AMERICAN ATTITUDES TOWARD FOREIGN DIRECT INVESTMENT IN THE UNITED STATES

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The sharp increase in the flow of foreign direct investment into the United States during the 1970s, and the recent acceleration of such investment, has focused the attention of the Carter administration, Congress, the Press, and the business community on our national policy with respect to such investment. This article reviews that policy and the pressures building for changes. It discusses one area of foreign investment — banking — which has been a particular subject of recent attention.

1. United States Government policy

United States Government policy with respect to foreign investment traditionally has been an open door policy [1], based upon two principles. First, the investment process works most efficiently in the absence of government intervention. That is to say, international investment will generally produce the most efficient allocation of resources if it is allowed to flow according to market forces. A policy that encourages capital inflows, for example, through preferential tax treatment or subsidized borrowing costs for selected industries, would breed mutually destructive competition with our economic partners [2]. Likewise, a policy designed to discourage capital inflows would induce retaliatory measures by other governments.

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Second, the United States seeks to accord national treatment to all investors. All investors, domestic or foreign, must be treated in equal and nondiscriminatory fashion. Once foreigners make investments here, the investments should be accorded the same treatment as domestic investments.

Development of the open policy is due in part to our belief in the free market system, and in part to a careful and pragmatic assessment of our national self-interest. Foreign capital underwrote a substantial portion of the early development of United States industry and has provided vital support for its subsequent growth. Today's influx of foreign capital creates new jobs, provides more productive capacity and increases competition. Furthermore, since U.S. investment abroad far exceeds foreign investment here [3], the United States has a clear interest in promoting equitable and nondiscriminatory treatment of investment worldwide.

2. Recent challenges to United States Government policy

Although, in general, the United States Government policy toward foreign investment can fairly be characterized as an open door policy, changes in the economic environment have stimulated changes in American attitudes and law relating to foreign investment. For a long time after the initial injection of foreign capital into American industry, the amount of foreign investment was relatively limited and our open door policy was generally not challenged by domestic pressures.

However, the 1970s witnessed a significant increase in the level of foreign investment [4], and concurrent concern over it. This concern peaked during the period 1973-1975, first in response to a substantial increase in investment from Western Europe and Japan, and later in response to the emergence of the Organization of Petroleum Exporting Countries (OPEC) as a major source of surplus capital. This reaction legitimately grappled with the important and difficult question of how best to accommodate a real transfer of wealth without temporary and irrational distortions of our capital markets; other responses to the increased level of foreign investment contained elements of discrimination and protectionism.

Numerous bills were introduced in the 93rd and 94th Congresses to stem the tide of foreign investments [5]. For example, bills were introduced which would (i) restrict foreign persons from acquiring more than 5 percent of the voting securities or more than 35 percent of the nonvoting securities of publicly held U.S. corporations [6]; (ii) prohibit aliens or corporations controlled by aliens from owning or controlling more than 10 percent of the voting securities of publicly held U.S. corporations engaged in the energy or defense industries [7]; and (iii) establish a commission to prohibit or restrict foreign ownership or management control of domestic corporations, industries, real estate, or other natural resources vital to the "economic security and national defense" of the United States [8]. The approaches embodied in these bills, strongly opposed by the Nixon and Ford administrations, were rejected by Congress.

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In 1974 new foreign direct investment reached a total of $4.6 billion. As the rate of investment moderated in the period 1975–1977, and as OPEC investors were found to be interested primarily in portfolio investment, not control, the impetus behind exclusionary legislation abated. Congressional concern resurfaced during the period 1977–1978 as the sustained decline of the dollar resulted in a surge of new foreign investment. In 1978 new foreign direct investment reached a record level of $6.3 billion [9]. Hearings were convened and bills introduced to deal with foreign acquisitions of U.S. banks [10] and farmland [11] and with the level and nature of OPEC investments in the United States [12]. No new restrictive federal legislation was enacted, however, and the Carter administration has strongly opposed any efforts to do so [13].

