeovers, Seminar Told*, Daily Rep. for Executives (BNA) 180 (Sept. 16, 1992).

has increased dramatically.[5] Pursuant to a U.S. globalist trade philosophy, an overwhelming majority of these transactions have taken place without encountering any U.S. legislative or regulatory barriers.[6] Despite this philosophy, however, exceptions in the interest of national security have been carved out of the U.S. open investment policy.[7]

In an attempt to monitor and, at times, prevent direct investment in the United States, particularly in areas implicating national security, the U.S. Congress has enacted legislation to monitor certain types of transactions involving non-U.S. investors in the United States.[8] Specifically, under the Exon-Florio provision ("Exon-Florio" or the "Provision") of the Omnibus Trade & Competitiveness Act[9] ("Omnibus Trade Act"), the

5. Anthony F. Essaye & Dale C. Turza, *The Next Step in Regulating Foreign Investments*, N.Y.L.J., Feb. 1, 1990, at 5. These transactions include the Sony Corporation's acquisition of Columbia Pictures, which constitutes the first Japanese acquisition of a U.S. media company, and the Mitsubishi Estate Company's acquisition of an interest in Rockefeller Center. *Id.* According to at least one U.S. government source, foreign investment in the United States totalled approximately US$329,000,000,000 during the late 1980s. *International Taxes, International Tax Policy Makers Should Strive For Balance, Treasury Official Says*, Daily Rep. for Executives (BNA) G-7 (Mar. 2, 1990). This amount sharply contrasts with the same figure for 1966 which was US$9,000,000,000.

6. *See* Banker, *supra* note 2, at 7. This situation can be attributed to former President Bush's trade policy, which welcomed direct investment that fluctuates in response to market forces and imposed as few regulations on trade as possible. *Subcommittee on International Finance and Monetary Policy Senate Banking Committee* (June 4, 1992) (Testimony of Frederick W. Volcansek, Acting Assistant Secretary for Trade Development, U.S. Department of Commerce) [hereinafter Volcansek Testimony], *available in* LEXIS, Nexis Library, CURRNT File.

Under the United States' traditional laissez-faire approach to direct investment, the free market ultimately decides the most efficient allocation of business resources. *Foreign Investment: U.S. Has Uncoordinated Policy, Inadequate Controls on Takeovers, Seminar Told*, *supra* note 4, at 180; W. Jeffers Pickard, *CEOs For Clinton?*, SAN FRANCISCO CHRON., Sept. 30, 1992, at A-16. Thus, the government refrains from regulating business as much as possible, maintaining that any attempt to manipulate the market will fail and ultimately harm the U.S. economy. *See Foreign Investment: U.S. Has Uncoordinated Policy, Inadequate Controls on Takeovers, Seminar Told*, *supra* note 4, at 180.

7. Volcansek Testimony, *supra* note 6.

8. Omnibus Trade and Competitiveness Act, Pub. L. No. 100-418, § 5021, 102 Stat. 1107, 1425-26 (1988) (amending Title VII of the Defense Production Act, 50 U.S.C. app. § 2158 (1950)).

9. *Id.* The Exon-Florio provision actually expired on October 20, 1990. *Lapse in Exon-Florio; Uncertainty Affects Deals Involving Foreigners*, N.Y.L.J., Jan. 17, 1991, at 5. On August 17, 1991, however, then President George Bush signed H.R. 991, which made Exon-Florio a permanent provision of the Defense Production Act, Pub. L. No. 102-99, 105 Stat. 487. *See Bush Signs Defense Measure Making Exon-Florio Permanent*, Int'l Trade Rep. (BNA) 1248 (Aug. 21, 1991).

President of the United States has the power to prohibit or to prevent on a temporary basis a non-U.S. corporation from merging with or acquiring a U.S. corporation when the transaction potentially could impair U.S. national security.[10] The current structure and application of Exon-Florio has been the subject of much conflict in the United States as well as in other countries.[11] In particular, some critics have asserted that Exon-Florio is both weak and ineffective and, therefore, requires extensive modification.[12] Others have argued that any increase in the scope or application of Exon-Florio will ultimately harm the U.S. economy.[13]

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10. Omnibus Trade and Competitiveness Act § 5021. Specifically, the Omnibus Trade Act states that

> 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 on or after the date of enactment of this section by or with foreign persons which could result in foreign control of persons engaged in interstate commerce in the United States . . . . [Furthermore,] 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.

Id.

11. *EC Complains of Uncertainty Associated With Exon-Florio*, Int'l Trade Rep. (BNA) 300 (Feb. 19, 1992); *Foreign Investment, Treasury Reiterates Opposition to Changes in Exon-Florio, Industry Views Are Mixed*, Fed. Cont. Rep. (BNA) (Apr. 6, 1992).

12. *Foreign Investment: U.S. Has Uncoordinated Policy, Inadequate Controls on Takeovers, Seminar Told*, *supra* note 4, at 180; *'Major Reforms' in Monitoring Defense-Related Acquisitions Urged*, Int'l Trade Rep. (BNA) 1424 (Aug. 19, 1992).

13. *See Foreign Investment, U.S. Welcomes Foreign Investment, Urges Other Countries to Do Same, President Says*, Daily Rep. for Executives (BNA) A-6 (Dec. 30, 1991) (discussing Bush administration's anti-protectionist policies on direct investment).

Many of the same concerns facing the United States with respect to direct investment have also arisen and been addressed in other countries. *See generally* MacLachlan & Mackesy, *supra* note 3, at 381-83 (discussing European regulation of mergers, acquisitions, and takeovers in the European Community). For example, some European countries have enacted legislation that limits and, at times, completely restricts direct investment within their borders. CCH International, Doing Business in Europe (France), ¶ 25,640, 26,702; CCH International, Doing Business in Europe (Italy), ¶ 51,000, 52,152; CCH International, Doing Business in Europe (Spain), ¶ 75,800, 76,903; ALLAN W. JOHNSTONE, UNITED STATES DIRECT INVESTMENT IN FRANCE: AN INVESTIGATION OF THE FRENCH CHARGES (1965). France, for example, has a policy that limits foreign ownership of the country's important assets, as well as a plan to retain and expand its critical technologies and industries. *See* Susan J. Tolchin, *The United Bazaar of America: Defense Industries for Sale*, WASH. POST, May 31, 1992, at C-4. The French government refers to these regulations, which limit direct investment, as serving the "national interest." *Id.*

This Note examines U.S. legislation that regulates direct investment and argues that the U.S. Congress should amend Exon-Florio in order to focus and strengthen the Provision's application to transactions involving U.S. defense production companies. Part I of this Note sets forth the existing procedural and administrative requirements of Exon-Florio and explains several modifications to the Provision that Congress has recently enacted. Part II outlines additional proposed modifications to Exon-Florio that have been presented before Congress and considers such proposals with respect to a recent case involving the Provision. Part III argues that Congress should amend Exon-Florio in order to focus and confine the Provision's application to national defense. This Note concludes that such modifications would be justifiable because they would define national defense as a narrow exception to the traditional U.S. globalist trade policy and, consequently, benefit all those involved in international mergers, acquisitions and takeovers in the United States.

I. *CURRENT U.S. LEGISLATION REGARDING DIRECT INVESTMENT*

The Exon-Florio provision of the Omnibus Trade & Competitiveness Act addresses direct investment in the United States and, in particular, involves the voluntary disclosure of international transactions that bear on "national security."[14] The Provision is designed to protect two aspects of national security: maintenance of a substantial defense industry to ensure that the United States can rapidly build up its military when necessary, and prevention of the transfer of sensitive military technologies to hostile nations.[15] The National Defense

14. Omnibus Trade and Competitiveness Act, Pub. L. No. 100-418, § 5021, 102 Stat. 1107, 1425-26 (1988) (amending Title VII of the Defense Production Act, 50 U.S.C. app. § 2170 (1950)). For a discussion of "national security," see *infra* notes 42-61 and accompanying text.

15. Gerald T. Nowak, Note, *Above All, Do No Harm: The Application of the Exon-Florio Amendment to Dual-Use Technologies*, 13 MICH. J. INT'L L. 1002, 1003 (1992); *Bush Expected to Sign Bill Making Exon-Florio Permanent, ABA Panel Told*, Int'l Trade Daily (BNA) (Aug. 15, 1991) (containing comments of G. Christopher Griner, former official in the Department of Defense Office of the General Counsel).

The Exon-Florio provision was enacted in the wake of a controversial proposed acquisition involving the Fairchild Semiconductor Corporation, a U.S. defense contractor, and Fujitsu, a Japanese corporation. *See* Nowak, *supra*, at 1007. After an-

Authorization Act for Fiscal Year 1993 is a recent amendment to Exon-Florio that modifies and supplements the Provision in light of these objectives.[16]

A. *The Exon-Florio Provision*

The Exon-Florio provision authorizes the President or the President's "designee" to investigate non-U.S. entities' proposed mergers, acquisitions, and takeovers in order to evaluate their potential effect on U.S. "national security."[17] Currently, the responsibility for implementing Exon-Florio is delegated to the Committee on Foreign Investment in the United States ("CFIUS" or the "Committee"),[18] which monitors non-U.S. mergers, acquisitions, and takeovers through voluntary filings.[19] In the event CFIUS decides that a transaction could adversely affect national security, it refers the matter to the President, who then makes the ultimate decision whether to suspend or to block the transaction.[20]

1. The Structure and Function of Exon-Florio and the Committee on Foreign Investment in the United States

Under Exon-Florio, the President must base a decision to prohibit or to suspend a transaction on credible evidence that the non-U.S. investor might take action that threatens to impair national security and existing laws do not provide adequate and appropriate authority for the President to protect

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nouncing its intentions to acquire Fairchild, Fujitsu encountered a significant amount of criticism, which ultimately caused Fujitsu to back down from the transaction. *See id.*; Donna K.H. Walters & William C. Rempel, *The Fairchild Deal; Trade War: When Chips Were Down*, L.A. TIMES, Nov. 30, 1987, at 1; Donna K.H. Walters & William C. Rempel, *Trade War Victim; A One-Time Winner Is Out Of Chips*, L.A. TIMES, Dec. 1, 1987, at 1.

16. Pub. L. No. 102-484, § 837, 106 Stat. 2463-65 (1992)

17. Omnibus Trade and Competitiveness Act, Pub. L. No. 100-418, § 5021, 102 Stat. 1107, 1425-26 (1988) (amending Title VII of the Defense Production Act, 50 U.S.C. app. § 2170 (1950)).

18. Exec. Order No. 12,661, 3 C.F.R. 618-24 (1988), *reprinted in* 19 U.S.C. § 2901 (1988). CFIUS was originally established during the Ford Administration to monitor direct investments in the United States. Exec. Order No. 11,858, 3 C.F.R. 990-92 (1971-1975), *reprinted in* 15 U.S.C. § 78b (1982).

19. Omnibus Trade and Competitiveness Act § 5021; *Foreign Investment, U.S. Has Uncoordinated Policy, Inadequate Controls on Takeovers, Seminar Told*, *supra* note 4, at 180.

20. Omnibus Trade and Competitiveness Act § 5021.

national security.[21] When evaluating the effect of a particular transaction on national security, the President may consider, among other factors, domestic production required for projected national defense needs, the capability and capacity of domestic industries to meet national defense requirements, and the impact of domestic industries and commercial activity by non-U.S. citizens on the capability and capacity of the United States to meet the demands of national security.[22]

In order to facilitate the President's decisions regarding Exon-Florio transactions, the Committee on Foreign Investment in the United States, an inter-agency administrative body, was formed to collect and analyze data on direct investment in the United States.[23] The chairman of CFIUS is the Director of

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21. *Id.* Such existing laws do not include the International Emergency Economic Powers Act ("IEEPA"), Pub. L. No. 95-223, tit. V, at 202, 91 Stat. 1626 (1977) (current version at 50 U.S.C. §§ 1701-1706 (1992)), nor the Exon-Florio provision, itself. Omnibus Trade and Competitiveness Act § 5021. Primarily, the IEEPA provides the President with the authority to deal with any unusual and extraordinary threat to national security, foreign policy, or the economy of the United States, if the threat results from a non-U.S. source and the President declares a national emergency with respect to such threat. 91 Stat. 1626 (1977) (current version at 50 U.S.C. §§ 1701-1706 (1992)). For a discussion of the IEEPA as a statutory source of presidential emergency power, see M.P. MALLOY, ECONOMIC SANCTIONS & U.S. TRADE (1990).

Exon-Florio applies only to transactions where a non-U.S. entity would gain "control" of a U.S. entity. Victor I. Lewkow & Christopher E. Austin, *Regulation of Foreign Investment in the U.S.*, INT'L FIN. L. REV., Sept. 1992, (Int'l M&A Supp.), at 71. Under the provision, control does not refer to a percentage of ownership in the acquired entity (the "target"), but rather is defined in terms of the effective power of the acquiring entity to make certain decisions for the target. *Id.*

22. Omnibus Trade and Competitiveness Act § 5021. In 1992, Congress added additional factors that the President may consider in determining whether a transaction affects national security. *See* National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 837, 106 Stat. 2315 (1992); *see also infra* notes 64-66 and accompanying text (discussing additional considerations President may consider under National Defense Authorization Act for Fiscal Year 1993).

In practice, the President has utilized Exon-Florio only once to block a merger. Lewkow & Austin, *supra* note 21. This infrequency results, in part, from the Bush Administration's narrow interpretation of the term "national security" as well as an overall concern that increases in trade restrictions will discourage investment that is vital to the U.S. economy. *Foreign Investment, House Energy Committee Begins Markup of Exon-Florio Modifications*, Daily Rep. for Executives (BNA) A-10 (Nov. 20, 1991); *Foreign Investment, International Investment Group Labels Exon-Florio Changes Cumbersome, Harmful*, Daily Rep. for Executives (BNA) A-17 (Nov. 18, 1991); *Foreign Investment, U.S. Welcomes Foreign Investment, Urges Other Countries to Do Same, President Says*, Daily Rep. for Executives (BNA) A-6 (Dec. 30, 1991).

23. Exec. Order No. 11,858, 3 C.F.R. 990-92 (1971-1975), *reprinted in* 15 U.S.C. § 78b (1981).

the Office of International Investment, Department of the Treasury and its members include representatives from the Departments of State, Defense, Commerce, and Council of Economic Advisors, as well as the Attorney General and the U.S. Trade Representative.[24] CFIUS reviews direct investments that impact U.S. national interests, and develops legislative and regulatory proposals in response to such investments.[25] Traditionally, non-U.S. corporations that intend to merge with U.S. corporations have filed with CFIUS voluntarily.[26]

When the U.S. Congress enacted Exon-Florio, CFIUS attained additional responsibilities.[27] By Executive Order, the President designated CFIUS to investigate and evaluate merger and acquisition proposals voluntarily filed by non-U.S corporations.[28] If a non-U.S. corporation fails to file its in-

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24. *CFIUS To Continue Reviewing Acquisitions Despite Lapse of Exon-Florio Provision*, Int'l Trade Rep. (BNA) 1739 (Nov. 14, 1990); *Narrow Interpretation of Statute Hobbles Exon-Florio Reviews, Lawyers Told*, Int'l Trade Rep. (BNA) 325 (Feb. 19, 1992).

25. John E. Chierichella & Douglas E. Perry, *Foreign Investment in Defense-Related Companies*, Fed. Contracts Rep. (BNA) 837 (May 8, 1989). In general, CFIUS could make recommendations but had no enforcement powers or regulatory strength. *Id.*

26. *CFIUS To Continue Reviewing Acquisitions Despite Lapse of Exon-Florio Provision*, *supra* note 24, at 1739. Despite the lapse in Exon-Florio between October 20, 1990 and August 17, 1991, CFIUS remained intact and continued to receive voluntary filings of proposed transactions. *Id.*

27. Exec. Order No. 12,661, 3 C.F.R. 618-24 (1988), *reprinted in* 19 U.S.C. § 2901 (1988); Elliot L. Richardson & Brad Larschan, *Let the (Foreign) Buyer Beware*, LEGAL TIMES, Aug. 28, 1989, at 17. The increase in CFIUS' authority resulted in a significant amount of criticism. John S. McClenahen, *Deal Doomer?*, INDUS. WK., Sept. 1989, at 81. For example, the former chairperson of the U.S. International Trade Commission, Susan Liebeler, stated that Exon-Florio could do serious damage. *Id.* She added that unless the new regulations were tightened, the United States could ultimately discourage overseas investors by making it easier for future administrations to implement a policy of economic nationalism. *Id.*

28. Exec. Order No. 12,661, 3 C.F.R. 618-24 (1988), *reprinted in* 19 U.S.C. § 2901 (1988). Originally, President Ford established CFIUS to monitor direct investment in the United States. Exec. Order No. 11,858, 3 C.F.R. 990-92 (1971-1975), *reprinted in* 15 U.S.C. § 78b (1982). Subsequently, President Reagan delegated to CFIUS the responsibility to review and investigate acquisitions involving foreign interests under Exon-Florio. *Let the (Foreign) Buyer Beware*, *supra* note 27, at 17.

CFIUS initially has 30 days to determine whether it should investigate a proposed transaction. Omnibus Trade and Competitiveness Act, Pub. L. No. 100-418, § 5021, 102 Stat. 1107, 1425-26 (1988) (amending Title VII of the Defense Production Act, 50 U.S.C. app. 2170 (1950)). Specifically, the Omnibus Trade Act provides that

> [i]f 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

tended merger, acquisition, or takeover with CFIUS and still enters into a transaction with a U.S. corporation, the transaction is subject to divestiture by the President at any time in the future.[29] Consequently, non-U.S. corporations intending to merge with or to acquire a U.S. corporation are motivated to file with CFIUS ahead of time, even if the potential impact on national security is slight.[30]

To date, Exon-Florio has not prevented a significant amount of non-U.S. direct investment in the United States as the President has exercised his authority under Exon-Florio only once.[31] In that instance, then-President George Bush ordered the China National Aero-Technology Import and Export Corporation ("CATIC") to divest itself of control over MAMCO, a U.S. corporation.[32] This case directly related to national defense,[33] and thus national security, because MAMCO manufactured aircraft components that could be con-

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> 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 . . . . [Furthermore,] the President shall announce the decision to take action . . . not later than 15 days after the investigation . . . is completed.

Id. Thus, if CFIUS determines that an investigation is necessary, it must conduct such an investigation within 45 days. *Id.*; *Senate Subcommittee on International Finances and Monetary Policy, Committee on Banking, Housing and Urban Affairs* (June 4, 1992) (Testimony of Mr. Chester Paul Beach, Jr., Acting General Counsel, Department of Defense). Ultimately, CFIUS prepares a report of its findings and recommends to the President whether or not the transaction should be prohibited. Omnibus Trade and Competitiveness Act § 5021. The President, in turn, has 15 days to decide whether or not to prohibit the transaction. *Id.* Thus, the entire process of evaluation requires, at most, 90 days. *Id.*; *see* Chierichella & Perry, *supra* note 25, at 837.