3. Re-examination of United States Government policy

Although the recent challenges outlined above have not resulted in a withdrawal from the open door policy, they have led to efforts to re-examine the policy. In view of these efforts, federal legislation has been enacted to augment and routinize the collection of data on foreign direct and portfolio investment in the United States. In addition, a formal mechanism has been established at the subcabinet level to coordinate governmental activities with respect to such investment.

3.1. Data collection

When concern over the degree of foreign investment was first seriously addressed at a policy level in 1973, the United States Government lacked sufficient data on foreign direct and portfolio investment. Thus, it was unable to evaluate the extent of these investments and the effect of these investments upon American industry and the economy [14]. Consequently, to fill this gap Congress enacted the Foreign Investment Study Act of 1974 (FISA) [15] and the International Investment Survey Act of 1976 (IISA) [16]. These were intended to develop the necessary data. In addition, the Office of Foreign Investment in the United States Commerce Department was established in order to compile information from public sources on foreign investment transactions [17].

FISA required the Government to conduct a survey of the nature, scope, and magnitude of foreign investment in the United States [18]. The Commerce Department conducted a survey of direct investment activity [19], concluding that at year end 1974, assets of foreign-owned corporations in the United States totalled approximately $174 billion [20]. The Treasury Department conducted a survey of portfolio investment activity [21], and concluded that at year end 1974, foreign portfolio investments totalled approximately $67 billion, about $27 billion of which was held by foreign official institutions [22].

IISA augments FISA by establishing a permanent basis for regular surveys of
foreign investment activity in the United States [23]. It requires that a presidential survey be conducted at least once every five years of both direct and portfolio investment [24]. In addition, in order to facilitate the collection of such data, it authorizes the imposition of record-keeping and reporting requirements on domestic corporations [25].

The Commerce Department is presently conducting the first of the IISA direct investment surveys. It is scheduled for completion in 1982 and “with respect to United States direct investment abroad and foreign direct investment in the United States” will (i) “identify the location, nature, magnitude of, and changes in total investment by any parent in each of its affiliates”; (ii) obtain (a) balance sheet information on parents and affiliates, (b) income statements of parents and affiliates in each country in which they have significant operations, and (c) intracompany trade information; (iii) collect employment data and levels of compensation, by country, industry and skill level; (iv) obtain tax payment information; and (v) determine research and development expenditures and compensation related to technology transfer by industry and country [26]. The first of the portfolio investment surveys is scheduled for completion in November 1980 and will determine the magnitude and aggregate value of portfolio investment; form of investment; type, nationality and recorded residence of investors; diversification of holdings by economic sector; and holders of record [27].

In the Agricultural Foreign Investment Disclosure Act of 1978, Congress established detailed reporting requirements with respect to foreign ownership and acquisition of land used for agricultural, forestry, or timber products [28]. The information collected pursuant to these requirements is evaluated by the Secretary of Agriculture in order to determine the effects of foreign acquisitions, transfers, and holdings on family farms and rural communities [29]. Efforts are also underway to establish a more comprehensive and contemporaneous reporting system on foreign ownership of banks in the United States; such a system would better enable Congress and the bank regulatory authorities to monitor such information on a timely and complete basis [30].

3.2. Committee on Foreign Investment in the United States

In addition to taking steps to improve its information base, the United States Government in 1975 established the Committee on Foreign Investment in the United States [31]. The Committee is an interagency committee, chaired by the Assistant Secretary of the Treasury for International Affairs. In addition to the Assistant Secretary, the Committee includes senior officials from the Departments of State, Defense, and Commerce. The Committee has met periodically, twice during the Carter administration, to review investment trends; to provide guidance for advance consultations with foreign governments on prospective major foreign governmental investments in the United States; to review private investments in the United States which, in the judgment of the Committee, might have major implica-
tions for United States national interests; and, where it appears necessary, to consider proposals for new legislation or regulations related to foreign investment [32].

The Committee’s objectives are limited in accordance with the general American policy of avoiding governmental involvement in particular transactions. Although the Committee has no legal authority to block or modify investments, it has nevertheless played a constructive, consultative role in some proposed direct investments by foreign governments in publicly held U.S. corporations [33]. The question of whether a prospective investment by a foreign government is significant enough to merit Committee review and the time of notification of the intended investment are left, at least initially, to the foreign government [34].