29. Omnibus Trade and Competitiveness Act § 5021; *see* Banker, *supra* note 2, at 7.

30. *See* Banker, *supra* note 2. The broad definition of national security in Exon-Florio, coupled with the constant risk of divesture, causes most investors to file under Exon-Florio even in transactions in which national security problems are remote. *Id.*

31. *Id.*; Jim Mendenhall, *UNITED STATES: Executive Authority to Divest Acquisitions Under the Exon-Florio Amendment—the MAMCO Divestiture*, 32 HARV. INT'L L.J. 286 (1991). President Bush's action here marked the first time in which Exon-Florio was used to block a transaction. *Id.*

32. *Id.* at 289-90. Before President Bush's decision in this case, the Chinese corporation had already owned a portion of MAMCO. *Id.* at 291. Nevertheless, the President concluded, based on credible confidential information, that CATIC's continued control of MAMCO might have threatened to impair national security. *Id.*

33. *Id.* Significantly, the President's decision to prohibit the merger in the MAMCO case was based upon national defense considerations rather than a general concern for national security which can be interpreted broadly. *Id.*

verted for use into military aircraft.[34] Ultimately, President Bush prohibited the transaction because he concluded it adversely affected national security.[35]

Still, because President Bush has been the only President to utilize Exon-Florio and has blocked only one transaction, most non-U.S. investors readily comply with the Exon-Florio filing provisions.[36] Moreover, filing under Exon-Florio ultimately protects the interests of the non-U.S. investor because once the non-U.S. entity files with CFIUS and receives approval, which is almost inevitable, it is protected from future suspension or prohibition with respect to that transaction.[37]

Nevertheless, in contrast to former President Bush's globalist policy on direct investment, President Clinton may pursue a more protectionist policy.[38] Commentators have noted that President Clinton's position in this area is unclear.[39] While some of the President's advisors have been viewed as supporting relatively protectionist principles, others have been viewed as supporting globalist philosophies.[40] In the event President Clinton takes a more protectionist position than that of former President Bush, a larger number of transactions may be blocked under Exon-Florio.[41]

2. The Current Definition of "National Security"

The most controversial aspect of Exon-Florio involves the term "national security."[42] Under its broadest interpretation, the term could be said to encompass the economic well-being

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34. *Id.*

35. *Id.* Ostensibly, the President blocked the merger in this case for "national security" purposes under Exon-Florio. *Id.* Some critics have suggested, however, that the actual reason for the President's action was the result of his opinion about the Chinese government and its political system rather than the effect of the transaction on U.S. national security. *Id.* at 294.

36. Barbara Franklin, *Lapse in Exon-Florio; Uncertainty Affects Deals Involving Foreigners*, N.Y.L.J., Jan. 17, 1991, at 5.

37. Chierichella & Perry, *supra* note 25, at 837.

38. *Getting His Way*, ECONOMIST, Nov. 7, 1992, at 15.

39. *Foreign Investment: U.S. Has Uncoordinated Policy, Inadequate Controls on Takeovers, Seminar Told*, *supra* note 4, at 180 (describing views of Susan J. Tolchin, professor of Public Administration at George Washington University).

40. *Id.*

41. *See* Banker, *supra* note 2, at 7.

42. *Foreign Investment, EC Expresses Concern About U.S. Barring Thomson-CSF Takeover of LTV Missiles Unit*, Daily Rep. for Executives (BNA) 35 (July 2, 1992). The controversy surrounding "national security" has existed particularly in non-U.S.

of the United States as well as the condition of the U.S. national defense.[43] This position is based on the notion that all substantial economic transactions, including defense industry transactions, have some effect on national security.[44] In contrast, a more narrow interpretation defines the phrase "national security" to include only those enterprises directly involved in the production of national defense weapons.[45] Most commentators agree that industries involved in U.S. defense production are covered under Exon-Florio.[46] These industries clearly affect national security and, consequently, the government should monitor the control of these industries constantly.[47] A multitude of interpretations regarding "national security" exists, however, between the liberal and conservative extremes.[48]

The most relevant interpretation of national security is

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countries and involves questions relating to the scope and application of the term. *Id.*

43. OMNIBUS TRADE AND COMPETITIVENESS ACT OF 1988 CONFERENCE REPORT, H.R. CONF. REP. No. 576, 100th Cong., 2d Sess. 926 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1609, 1959. Both the original House and Senate versions of Exon-Florio included the term "essential commerce" as one of the criteria for investigating a particular merger or acquisition. *Id.*; Nowak, *supra* note 15, at 1013 n.70; *see* Jonathan P. Hicks, *The Takeover of American Industry*, N.Y. TIMES, May 28, 1989, at 1; Samuel Fromartz, *Law on Foreign Buyouts Assailed as a Potential Trade Weapon*, Reuter Bus. Rep., Dec. 12, 1989, *available in* LEXIS, Nexis Library, ALLWLD File. After negotiations with the Executive branch, however, Congress agreed to redact the term "essential commerce." OMNIBUS TRADE AND COMPETITIVENESS ACT OF 1988 CONFERENCE REPORT, H.R. CONF. REP. No. 576, 100th Cong., 2d Sess. 926 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1609, 1959.

44. Cecilia M. Waldeck, Note, *Proposals For Limiting Foreign Investment Risk Under the Exon-Florio Amendment*, 42 HASTINGS L.J. 1175, 1211, 1215 (1991).

45. Chierichella & Perry, *supra* note 25, at 837. The Department of Defense has played a major role in designating which types of defense-related transactions could affect national security. *Id.*; *see* Banker, *supra* note 2, at 7.

46. *See* Chierichella & Perry, *supra* note 25, at 837 (describing specific defense-production industries).

47. *See* Banker, *supra* note 2, at 7 (discussing which transactions relating to national defense should be monitored).

48. *Id.* The broad nature of "national security" permits a large array of interpretations to exist. *Id.*

A collateral issue related to and arising under Exon-Florio involves the differing viewpoints expressed of individuals commonly referred to as "protectionists" and those referred to as "economic globalists." *See id.* Individuals belonging to the former group consider most, if not all, direct investment in the United States a threat to the domestic economy. *Id.* Members of the latter group welcome such investment. *Id.*

that made by the U.S. Executive.[49] The President of the United States ultimately decides which transactions affect "national security" under Exon-Florio,[50] and, consequently, which transactions should be suspended or prohibited.[51] Therefore, the definition of national security will vary depending on the President's view.[52] Specifically, under former President Bush's globalist philosophy,[53] "national security" was read narrowly to avoid interference with global trade and the free market.[54] This philosophy is viewed as conservative because divestitures were effectuated in as few instances as possible.[55] Under a

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49. *See Foreign Investment, U.S. Welcomes Foreign Investment, Urges Other Countries to Do Same, President Says*, Daily Rep. for Executives (BNA) A-6 (Dec. 30, 1991).

50. Omnibus Trade and Competitiveness Act, Pub. L. No. 100-418, § 5021, 102 Stat. 1107, 1425-26 (1988) (amending Title VII of the Defense Production Act, 50 U.S.C. app. § 2170 (1950)). While CFIUS initially scrutinizes transactions which are filed with the Committee, the President makes the ultimate decision as to whether such transactions threaten national security. *Id.*

51. *Let the (Foreign) Buyer Beware*, *supra* note 27, at 17. CFIUS' interpretation of national security is dictated by the President's interpretation of the term because the President retains the exclusive authority to decide whether to block a transaction on the basis of national security. *Id.* Furthermore, depending on whether the President's interpretation of national security is broad or narrow, Exon-Florio will be applied, respectively, to prevent a larger or smaller number of international transactions. Sidney Blumenthal & James Chace, *Memo to Democrats*, N.Y. TIMES, Feb. 23, 1992, § 6, at 32.

52. *Let the (Foreign) Buyer Beware*, *supra* note 27, at 17.

53. The globalist philosophy which existed under President Bush's Administration could be significantly altered during the Clinton Administration. *See Foreign Investment: U.S. Has Uncoordinated Policy, Inadequate Controls on Takeovers, Seminar Told*, *supra* note 4.

54. George Bush, Statement Released by the White House, Office of the Press Secretary, U.S. Department of State Dispatch (Dec. 26, 1992), *available in* LEXIS, Nexis Library, CURRNT File. The President's interpretation of "national security" has been enunciated by an official White House Statement on December 26, 1991. Specifically, it states, in relevant part, that

> the United States provides foreign investors fair, equitable and nondiscriminatory treatment as a matter of both law and practice. While there are exceptions, generally related to national security, such exceptions are few; they limit foreign investment only in certain sectors, such as atomic energy, air and water transport, and telecommunications. These exceptions are consistent with our international obligations.

Id.

55. *Narrow Interpretation of Statute Hobbles Exon-Florio Reviews, Lawyers Told*, Int'l Trade Rep. (BNA) (Feb. 19, 1992). This conservative interpretation of national security has incited much criticism regarding the overall application of Exon-Florio. *Id.*; *see supra* notes 31-35 and accompanying text (discussing MAMCO divestiture); Mendenhall, *supra* note 31, at 294. At present, the MAMCO divestiture can be viewed as a rare exception to the general rule of allowing direct investment in virtually all situations. *Id.*

more protectionist philosophy, President Clinton may be inclined to take a more liberal position and interpret the term "national security" more broadly than did former President Bush.[56] Consequently, a broader range of transactions, including those dealing with non-military commercial industries, may be subject to suspension or blockage under the Provision.[57]

In drafting Exon-Florio, Congress refrained from defining national security in order to encourage a broad interpretation of the term.[58] The U.S. legislature originally intended Exon-Florio to apply to international transactions beyond national defense, particularly those transactions closely related to commercial security.[59] Congress, however, encountered much resistance from the Executive branch in passing this legislation due to the latter's strong free trade policies.[60] Consequently, when the provision was ultimately enacted, it did not contain any portions that strongly suggested the application of Exon-Florio to commercial matters.[61]

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56. *Getting His Way*, *supra* note 38, at 15.

57. *Id.*

58. OMNIBUS TRADE AND COMPETITIVENESS ACT OF 1988 CONFERENCE REPORT, H.R. CONF. REP. No. 576, 100th Cong., 2d Sess. 926 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1609, 1959.

59. H.R. CONF. REP. No. 576. According to the House Conference Report, accompanying Exon-Florio, Congress' intent was confined to protecting national security, without discouraging direct investment. *Id.*; Nowak, *supra* note 15, at 1006. Nevertheless, when considering the conference report, it is possible to view Congress' desire that the Act be applied to economic security as well as national security. *Id.* In relevant part, the conference report states that

> [t]he standard of review in this section is "national security" . . . . the term "national security" is to be interpreted broadly without limitation to particular industries. . . . [Factors to be considered] include but are not limited to domestic production needed for projected national defense requirements; the capability and capacity of domestic industries to meet national defense requirements. . . ; and the control of domestic industries . . . as it affects the capability and capacity of the United States to meet the requirements of national security.

H.R. CONF. REP. No. 576.

60. *See generally* Thomas J. Soseman, *International Law—The Exon-Florio Amendment to the 1988 Trade Bill: A Guardian of National Security or a Protectionist Weapon?*, 15 J. CORP. L. 597 (1990).

61. Omnibus Trade and Competitiveness Act, Pub. L. No. 100-418, § 5021, 102 Stat. 1107, 1425-26 (1988) (amending Title VII of the Defense Production Act, 50 U.S.C. app. § 2170 (1950)).

B. *The National Defense Authorization Act For Fiscal Year 1993*

The National Defense Authorization Act For Fiscal Year 1993[62] (the "NDA Act") is a recent amendment to Exon-Florio that modifies and supplements the Provision.[63] One such provision adds discretionary considerations for the President's use in determining whether a transaction affects national security.[64] The President may analyze the potential effect of a proposed transaction on sales of military goods, equipment, or technology to any country that supports terrorism.[65] The President may also consider the potential effects of the proposed or pending transaction on U.S. technological leadership in areas affecting U.S. national security.[66]

The NDA Act also requires mandatory investigations for certain mergers and acquisitions.[67] Specifically, the President or the President's designee must investigate situations where an entity, controlled by a non-U.S. government, seeks to engage in a transaction with a U.S. company that could affect U.S. national security.[68] Thus, investigations of certain transactions are required, rather than subject to the discretion of CFIUS.[69]

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62. Pub. L. No. 102-484, § 837, 106 Stat. 2463-65 (1992).

63. *Id.*; *Foreign Investment, Thomson Bid to Acquire LTV Continues to Generate Fallout in Congress, Court*, Daily Rep. for Executives (BNA) 189 (Sept. 29, 1992).

64. National Defense Authorization Act For Fiscal Year 1993, Pub. L. No. 102-484, § 837, 106 Stat. 2463-65 (1992).

65. *Id.*

66. *Id.*

67. *Id.* Specifically, the proposed act states that

> the President or the President's designee shall make an investigation, as described in subsection (a), in any instance in which an entity controlled by or acting on behalf of a foreign government seeks to engage in any merger, acquisition or takeover of a person engaged in interstate commerce in the United States that could affect the national security of United States.

Id.

68. *Id.*

69. *Id.* In addition to mandatory investigations, the NDA Act also requires firms that are performing certain Department of Defense contracts to notify the Department if they intend to perform part of the contract outside the United States or Canada. Specifically, the NDA Act states that

> [a] firm that is performing a Department of Defense contract for an amount exceeding $10,000,000, or is submitting a bid or proposal for such a contract, shall notify the Department of Defense in advance of any intention of the firm or any first-tier subcontractor of the firm to perform outside the United States and Canada any part of the contract that exceeds $500,000 in value and could be performed inside the United States or Canada.

Id. § 840.

In addition, the NDA Act prohibits specific non-U.S. firms from buying certain U.S. defense companies.[70] Under national security programs, certain U.S. companies perform contracts for the Departments of Defense or Energy with access to classified information.[71] Under the NDA Act, these companies are restricted from acquisition by a non-U.S. entity.[72] Likewise, if the company being acquired has been awarded defense or energy contracts during the previous fiscal year in excess of US$500,000,000, it is restricted from acquisition by a non-U.S. entity.[73]

The NDA Act further modified Exon-Florio by requiring the President to submit a written report to Congress on the President's determination of whether or not to suspend or block a transaction.[74] The report must include a detailed explanation of the findings and factors that the President considered in deciding on the transaction.[75] Finally, the NDA Act suggests, but does not require, that the President include the Director of the Office of Science and Technology Policy and the Assistant to the President for National Security in the membership of CFIUS.[76]

II. *PROPOSED AMENDMENTS TO EXON-FLORIO IN LIGHT OF THE LTV CASE*

A number of proposals have been presented before Congress and are designed to strengthen and further clarify Exon-

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70. *Id.* § 824. In particular, the proposed act states that

> no entity controlled by a foreign government may purchase or otherwise acquire a company engaged in interstate commerce in the United States that- (1) is performing a department of defense contract, or a department of energy contract under a national security program, that cannot be performed satisfactorily unless that company is given access to information in a proscribed category of information; or (2) during the previous fiscal year, was awarded- (A) Department of Defense prime contracts in an aggregate amount in excess of $500,000,000; or (B) Department of Energy prime contracts under national security programs in an aggregate amount in excess of $500,000,000.

Id.

71. *Acquisition Policy, Defense Authorization Bill to Include Claims Certification Provision*, Fed. Cont. Rep. (BNA) D-3 (Oct. 5, 1992).

72. National Defense Authorization Act § 837.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

Florio in its structure and application.[77] Specifically, the proposed Technology Preservation Act of 1991 (the "TPA") and the International Mergers and Acquisitions Review Act of 1991 (the "Review Act") are designed to improve the current version of Exon-Florio.[78] The Technology Preservation Act of 1991, a bill proposed in Congress, would expand Exon-Florio's control over direct investment in the United States.[79] Likewise, the International Mergers and Acquisitions Review Act of 1991[80] is a proposed body of legislation that would strengthen the direct investment review process under Exon-Florio.[81] Both of these proposed acts are intended to improve the current version of Exon-Florio.[82] A useful way of considering these proposed amendments is to discuss them in light of a recent and controversial case involving the Provision.[83]

A. *The LTV Case*

In early 1992, the French state-owned company, Thomson-CSF, Inc. and two partners attempted to acquire the LTV Corporation, a U.S. steel, defense, and aerospace firm.[84] Specifically, Thomson, in conjunction with a U.S. investment firm,

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77. Technology Preservation Act, H.R. 2624, 102d Cong., 1st Sess. (1991); International Mergers and Acquisitions Review Act, H.R. 2631, 102d Cong., 1st Sess. (1991).

78. *See supra* note 77 (listing proposed acts, each of which sets forth specific modifications to various aspects of the current Exon-Florio provision).

79. H.R. 2624, 102d Cong., 1st Sess. (1991); *Exon-Florio Should Either Be Killed or Enhanced, House Banking Panel Told*, Sec. Reg. & L. Rep. (BNA) 497 (Apr. 10, 1992).

80. International Mergers and Acquisitions Review Act, H.R. 2624, 102d Cong., 1st Sess. (1991).

81. *Id.* Under a stronger review process, this proposed act would monitor and regulate direct investment. *Id.*

82. H.R. 2624; H.R. 2631; *Foreign Investment, Treasury Reiterates Opposition to Changes in Exon-Florio, Industry Views Are Mixed*, Fed. Cont. Rep. (BNA) D-10 (Apr. 6, 1992). Still other legislation has been proposed in the House of Representatives that is designed to accomplish the same goals as the Technology Preservation Act. *See* Foreign Investment and Economic Security Act, H.R. REP. No. 2386, 102d Cong., 1st Sess. (1991), introduced by Reps. Mel Levine (D-Ca.) and Frank Wolf (R-Va.), as reported in *Bill Offered To Strengthen Law Governing Foreign Acquisitions*, Int'l Trade Rep. (BNA) (June 19, 1991). Because of the similarity of this additional proposal to the Technology Preservation Act, this Note will concentrate solely on the Technology Preservation Act along with the two other proposals cited.

83. *See* Eric Schmitt, *Administration Must Decide On LTV Unit's Sale to French*, N.Y. TIMES, May 20, 1992, at D-1.

84. *See* Arshad Mohammed, *France's Thomson-CSF Bids $400 Million for LTV Unit*, Reuter Libr. Rep., Apr. 1, 1992, *available in* LEXIS, Nexis Library, CURRNT File.

the Carlyle Group, and a U.S. defense and auto company, GM Hughes, made a bid of US$400,000,000 for LTV.[85] Under the terms of the bid, Thomson and GM Hughes' Hughes Aircraft Co. would take control of the LTV Missiles Division, while Carlyle would take control of the LTV Aircraft Division.[86] Among other regulatory hurdles, the Thomson bid was subject to approval under Exon-Florio.[87]

Following Thomson's bid, members of Congress sharply criticized the proposed transaction mainly due to concern that non-U.S. ownership of a U.S. defense business would pose a threat to national security.[88] Perhaps the most extreme opposition came from West Virginia Senator Robert C. Byrd, who proposed a bill[89] to bar any non-U.S. company from purchasing the LTV Corporation.[90] Senator Byrd insisted that there was a strong possibility that Thomson would shift the LTV subcontractor base from the United States to France, thereby eroding U.S. defense manufacturing.[91] Ultimately, CFIUS recommended that the President block the transaction following the failure of Thomson-CSF and the U.S. Department of Defense to agree on special security arrangements ensuring U.S.

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85. *Id.*

86. *Id.*

87. *Id.*

88. Harihar Krishnan, *Loral Corp. Agrees to Buy LTV's Missiles Division*, UPI, July 23, 1992, *available in* LEXIS, Nexis Library, UPI File.

89. S. 2704, 102d Cong., 2d Sess. (1992). The bill states in relevant part that

> [t]he Congress finds that the sale or other transfer to a foreign person of a United States business concern that is critical to the defense industrial base of the United States would be detrimental to the national security interests of the United States .... Notwithstanding any other provision of law or any agreement to the contrary, no foreign person may purchase or otherwise acquire the LTV Aerospace and Defense Company.

Id. The bill goes on to define "foreign person" as "any foreign organization, corporation, or individual resident in a foreign country, or any domestic or foreign organization, corporation, or individual, that is owned or controlled by the foreign organization, corporation, or individual." *Id.*; *see Foreigners Buying American*, NAT'L J.—GOV'T EXECUTIVE, Aug. 1992.