4. Limitations on foreign investment in the United States

Congress and the Executive Branch have broad powers to regulate foreign investment in the United States under the Commerce Clause of the federal constitution and under the constitutional provisions relating to the maintenance of national defense and the conduct of foreign policy [35]. To a lesser degree the states also have power to regulate and restrict foreign investment [36]. Historically, these powers have been exercised in few instances and have been confined to particular types of foreign investment.

4.1. Restrictions on foreign investment in real estate

Restrictions on foreign investment in real estate have existed from time to time, particularly with respect to land used for agricultural, forestry, or mineral resource development. Heavy public pressure to enact new restrictive legislation has developed in recent years with respect to foreign ownership of farmlands. Current data suggests that the extent of such ownership is not significant. Nonetheless, such ownership has been blamed for the dramatic escalation of land prices in various parts of the country and for what has been perceived to be an increase in absentee ownership. The Secretary of Agriculture is currently in the process of evaluating these concerns on the basis of improved data, pursuant to a mandate contained in the Agricultural Foreign Investment Disclosure Act of 1978 [37].

4.1.1. Federal laws

The first federal laws restricting alien ownership of real estate were enacted in the nineteenth century, when congressional concern arose over large foreign land acquisitions in the Western territories. The Territorial Land Act of 1887 prohibited alien landholding in the organized territories, except by immigrant farmers who had applied for citizenship [38]. Other federal laws restricted the acquisition of homesteads [39] and federally owned grazing land [40]. Although these laws are still on the books, they are of little importance today because the Western terri-
tories have become states. However, federal laws restricting alien acquisitions of federally owned mineral-rich land remain important today because much mineral-rich land is still federally owned. In addition, the Federal Land Policy and Management Act of 1976 prohibits disposal of public lands to individuals who are not American citizens or to corporations that are not subject to the laws of any state or of the United States [41].

4.1.2. State laws

Real property law in the United States is generally a matter for state, not federal, law, and dates from the initial reception of the English common law by the original colonies [42]. It is not uniform [43].

In numerous instances the states built upon the English common law by adding their own restrictive legislation. For instance, in the late nineteenth century some Midwestern states enacted statutes that were modeled after the Territorial Land Act of 1887. Some of these were later repealed to encourage foreign investment [44]. Several Western states, especially California, enacted statutes that discriminated primarily against Orientals under the guise of prohibiting land ownership by “aliens ineligible for citizenship” [45]. The Supreme Court, in 1923, rendered two opinions that upheld the validity of such discriminatory laws, declaring that the laws were within the power of a state to define and delimit property rights and did not violate the equal protection clause of the federal constitution [46].

Following the Second World War the laws of most states that discriminated against land ownership by Orientals gave way to court disapproval, legislative repeal or popular referendum, or were rendered moot by the 1952 amendments to the federal immigration laws [47]. However, a 1978 survey by the General Accounting Office of the United States (GAO) concluded that 25 states still retained some form of restriction on alien acquisition or holding of farmland [48]. The continuing validity of these statutes is open to question in some instances. For example, with respect to restrictions applied to resident aliens, the equal protection clause of the Fourteenth Amendment to the federal constitution severely limits the enforceability of such restrictions [49]. With respect to nonresident aliens, however, there is substantial precedent upholding such restrictions. Indeed, many of the Treaties of Friendship, Commerce and Navigation to which the United States is a party recognize that states have authority to restrict land ownership by aliens [50].

The GAO survey concluded that, in general, state legislation that restricts alien acquisition or holding of farmland does “not significantly inhibit foreign ownership of land” [51]. An authority on the statutes has also concluded that “[t]here is little in present state law that effectively and validly excludes foreign investment in real estate” [53]. This conclusion is based on four factors: (i) by their terms or because of constitutional limitations, the statutes do not apply to resident aliens; (ii) by their own terms or because of treaty limitation, the statutes commonly do not apply to urban, commercial, industrial or residential real estate; (iii) the statutes are frequently easily avoided, for example by the making of acquisitions
through corporations incorporated in the United States for that purpose; and (iv) legislative relief may be available in certain cases, for example in the situation of a promise of increased local employment and productivity [53].