90. *Foreigners Buying American*, *supra* note 89. The National Defense Authorization Act sets forth a limitation on the sale of the LTV Corporation. National Defense Authorization Act For Fiscal Year 1993, Pub. L. No. 102-484, § 837, 106 Stat. 2463-65 (1992). In particular, the Act requires that any contract between the U.S. Department of Defense and the LTV Aerospace and Defense Company include a provision that requires the purchaser of all or part of LTV's operating assets, after April 1992, to assume all the liabilities of LTV to its retired employees. *Id.*

91. *Id.*

government control over sensitive information.[92] Before the President acted on the matter, however, Thomson withdrew its original CFIUS notification and pursued discussions with other U.S. companies to comply better with U.S. government security restraints.[93] Later the same month, the Loral Group, a U.S. defense contractor, agreed to purchase the LTV Missile Division in a transaction that reduced Thomson's interest in the division to less than ten percent.[94]

The LTV case illustrates a growing concern in the United States that direct investment may threaten national security, as well as the U.S. economy.[95] Despite a globalist trade philosophy that sharply criticizes such concerns, legislation has been proposed in Congress ultimately to prevent the occurrence of certain types of non-U.S. mergers and acquisitions, like the LTV transaction, by strengthening Exon-Florio.[96] This legislation has a broader scope than Senator Byrd's bill, because it applies generally to all direct investment in the United States.[97]

B. *The Technology Preservation Act*

The proposed Technology Preservation Act would amend Exon-Florio in several ways.[98] One of the most significant changes under the proposed TPA involves CFIUS.[99] Currently, the President determines and designates the individual members of CFIUS and, thus, the composition of the Commit-

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92. Victor I. Lewkow & Christopher E. Austin, *Regulation of Foreign Investment in the U.S.*, INT'L FIN. L. REV., Sept. 1992, (Int'l M&A Supp.), at 71.

93. *Thomson-CSF Tries to Restructure LTV Bid, Faces $20 Million Penalty by End of July*, Int'l Trade Rep. (BNA) (July 22, 1992).

94. Krishnan, *supra* note 88.

95. *Id.*

96. *Thomson Bid to Acquire LTV Continues to Generate Fallout in Congress, Court*, Int'l Bus. Daily (BNA) D-28 (Sept. 29, 1992).

97. *Id.*

98. Technology Preservation Act, H.R. 2624, 102d Cong., 1st Sess. (1991). While this act was proposed well before the LTV case occurred, nevertheless, it reflects the concern over the past few years that foreign mergers and acquisitions need to be monitored more closely. *Exon-Florio Should Either Be Killed or Enhanced, House Banking Panel Told*, 24 Sec. Reg. & L. Rep. (BNA) 497 (Apr. 10, 1992).

99. Technology Preservation Act, H.R. 2624, 102d Cong., 1st Sess. § 2 (1991). This section of the proposed act deals exclusively with the President's designee, otherwise known as CFIUS. *Id.*

tee is subject to change.[100] Under the TPA, however, the particular members of CFIUS would be codified.[101] Specifically, CFIUS would be composed permanently of the Secretaries of Commerce, Defense, Treasury, Energy, and State Departments, as well as the U.S. Trade Representative, the Attorney General, the National Security Advisor, and the Assistant to the President for Science and Technology.[102] The TPA would substitute the current chairperson of CFIUS, the Secretary of the Treasury, with the Secretary of Commerce.[103]

Another change under the proposed TPA involves the overall investigation process of transactions filed with CFIUS.[104] Specifically, the TPA would authorize the President and CFIUS to conduct preliminary reviews to determine whether a further investigation is necessary to evaluate the effects on national security of certain mergers, acquisitions, and takeovers.[105] Currently, no such review occurs before the formal investigation process.[106]

Furthermore, in connection with the review and investigation of a merger, acquisition, or takeover of a U.S. company by a non-U.S. company, the proposed TPA would allow CFIUS to solicit written assurances from the non-U.S. entity that the plans and intentions of such entity for the future operation of the U.S. company would not impair national security.[107] The

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100. Exec. Order No. 11,858, 3 C.F.R. 990-92 (1971-1975), *reprinted in* 15 U.S.C. § 78b (1982).

101. Technology Preservation Act, H.R. 2624, 102d Cong. 1st Sess. § 2 (1991).

102. *Id.*

103. *Id.*; *see supra* note 24 and accompanying text (detailing current composition of CFIUS).

104. Technology Preservation Act, H.R. 2624, 102d Cong. 1st Sess. § 2 (1991).

105. *Id.*

106. *Id.*

107. *Id.*; *Bill Offered to Strengthen Law Governing Foreign Acquisitions*, *supra* note 82. Such assurances would be required in all transactions affecting national security. *Id.* Specifically, the proposed act states that

> (i) The President or the Committee on Foreign Investment in the United States may, in connection with a review and investigation under paragraph (1) of a merger, acquisition, or takeover of a United States person by a foreign person, solicit assurances from the foreign person that the plans and intentions of such person for the future operation of the United States person will not impair the national security. Such assurances shall be in writing and shall, when received, be made available to each member of the committee.

Technology Preservation Act, H.R. 2624, 102d Cong., 1st Sess. § 2 (1991).

TPA would also include additional factors that the President could consider when deciding whether or not to block a transaction.[108]

C. *The International Mergers and Acquisitions Review Act of 1991*

Representative Philip R. Sharp of Indiana has introduced the International Mergers and Acquisitions Review Act of 1991[109] as an alternative to the Technology Preservation Act.[110] The proposed Review Act would amend the Clayton Act,[111] which requires the registration of certain mergers and acquisitions in the United States on the basis of antitrust principles.[112] Initially, the Review Act would establish the National Security Liaison Committee ("NSLC") to review all U.S. and non-U.S. notifications filed under mandatory pre-merger notification provisions of the Clayton Act.[113] The proposed Review Act would then bar any entity's acquisition of the voting securities or assets of another entity unless both parties filed notifications pursuant to the Review Act.[114]

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108. Technology Preservation Act, H.R. 2624, 102d Cong., 1st Sess. § 5 (1991). These factors include the domestic production needed for projected national defense requirements, the capability of domestic industries to meet national defense requirements, and the United States and world market position of the persons engaged in the transaction under investigation. *Id.*

109. International Mergers & Acquisitions Review Act, H.R. 2631, 102d Cong., 1st Sess. (1991).

110. *Treasury Reiterates Opposition to Collins' Ideas on Exon-Florio Changes*, 24 Sec. Reg. & L. Rep. (BNA) 458 (Apr. 3, 1992).

111. Ch. 323, 38 Stat. 730 (1914) (current version at 15 U.S.C. § 12 (1992)). The Clayton Act addresses filing requirements for particular transactions and is intended to protect the public against evils which result from the lessening of competition. *See* International Shoe Co. v. FTC, 280 U.S. 291, 297-98 (1930) (defining purpose of Clayton Act in general). In short, the Clayton Act is designed to prevent monopolies. *See id.* (discussing antitrust aspects of Clayton Act).

112. International Mergers and Acquisitions Review Act, H.R. 2631, 102d Cong., 1st Sess. § 3 (1991).

113. *Id.* § 4. The Clayton Act involves U.S. mergers and acquisitions in general. 15 U.S.C. § 12 (1992). Subsequent to its enactment, the Clayton Act was amended under the Hart-Scott-Rodino Act, which applies only to transactions in which the parties involved are of a particular size (usually with net sales or total assets above US$100,000,000) and the proposed transaction involves either the acquisition of at least US$15,000,000 of voting securities or assets or the acquisition of 50 % or more of the outstanding voting securities of a target with at least US$25,000,000 in annual net sales or total assets. Victor I. Lewkow & Christopher E. Austin, *Regulation of Foreign Investment in the U.S.*, INT'L FIN. L. REV., Sept. 1992, (Int'l M&A Supp.), at 71-72.

114. International Mergers and Acquisitions Review Act, H.R. 2631, 102d Cong., 1st Sess. § 3 (1991).

Additionally, the Review Act would regulate transactions where either the acquiring party or the party to be acquired (the "target") is engaged in commerce, or in an activity affecting commerce, and each meets a minimum net sales requirement.[115] Also, when the target has a contract with the U.S. government that involves the target's access to classified information, both parties would be required to file notifications.[116] Finally, the proposed Review Act would require a waiting period, after filing with the NSLC, before the transaction could be concluded.[117]

Under the Review Act, the NSLC would be required to refer certain notifications, including any that might threaten or impair national security, to the President or the President's designee under Exon-Florio for investigation.[118] Thus, this provision would apply to all transactions by U.S. as well as non-U.S. entities bearing on national security; the Review Act could function in conjunction with Exon-Florio.[119] Like the TPA, the Review Act would also codify CFIUS but would designate somewhat different members.[120] Specifically, the Review Act would include the Chairman of the Council of Economic Advisors and the Director of the Office of Management and Budget instead of the National Security Advisor and the

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115. *Id.* Under the Review Act, notifications would be required by both parties if, as a result of the acquisition, the acquiring party would hold fifteen percent or more of the voting securities or assets of the target or an aggregate total of US$15,000,000 of the same. *Id.* In addition, the Review Act would monitor transactions in which the acquiring party or the target is engaged in commerce, or an activity affecting commerce, and both are domiciled outside the United States. *Id.* The Review Act would require notification by both parties where the combined net sales in the United States of both exceeds US$350,000,000 and, as a result of the transaction, the acquiring party would hold five percent or more of the target. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* Specifically, the proposed act states that

> [t]he National Security Liaison Committee established in section 7B may, by rule in accordance with section 553 of title 5, United States Code . . . require that notifications required under subsection (a) contain such additional documentary information and material as is necessary and appropriate to enable the Committee to determine whether a proposed acquisition should be referred, under section 7B(c)(2), to the President or the President's designee under section 721 of the Defense Production Act of 1950.

Id.

119. *Id.*

120. *Id.* § 5.

Assistant to the President for Science and Technology.[121] Likewise, the proposed Review Act would retain the Secretary of the Treasury as the chairperson of CFIUS rather than replacing the office with the Secretary of Commerce as the proposed Technology Preservation Act suggests.[122]

The Review Act further suggests that the President negotiate with other countries to establish agreements on the exchange of certain commercial and market information.[123] Such information could be used to determine the possible anti-competitive effects of transnational mergers and acquisitions.[124] Finally, the proposed Review Act would urge the President to negotiate with other countries to establish dispute resolution mechanisms that could deal with the regulatory overlap among countries with respect to such mergers and acquisitions.[125]

III. *THE NEED FOR MODIFICATIONS TO EXON-FLORIO THROUGH PROPOSED U.S LEGISLATION*

In order to protect a country's economic and military security in an increasingly global market, strong legislation is required. Through the use of a voluntary filing system and imprecise objectives, Exon-Florio fails to monitor and regulate successfully direct investments vital to U.S. national security.[126] By implementing key aspects of the proposed U.S. legislation currently before Congress, Exon-Florio would become more productive and effective. For these reasons, Congress should amend Exon-Florio by implementing certain portions of the proposed U.S. legislation.

A. *The Need for Congressional Action*

The United States must amend its approach to direct investment and can justify such an amendment without impeding

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121. *Id.*

122. *Id.*; Technology Preservation Act, H.R. 2624, 102d Cong, 1st Sess. § 2 (1991).

123. International Mergers and Acquisitions Review Act, H.R. 2631, 102d Cong., 1st Sess. § 6 (1991).

124. *Id.*

125. *Id.*

126. OMNIBUS TRADE AND COMPETITIVENESS ACT OF 1988 CONFERENCE REPORT, H.R. CONF. REP. No. 576, 100th Cong., 2d Sess. 926 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1609, 1959; *Narrow Interpretation of Statute Hobbles Exon-Florio Reviews, Lawyers Told*, *supra* note 55.

the U.S. globalist trade philosophy.[127] The current U.S. merger legislation relating to non-U.S. direct investment is inadequate because it permits an overwhelming majority of non-U.S. entities to merge with or acquire U.S. entities.[128] While there are current filing requirements, including Exon-Florio, and certain restrictions on transactions outlined in the recent National Defense Authorization Act, practically no U.S. statute closely monitors or discourages direct investment in areas as vital as national defense.[129] In contrast, countries like France, Italy, and Spain make direct investment, such as that in the LTV case, extremely difficult in their respective countries.[130]

For instance, if a U.S. company, controlled by the U.S. government, wished to purchase a major French manufacturer of France's military weapons, the U.S. company would encounter several obstacles to effecting such a transaction.[131] Conversely, however, under present U.S. legislation, the French government, acting through a private company, would encoun-

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127. White House Statement Announcing United States Foreign Direct Investment Policy, 27 WEEKLY COMP. PRES. DOC. 1894 (Dec. 26, 1991).

128. *See supra* notes 21-30 and accompanying text (discussing structure and function of present Exon-Florio provision).

129. *Foreign Investment, U.S. Has Uncoordinated Policy, Inadequate Controls on Takeovers, Seminar Told*, *supra* note 4.

130. *See supra* note 13 (describing current legislation in France, Italy, and Spain regarding direct investment).

131. CCH International, Doing Business in Europe (France), ¶ 25-680, 26,702; SIMEON & ASSOCIES, *supra* note 3. Currently, direct investments by non-residents are subject to prior authorization of the Ministry of Economy, Finance, and Budget. *Id.* A direct investment in France is defined as

> one or more operations that individually or together permit one or more individuals or legal entities to create, or to obtain or increase their "control" over, an industrial, agricultural, commercial, financial, or real estate enterprise or [an ongoing business] located in France.

Id.

Likewise, a non-resident investor who wishes to acquire a controlling interest in a French company must file with the Treasury Department of the Ministry of Economy prior to the intended transaction. Jacques Epstein, et al., *Foreign Investment Controls*, INT'L FIN. L. REV., Sept. 1992 (Int'l M&A Supp.), at 41. Theoretically, the non-resident investor must comply with the filing requirement only if the offer is for twenty percent or more of a "listed" company. *Id.* In practice, however, this filing requirement can be triggered by the acquisition of any form of control by the non-resident party. *Id.*

In addition to the initial filing requirement, the non-resident acquiring party, prior to completing the transaction, must submit to the Treasury Department of France an additional document that describes the major points of the proposed transaction as well as information about the acquiring entity, itself. *Id.*

ter virtually no restrictions in the United States if it attempted to acquire a similarly-situated U.S. manufacturer.[132] While the National Defense Authorization Act has attempted to rectify this situation by requiring mandatory investigations in certain cases and completely prohibiting specific types of transactions, it has not gone far enough.[133]

In the LTV case, Thomson was not actually prohibited from the original merger.[134] While it encountered much criticism, particularly in Congress due to the proposed acquisition, Thomson was never actually blocked from the transaction.[135] Instead, the non-U.S. company found it easier to restructure the transaction rather than pursuing the initial proposal any further.[136] As the LTV case illustrates, Exon-Florio does not significantly block transactions that are vital to national security as do other countries. Therefore, the Provision should be modified to better address U.S. concerns regarding direct investment. While modifications to Exon-Florio are imperative, such modifications should only increase the strength of Exon-Florio with respect to national defense. The United States should not abuse Exon-Florio and extend it to serve commercial security interests. Such an extension would constitute an unnecessarily protectionist measure, which would adversely affect the U.S. economy. Therefore, it is essential that any amendment to Exon-Florio narrowly and directly benefit U.S. national defense rather than purport to benefit the U.S. economy. This focused approach can best be achieved through a more specific definition of national security.

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132. *See supra* notes 84-97 and accompanying text (discussing LTV case and relevant U.S. trade policies).

133. *See supra* notes 67-73 and accompanying text (discussing mandatory investigations of certain transactions under the National Defense Authorization Act For Fiscal Year 1993).

134. *Foreign Investment, Thomson-CSF Tries to Restructure LTV Bid, Faces $20 Million Penalty by End of July*, Daily Rep. for Executives (BNA) 140 (July 21, 1992).

135. *Id.*

136. *Id.* Ultimately, Thomson did, in fact, purchase a portion of LTV. *Loral Announces Plan to Acquire LTV Missiles; Thomson-CSF Interest 9.9%*, Int'l Bus. Daily (BNA) (July 28, 1992). Moreover, given the U.S. Executive's globalist trade philosophy, it is possible that even the original investment proposal would have survived the President's scrutiny under Exon-Florio, despite Congressional influences, if Thomson would have pursued it further. Harihar Krishnan, *Loral Group Agrees to Buy LTV's Missile Division*, UPI, July 23, 1992, *available in* LEXIS, Nexis Library, CURRNT File.

B. *The Current Exon-Florio Provision Should Be Modified to Adopt Provisions Set Forth in the Recent Proposed U.S. Legislation*

Congress should amend Exon-Florio in order to protect U.S. national interests more effectively, particularly national defense interests. Three major problems exist under the present Exon-Florio provision. The first problem concerns the organization of CFIUS.[137] The present composition and control of CFIUS does not best serve the interests of the United States. A second problem with Exon-Florio involves the term "national security." This term is unnecessarily ambiguous and thus problematic for all parties involved in international mergers and acquisitions in the United States.[138] Consequently, this aspect of Exon-Florio must also be amended. A final problem with Exon-Florio concerns its overall approach to monitoring mergers and acquisitions in highly sensitive industries that are vital to U.S. national security.[139] Such mergers and acquisitions must be regulated as closely as possible, without substantially impeding the U.S. globalist trade philosophy.[140] Solutions to these problems can be derived, in part, from elements of both bodies of proposed U.S. legislation.[141]

1. Modifications to CFIUS

A major disadvantage to Exon-Florio is its failure to clearly delineate the composition, authority, and role of CFIUS.[142] Currently, CFIUS is a body of Executive branch members whose administrative powers stem directly from the President.[143] As the President's "designee," the very existence

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137. OMNIBUS TRADE AND COMPETITIVENESS ACT OF 1988 CONFERENCE REPORT, H.R. CONF. REP. No. 576, 100th Cong., 2d Sess. 926 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1609, 1959.

138. Chierichella & Perry, *supra* note 25, at 837.

139. H.R. CONF. REP. No. 576.

140. *See supra* notes 6, 53-54 accompanying text (discussing traditional U.S. trade philosophy under Bush Administration).

141. Technology Preservation Act, H.R. 2624, 102d Cong., 1st Sess. (1991); International Mergers and Acquisitions Review Act, H.R. 2631, 102d Cong., 1st Sess. (1991).

142. OMNIBUS TRADE AND COMPETITIVENESS ACT OF 1988 CONFERENCE REPORT, H.R. CONF. REP. No. 576, 100th Cong., 2d Sess. 926 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1609, 1959.

143. *Foreign Investment, U.S. Has Uncoordinated Policy, Inadequate Controls on Takeovers, Seminar Told*, *supra* note 4.

of CFIUS is subject to the President's own convictions.[144] Theoretically, CFIUS's composition can vary depending on the views of each particular President.[145] This instability does not serve U.S. national security interests. The structure of CFIUS should remain constant and intact, regardless of the President's convictions. A future President possibly could eliminate CFIUS entirely.[146] This situation undermines the importance of CFIUS and its authority to monitor mergers, acquisitions, and takeovers.

a. The Codification of CFIUS

The instability of CFIUS could be solved by codifying its members, its authority, and its function through legislation.[147] Consequently, the status of the Committee would be permanent and the President would not be able to shift members into and out of the group, or eliminate it completely.[148] Likewise, codifying the composition, authority, and role of the Committee would strengthen its authority and prompt companies to be more receptive to its requirements. If CFIUS were codified, rather than implied under the current Exon-Florio provision as the "President's designee," the Committee would be authorized to fully review and investigate direct investment under Exon-Florio within designated time frames, as the Provision suggests.[149] Thus, codifying CFIUS would immediately clarify its authority and role.

b. The Significance of Modifying the Composition of CFIUS

CFIUS is currently composed of Executive members who, by definition, cannot serve the overall purpose of Exon-

144. *Id.*

145. Chierichella & Perry, *supra* note 25, at 837.

146. *See supra* notes 23-28 and accompanying text (discussing executive orders implementing CFIUS and defining it as "president's designee").

147. Technology Preservation Act, H.R. 2624, 102d Cong., 1st Sess. (1991); International Mergers and Acquisitions Review Act, H.R. 2631, 102d Cong., 1st Sess. (1991).