4.1.3. Current development

The degree of concern over perceived present levels of foreign land acquisition has led to numerous proposals at the state and federal levels to further restrict alien investment in real estate. It has also resulted in a careful probing of the legal framework of acquisitions to determine if foreigners enjoy any unintended competitive advantage. One important focus of this probe has been on the federal income tax.

In certain circumstances foreign nationals are not subject to capital gains taxation. Nonresident aliens, individuals who spend less than one-half of the year in which a taxable event occurs in the United States and foreign corporations, are not subject to tax on gains from the sale or exchange of assets in the United States which are not “effectively connected” with the conduct of a trade or business in the United States [54]. Thus, the foreign investor may be willing to offer a higher price for real estate — or any other capital asset — than a domestic bidder because his after-tax gain from an appreciation of the asset may be greater. Foreign real estate investors have structured sales of U.S. real estate to avoid federal capital gains tax by, among other tax avoidance techniques, liquidating corporations owning such real estate which are “effectively connected” in a nontaxable transaction and then selling the real estate as individuals who are not “effectively connected”. The Carter administration has proposed legislation to reduce the opportunities for foreigners to avoid U.S. capital gains taxation on real estate sales [55].

Any foreigner intending to invest in United States real estate will, of course, consider factors other than tax consequences, several of which, such as exchange rate risks and limited knowledge about U.S. real estate, do put him at a disadvantage in comparison with an American purchaser.

4.2. Federal restrictions on investments in particular industries or activities

The United States has also developed bodies of federal law that sharply restrict or preclude foreign ownership in certain sectors of the economy, i.e. aviation, communications, maritime and nuclear energy. It has also done so with respect to the exploitations of energy and mineral resources on federal lands and has imposed security safeguards on the performance of defense contracts.

Each of the industries in which foreign investors are treated separately from domestic investors is heavily regulated. In most instances, obvious and compelling national security interests dictate separate treatment for foreign investors. None of the special legislation appears to have developed in response to a particular acquisition or to be directed against investors of a particular nationality. Each of the industries is a public utility in the sense that it either requires a license from the Government or involves some form of Government subsidy [56].

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4.2.1. Aviation and aeronautics

Foreign registered aircraft may “not take on at any point within the United States, persons, property, or mail carried for compensation or hire and destined for another point within the United States” [57]. U.S. registry is limited to aircraft owned by citizens or foreign individuals who are permanent residents of the United States, or, if the aircraft is based and used primarily in the United States, corporations organized or doing business in the United States [58]. Approval of the Civil Aeronautics Board is a prerequisite to acquisition by any foreign air carrier or person controlling a foreign air carrier of 10 percent of the voting securities or capital of an American person substantially engaged in the business of aeronautics [59].

4.2.2. Communications

Foreign governments and their representatives are prohibited from holding radio or television station licenses [60]. Aliens and their representatives and foreign registered or foreign-owned corporations are prohibited from holding licenses for the operation of various types of radio stations [61]. There are also limitations on foreign ownership of the Communications Satellite Corporation [62] and domestic telegraph carriers [63].

4.2.3. Maritime industries

Without prior approval of the Secretary of Commerce, an alien may not acquire any interest in or charter a vessel owned in whole or in part by a United States citizen and documented under the laws of the United States or the last documentation of which was under such laws [64]. Coastal shipping within the United States of passengers [65] and merchandise [66] is generally limited to vessels owned by citizens of the United States. Corporations will generally qualify as U.S. citizens for these purposes only if they are managed and 75 percent owned by United States citizens [67].

4.2.4. Energy and mineral resources

The Atomic Energy Act requires a license for the conduct of almost all activities relating to facilities which produce or use nuclear material. Aliens, foreign governments, foreign corporations or entities owned, controlled or dominated by such interests cannot be licensed except for export of such facilities. Determinations of ownership, control or domination are made on a case-by-case basis [68].