148. Technology Preservation Act, H.R. 2624, 102d Cong., 1st Sess. (1991); International Mergers and Acquisitions Review Act, H.R. 2631, 102d Cong., 1st Sess. (1991).

149. Omnibus Trade and Competitiveness Act, Pub. L. No. 100-418, § 5021, 102 Stat. 1107, 1425-26 (1988); *see supra* notes 101, 120 and accompanying text (describing codification of CFIUS under proposed Technology Preservation Act and International Mergers and Acquisitions Review Act respectively).

Florio.[150] For this reason, the composition of CFIUS must be altered. Both the Technology Preservation Act and the International Mergers and Acquisitions Review Act would partially modify the current composition of CFIUS.[151] Of these two approaches, however, the Technology Preservation Act presents the superior method. By requiring the National Security Advisor to be included in CFIUS, along with the Assistant to the President for Science and Technology, the Committee will be better equipped to instruct the President on various mergers and acquisitions that involve national security.[152] As the Technology Preservation Act designates, CFIUS should also include the Secretary of Energy as a member. The Secretary of Energy could furnish CFIUS with the knowledge to understand better the nuclear energy and weapons implications of certain mergers and acquisitions. Currently, the United States is eliminating many of its nuclear weapons, forcing the sale of several U.S. nuclear weapons facilities.[153] Thus, it is important for CFIUS to be fully informed about the capabilities of particular companies that are being offered for sale to non-U.S. organizations.[154]

c. The Need to Change the Chairperson of CFIUS

Another change that should be made regarding CFIUS

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150. *See supra* text accompanying note 24 (discussing composition of CFIUS).

151. Technology Preservation Act, H.R. 2624, 102d Cong., 1st Sess. (1991); International Mergers and Acquisitions Review Act, H.R. 2631, 102d Cong., 1st Sess. (1991).

152. H.R. 2624. The National Security Advisor is well-informed of the U.S. national security with respect to international events. *See* Remarks by General Colin Powell, Chairman of the Joint Chiefs of Staff to the School of Advanced International Studies (May 21, 1992), *available in* LEXIS, Nexis Library, CURRNT File. Likewise, the Assistant to the President for Science and Technology is well-suited to give advice on the nature of current U.S. technology, such as defense weapons, with respect to other countries. *See* B.R. Inman & Daniel F. Burton, Jr., *Technology and Competitiveness: The New Policy Frontier*, FOR. AFF., Spring 1990, at 116.

While the National Defense Authorization Act has suggested that the President include in the membership of CFIUS the Director of the Office of Science and Technology and the Assistant to the President for National Security, the Act does not require the President to include these officials. National Defense Authorization Act For Fiscal Year 1993, Pub. L. No. 102-484, § 837, 106 Stat. 2463-65 (1992). Rather than codifying the members of CFIUS by legislation, the Act leaves the status of the Committee to the discretion of the President. *Id.*

153. Graeme Browning, *Arms and the Global Economy*, NAT'L J., June 13, 1992, vol. 24, No. 24, at 1436.

154. *Id.*

concerns its chairperson. Currently, CFIUS is controlled by the Secretary of Treasury.[155] As several critics have suggested, the Secretary of Treasury has an institutional bias contrary to the purpose of CFIUS.[156] The Secretary of Treasury must be concerned, first, with reducing the deficit as much as possible.[157] Direct investment into the United States causes the deficit to decrease.[158] Consequently, the Secretary of Treasury most likely will be more interested in encouraging direct investment in the United States than in monitoring and regulating such investment when necessary under Exon-Florio.[159] For these reasons, the chairperson of CFIUS should become the Secretary of Commerce. As chairperson of CFIUS, the Secretary of Commerce could allow the Committee to evaluate better the trade situation in the United States without being biased against CFIUS activity.[160]

d. Complete Disclosure of CFIUS and Presidential Decisions Under Exon-Florio

Finally, one of the most significant programs that should be adopted regarding the Provision is the mandatory disclosure of virtually all Exon-Florio decisions.[161] Under this program, CFIUS would be required to publish any results it may deduce regarding proposed transactions of non-U.S. parties in

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155. Exec. Order No. 11,858, 3 C.F.R. 990-92 (1971-75 comp.), *reprinted in* 15 U.S.C. § 78b (1982); Chierichella & Perry, *supra* note 25, at 837.

156. *Narrow Interpretation of Statute Hobbles Exon-Florio Reviews, Lawyers Told*, *supra* note 55.

157. *Id.*; *see United States Should Have 'Serious Debate' on Foreign Investment Policy, ABA Told*, Int'l Trade Rep. (BNA) (May 1, 1991) (describing current secretary of treasury's attention to the budget deficit and trade deficit).

158. *Narrow Interpretation of Statute Hobbles Exon-Florio Reviews, Lawyers Told*, *supra* note 55.

159. *Id.*

160. The Technology Preservation Act proposes this very solution, which should be included in any amendment to Exon-Florio. Technology Preservation Act, H.R. 2624, 102d Cong., 1st Sess. (1991).

161. *'Major Reforms' in Monitoring Defense-Related Acquisitions Urged*, Int'l Trade Rep. (BNA) (Aug. 19, 1992). While the National Defense Authorization Act requires the President to submit a report to Congress regarding the President's determination of whether to suspend or to block a transaction, the Act does not supersede Exon-Florio's confidentiality element. National Defense Authorization Act, Pub. L. No. 102-484, § 837, 106 Stat. 2463-65 (1992). Consequently, the Act does not provide for public disclosure of Exon-Florio determinations. *Id.*

the United States.[162] Decisions to permit such transactions or refer them to the President would be disclosed. Furthermore, in situations where the President actually blocks a merger or acquisition under Exon-Florio, the President's rationale for blocking such a transaction would be outlined.[163] Consequently, when such a decision is questioned and controversial, it would not be viewed as arbitrary or groundless.

This disclosure process would serve as a resource for the parties to a blocked transaction who may wish to attempt an adjusted merger in the future. It would also advise companies that intend to merge in the future but have not yet entered into negotiations. Publication of such decisions would enable these investors to predict whether their future transactions would be approved and would inform them how to structure their transaction to ensure passage under Exon-Florio.[164] Finally, it would cause Exon-Florio to be viewed as a rational mechanism for preserving national security. With all these changes implemented, the composition, authority, and role of CFIUS would be defined more clearly and thus all future parties to direct investment in the United States would benefit.

2. Clarification of National Security

As discussed, the ambiguous nature of the term "national security" is a controversial aspect of Exon-Florio.[165] This term must be clearly delineated through legislation. Upon enacting Exon-Florio, Congress left national security undefined because it wanted to encourage a broad interpretation of the term.[166] In fact, Congress originally intended Exon-Florio to apply to international mergers and acquisitions that were more closely tied to commercial security.[167] However, when Congress en-

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162. *Id.*

163. *See supra* notes 102-03 and accompanying text (discussing proposed Technology Preservation Act's suggested composition of CFIUS).

164. *Id.*

165. OMNIBUS TRADE AND COMPETITIVENESS ACT OF 1988 CONFERENCE REPORT, H.R. CONF. REP. No. 576, 100th Cong., 2d Sess. 926 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1609, 1959.

166. *Id.*

167. *Id.* According to the House Conference Report, accompanying Exon-Florio, Congress' intent was confined to protecting national security, without discouraging direct investment. *Id.*; *see* Nowak, *supra* note 15, at 1006. Nevertheless, when considering the conference report, it is possible to view Congress' desire that

countered executive resistance to this broad application of Exon-Florio, it included the ambiguous term, "national security," to encourage a broad reading of the provision and, thus, to prevent as much direct investment as possible.[168]

The ambiguous nature of the term should not continue to provide a wide application of Exon-Florio to commercial transactions.[169] In practice, the current definition provides the President with the opportunity to block mergers or acquisitions that do not concern national defense but may still bear upon the economic condition of the United States.[170] Although a globalist President would probably not block such transactions in the interest of free trade, in today's political climate a more protectionist President might be inclined to misuse Exon-Florio to prohibit a merger or acquisition that impacts the U.S. economy.[171] Under the current version of Exon-Florio, such a protectionist President could justify his action using a loose interpretation of national security.[172]

A rational definition of the term includes only those transactions that closely bear on national defense. This interpretation constitutes the most effective definition of national security because it would limit the possibility of protectionist abuses under Exon-Florio. If the term is defined to reflect only those transactions that relate to U.S. national defense, the President's ability to suspend or block non-U.S. direct investment will be limited and more precise.[173] Consequently, transactions that remotely affect national security, through their economic implications, will not be prohibited unnecessarily. Fur-

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the Act be construed as applying to economic security as well as national security. *Id.*; *see supra* note 59 (reproducing language of conference report).

168. *See generally* Thomas J. Soseman, *International Law—The Exon-Florio Amendment to the 1988 Trade Bill: A Guardian of National Security or a Protectionist Weapon?*, *supra* note 60. Such resistance on the part of the Executive results from the President's strong free trade policies. *See id.*

169. *See* Cecilia M. Waldeck, *Proposals For Limiting Foreign Investment Risk Under the Exon-Florio Amendment*, *supra* note 44.

170. *See* Mendenhall, *supra* note 31, at 286-87.

171. *See generally* Soseman, *supra* note 60; *see also* Nowak, *supra* note 15; Edward Felsenthal, *Threat to the Republic? The Politics of Foreign Direct Investment in the United States*, 14 FLETCHER F. WORLD AFF. 354 (1990). This occurrence is a strong possibility during the Clinton Administration. *Getting His Way*, *supra* note 38, at 15.

172. Felsenthal, *supra* note 171.

173. *Foreign Investment, U.S. Has Uncoordinated Policy, Inadequate Controls on Takeovers, Seminar Told*, *supra* note 4.

thermore, by limiting the term to transactions involving national defense, non-U.S. investors will be better-equipped to determine ahead of time whether or not they will be blocked in a particular transaction.