Under the Mineral Leasing Act of 1920 and related statutes, rights of way over federal land for oil pipelines and the acquisition of lease rights or other dispositions of interest with respect to coal, oil and various other minerals on federal land may only be granted, leased or sold to citizens and corporations organized under the laws of the United States or, in some cases, to municipalities. Furthermore, aliens may not have any interest in a lease by means of stock ownership, holding or control unless the country of which they are citizens grants similar privileges to U.S.
citizens or corporations [69]. These restrictions do not apply to the outer continental shelf [70].

4.2.5. Defense

The industrial security program established by Executive Order [71] and Defense Department regulations [72] require contractors working on projects involving classified material to have a “facility” clearance [73] and personnel clearances [74] for key management personnel and others who have access to classified material. A facility clearance is not available for a facility “under foreign ownership, control or influence” or to foreign nationals [75]. The restrictions of course discourage foreign investors from acquiring companies which depend on income produced from work on classified contracts. Nevertheless, there are certain limited exceptions which permit foreign-owned or controlled companies to segregate that portion of a business which engages in such work into a subsidiary and to place the voting securities of that subsidiary into a voting trust whose trustees have clearances, retaining only a right to profits [76].

5. Foreign investment in United States banks

Since 1970, foreign banks have acquired at least 59 American banks with assets at the time of acquisition of approximately $20.6 billion [77]. These acquisitions reflect recognition by foreign banks of the competitive advantages of a significant American presence. The pace of acquisitions appears to have accelerated recently and larger American banks have been acquired. Two acquisitions in the first half of 1979 accounted for nearly half of the assets acquired during the decade [78] and another large acquisition was pending as of November 1, 1979 [79]. The desirability of acquisitions of U.S. banks has been enhanced by unfavorable economic and political conditions in some countries and by the favorable prices of some bank stocks which are well below book value and show apparently favorable price/earnings ratios.

Despite the wave of acquisitions, foreigners still own only a tiny fraction of U.S. banks and, even including pending acquisitions, assets of foreign-owned U.S. banks would only be approximately 3 percent of total U.S. commercial banking assets [80]. Nevertheless, rumors of additional major acquisitions persist.

Together with the purchase of agricultural land, various forms of investment by foreigners in American banking have received more current attention in the business community, media and state and federal governments than all other direct foreign investment in the United States. The intensity of concern over foreign investment in our banking industry, particularly the acquisition of existing U.S. banks by foreign banks, is reflected in the introduction of legislation in the United States Senate calling for a moratorium on federal regulatory approval of takeovers of United States financial institutions pending the completion of a study of the impact.
of such acquisitions on the United States economy and banking system and the
development of possibly restrictive legislation with respect to such acquisitions
[81]. In addition, the Chairman of the Banking Committee of the United States
House of Representatives has requested an in-depth study of foreign acquisitions by
the House Subcommittee on Financial Institutions Supervision, Regulation and
Insurance, and the Superintendent of Banks of the State of New York has con-
ducted a review of New York State policy toward foreign acquisitions of New York
banks [82].

This concern contrasts with our historical willingness to permit such acquisi-
tions [83], a willingness, at least with respect to large banks, that is not generally
found abroad [84].

5.1. General regulatory and policy framework

The treatment of foreign banking in the United States is unique and complex,
reflecting the dual system of state and federal bank regulation which is one of the
most interesting and deep-seated manifestations of the federal system of govern-
ment. Like the aviation, communications, maritime, and energy industries, the
banking industry is heavily regulated, both at the federal and state levels. Because
of the national interest in the safety and soundness of American banks, the critical
role of banks in the implementation of national economic policy, and the public
trust with which they are charged, banks must be licensed either by state banking
authorities or by the Comptroller of the Currency before they can commence busi-
ness.

Although there have been some special obstacles to foreign control of United
States banks (e.g. a requirement that all directors of national banks be U.S. citizens)
[85], foreign bank operations in the United States have enjoyed certain competitive
advantages over U.S. banks in the past (e.g. interstate branching and the acquisition
and operation of a securities business). The International Banking Act of 1978
(IBA) [86] was enacted in part to redress this imbalance and to return to the prin-
ciple of national treatment for all banking enterprises [87]. To the extent that
foreign banks had availed themselves of particular competitive advantages prior to
the enactment of IBA, a grandfathering provision allows preservation of those bene-
fits [88].