At present, the ambiguity of the term causes all who are party to a direct investment that involves national security to risk prohibition that bars completion of the transaction.[174] U.S. companies that need to sell or merge with non-U.S. companies are faced with the question of whether or not their merger ultimately will be blocked after negotiations costing time and money.[175] Moreover, if the President were ultimately to block a merger in its later stages, both parties to the merger would be discouraged from attempting further mergers or acquisitions in the United States in the future.[176] U.S. legislation that defines the term more narrowly and, thus, designates which companies involve on national security would prevent this problem.[177]

The proposed Technology Preservation Act requires investigation of "critical technologies"[178] and requires assurances by the non-U.S. party that national security will not impaired by a particular transaction.[179] A more effective approach, however, would set forth, through legislation, particular categories of transactions that definitively bear on national security. The National Defense Authorization Act for Fiscal Year 1993 has partially accomplished this goal by supplementing the definition of national security with specific transactions and completely prohibiting such transactions.[180] Consequently, several transactions are defined for the public and meaningless negotiations between the parties are

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174. *EC Complains of Uncertainty Associated With Exon-Florio*, *supra* note 11.

175. *Id.*

176. *Id.*

177. *Id.*

178. Technology Preservation Act, H.R. 2624, 102d Cong., 1st Sess. (1991). Under Exon-Florio, the term "critical technology" is designated as that defined by section 2368 of Title X of the U.S. Code or the most recent report submitted to the President pursuant to the National Science and Technology Policy, Organization, and Priorities Act of 1976. *Id.* Section 2368 of Title X was repealed by Act on December 5, 1991, P.L. 102-90, div. A, tit. VIII, pt. C, § 821(c)(1), 105 Stat. 1431.

179. Technology Preservation Act, H.R. 2624, 102d Cong., 1st Sess. (1991).

180. National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 835, 106 Stat. 2463-65 (1992).

avoided.[181] Still, the National Defense Authorization Act does not extend far enough because it fails to address those transactions that do not exceed US$500,000,000.[182] Thus, a significant portion of direct investment is unaddressed by the NDA Act.

Under the International Mergers and Acquisitions Review Act, additional transactions would be delineated, but not necessarily prohibited by definition.[183] For example, a company that wants to acquire voting securities or assets of another company would be required to file notifications and undergo a waiting period if the target company has a contract with the U.S. government that involves the availability to the target company of classified information.[184]

In practice, transactions requiring registration and approval could be divided into two main groups. One group would consist of those transactions that clearly would be prohibited by legislation. The National Defense Authorization Act has already begun to regulate this group of transactions.[185] In order to preserve the U.S. globalist trade philosophy, this group should remain very small and should consist only of transactions that grossly and adversely affect the U.S. national defense.

Those mergers, acquisitions, and takeovers that clearly affect national security but do not pose a direct threat to national defense would comprise the second group. These transactions, therefore, should not be prohibited solely by definition. This designation would benefit U.S. and non-U.S. companies intending to invest by decreasing the risk of prohibition. Investors that intend to enter into transactions restricted by legislation would be better informed of the status of their transactions in advance.

A more precise definition of national security, accompanying the specific proscribed transactions, would eliminate many non-U.S. investors' concerns about U.S. governmental ap-

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181. *Id.*

182. *Id.*

183. International Mergers and Acquisitions Review Act, H.R. 2631, 102d Cong., 1st Sess. (1991).

184. *Id.*

185. National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, §§ 835-838, 106 Stat. 2463-65 (1992).

proval of their transactions.[186] It would also remove their ambivalence towards investing in the United States because they would know that the President could not randomly prohibit the transaction for political reasons under a guise of discretion for benefit of national security.[187] Consequently, such a definition of national security would prevent a negative response in other countries to the current broad definition of national security, which, at present, can be construed as excessively protectionist in nature.[188] Moreover, an updated definition of national security would prevent the term from varying according to liberal or conservative interpretations of the executive branch.[189] Eventually such a measure would encourage long-term direct investment and, ultimately, would help the economy.[190] For the foregoing reasons, the phrase "national security" should be defined more narrowly to constitute mergers and acquisitions bearing on national defense and should proscribe particular transactions, as the Defense Authorization Act for Fiscal Year 1993 suggests.[191]

3. Increased Attention to Monitoring and Regulating Direct Investment

A mandatory filing requirement for those transactions which clearly affect national defense would best regulate direct investment.[192] Transactions which grossly and adversely affect national security by threatening U.S. defense should require immediate disclosure with CFIUS and should be swiftly barred under legislation. These transactions would include those already delineated in the National Defense Authorization Act.[193]

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186. *EC Complains of Uncertainty Associated With Exon-Florio*, *supra* note 11.

187. *Id.*

188. *See id.*

189. Sidney Blumenthal & James Chace, *Memo to the Democrats*, N.Y. TIMES, Feb. 23, 1992, § 6, at 32.

190. *EC Complains of Uncertainty Associated With Exon-Florio*, *supra* note 11.

191. National Defense Authorization Act For Fiscal Year 1993, Pub. L. No. 102-484, § 837, 106 Stat. 2463-65 (1992).

192. *See supra* notes 84-97 and accompanying text (discussing LTV case).

193. National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 837, 106 Stat. 2463-65 (1992); *see supra* notes 95-97 and accompanying text (describing ramifications of LTV case). For example, under this act, an entity that is controlled by a non-U.S. government could not purchase or otherwise acquire certain U.S. companies engaged in interstate commerce in the United States if the target was performing a department of defense contract, or a department of Energy con-

Other transactions, which indirectly bear on national defense, should also require filing with CFIUS. An example of this type of transaction would be one involving a dual-use technology.[194] In the event a non-U.S. company intended to merge with or acquire a U.S. company that manufactured a dual-use technology, such as computers, this transaction could still be permissible if the target was not privy to information that could compromise U.S. national security.[195] While a computer company could theoretically be used to benefit the military resources of the government of the non-U.S. company, after investigation it may be determined that the target computer company would be used for non-military purposes.[196] In this event, CFIUS would most likely allow the transaction to proceed. Thus, of these marginal transactions, those which do not pose a serious threat to national security should not be blocked as long as they pass investigation and review under CFIUS and the President.

In addition, the parties to transactions that indirectly bear on national defense should also be required to submit written assurances to CFIUS that the transaction would not adversely affect national security in the future. The Technology Preservation Act would require such assurances and, thus, would increase the likelihood that the transaction would not impair national security.[197] Furthermore, the proposed TPA would require CFIUS to investigate and later review the permitted

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tract. *Id.* § 835. Such transactions would be prohibited if the U.S. company attained its government contract pursuant to a national security program and the contract could not be performed satisfactorily unless the company was provided access to classified information. *Id.* Furthermore, under the proposed act, a non-U.S. entity could not acquire a U.S. entity that was awarded certain department of defense or energy contracts over US$500,000,000 during the previous fiscal year. *Id.*

194. *See* Nowak, *supra* note 15, at 1004. A dual-use technology is a technology which has both military and civilian uses. *Hearing Before the Subcomm. on Commerce, Consumer Protection and Competitiveness of the House Comm. on Energy and Commerce*, 100th Cong., 2d Sess. 39 (1990) (Testimony of Howard D. Samuel, President, Industrial Union Department, AFL-CIO, and Clyde Prestowitz, President, Economic Strategy Institute); *see* SARA L. GORDON & FRANCIS A. LEES, FOREIGN MULTI-NATIONAL INVESTMENT IN THE UNITED STATES 4 (1986).

195. *See supra* notes 42-61 and accompanying text (describing scope of "national security").

196. *See supra* note 194 and accompanying text (defining dual-use technologies and relation to national security).

197. Technology Preservation Act, H.R. 2624, at § 2(B), 102d Cong., 1st Sess. (1991).

merger in the future to determine if any subsequent national security problems have developed.[198] Thus, CFIUS would be able to continue monitoring these transactions and continually protect the national security.[199]

If national security is more clearly defined and certain transactions are completely barred, voluntary filing for certain transactions will not work. Non-U.S. investors will not be inclined to comply as readily with a voluntary filing system if their proposed transactions are clearly prohibited. Likewise, non-U.S. investors who enter into transactions that indirectly affect national security would run a greater risk of prohibition under a new definition of national security. Therefore, such investors will also be reluctant to file voluntarily. For these reasons, mandatory filing must be included in any proposal to strengthen the Exon-Florio provision. Otherwise, the number of intended transactions filed with CFIUS would diminish greatly.

In the event a transaction that clearly bears on national defense is not filed with CFIUS, it should be subject to immediate divestiture by the President and both parties to the transaction should be penalized. Likewise, all transactions that affect national defense indirectly should also require filing with CFIUS and the parties to these transactions should be subject penalties if they fail to do so. All other transactions involving national security should continue to be filed on a voluntary basis.[200] Overall, these changes would improve the current system and should be integrated into the current Exon-Florio provision to make it more productive.

By implementing the specific amendments to Exon-Florio discussed above, the U.S. will be able to selectively modify its internal policy without harming its economy. In fact, many of the changes mentioned will benefit the U.S. economy through increased confidence in U.S. transactions and investment.

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198. *Id.*

199. *Id.* Still, the Technology Preservation Act does not require filing of transactions which clearly and adversely affect national security. *Id.* For this reason, the proposed act is flawed.

200. *See supra* notes 29-30 and accompanying text (discussing incentive under current voluntary filing system for non-U.S. entities to file with CFIUS). This requirement would be necessary to ensure that even those transactions which do not appear to affect national security indirectly, would still be filed with CFIUS if there is a remote chance they could do so. *See id.*

This suggestion is true particularly if Exon-Florio is confined to national defense and not extended to economic security.

CONCLUSION

All of foregoing modifications to Exon-Florio would best serve the interests of the United States because they would strategically increase regulation in vital areas of U.S. national security while at the same time maintaining the U.S. globalist trade philosophy. The National Defense Authorization Act is a step in the right direction but it does not modify the Provision enough. Consequently, the U.S. Congress should further amend Exon-Florio to define more clearly national security and to require mandatory filing for a greater number of transactions. Such an amendment should also modify the present structure of CFIUS and mandate the publication of virtually all CFIUS and Presidential decisions under the Provision. These modifications would greatly improve Exon-Florio as it currently exists and benefit all involved in international mergers, acquisitions, and takeovers in the United States.

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