Foreign investors can enter the banking business in the United States by (i)
opening a state or federal branch or agency of an existing foreign bank, (ii) estab-
lishing a new state or national bank, or (iii) acquiring an existing state or national
bank. The following discussion outlines these alternative forms of entry.

5.3. Branching

Until the passage of the IBA, only state supervisors were authorized to license
branches or agencies of foreign banks in the United States. Each state, of course,
has its own regulatory pattern. Only certain states permit foreign banks (including banks chartered in other states) to establish branches or agencies within their boundaries. The three states with the greatest amount of U.S. bank assets — New York, California and Illinois — permit banks chartered under the laws of foreign countries to open banking offices within their boundaries if approved by the state banking authorities. Most states do not [89]. Naturally, New York, California and Illinois have attracted the vast percentage of foreign-controlled bank assets in the United States [90].

Prior to enactment of the IBA, foreign banks could establish branches in any state which permitted such branching and were thereby able to conduct branch banking in more than one state. State and national banks were prohibited from interstate branching by the McFadden Act [91].

The IBA created a federal mechanism for foreign banks to establish federal branches or agencies with the approval of the Comptroller of the Currency [92]. Federal branches or agencies generally operate with the same powers and limitations as national banks [93]. However, Congress preserved the power of the states to exclude foreign banks by limiting federal branches or agencies to states in which foreign banks are not prohibited by state law from establishing a branch or agency [94].

The IBA introduced the concept of a “home state” to the regulation of United States activities of foreign banks and restricts the establishment of full deposit-taking branches, and the acquisition of subsidiary banks, outside the home state [95]. Subject to approval by the state being entered, a foreign bank may, however, establish branches outside its home state if the branches only accept deposits of the type permitted to Edge Act Corporations [96], agencies and commercial lending subsidiaries [97]. Banking establishments of foreign banks for which an application had been filed or which were operating outside the home state as of July 27, 1978, were grandfathered [98].

Although regulatory issues concerning access to and supervision of the foreign parent bank may remain, the IBA has restricted interstate branching, added the protections of federal deposit insurance, asset maintenance requirements and reserve requirements and limited the nonbanking activities of foreign banks with branches or agencies in the United States [99]. In passing the IBA, Congress developed a politically acceptable legislative framework — based on the principle of national treatment — for dealing with the branch and agency activities of foreign banks in the United States. As a result, there is currently little pressure to further restrict these activities.

5.3. De novo entry

An alternative means of foreign entry into the U.S. banking industry is through establishment of a new national bank or state-chartered bank. Prior to the IBA, federal law inhibited foreign, de novo entry by requiring that all directors of a
national bank be U.S. citizens [100]. The IBA modified this by authorizing the Comptroller of the Currency to waive the requirement in the case of not more than a minority of the directors of banks which are subsidiaries or affiliates of foreign banks [101]. De novo entry has not been of particular concern since it seems clearly pro-competitive, is generally thought of as bringing new business from the foreign parent’s home country to the United States, is subject to prior regulatory approval, and results in a bank functioning under the same regulatory regime as other U.S. banks. However, from the point of view of the foreign bank, de novo entry is a particularly slow and inefficient means of establishing a significant banking presence in the United States.

5.4. Bank acquisitions

The most effective means of establishing a significant banking presence in the United States is the acquisition of an existing state or national bank. The regulatory requirements imposed on acquisitions differ depending on whether an acquisition is proposed to be made by an individual, corporation, partnership, business trust or similar organization.

5.4.1. Acquisitions by individuals

Until 1979 an individual, including an alien, could buy a national or state bank without the approval of any federal banking authority. This regulatory gap received congressional and regulatory attention when a number of wealthy individuals from OPEC countries sought to acquire U.S. banks. Congress worried that such acquisitions would be made to the financial detriment of the banks and the communities they served. This concern has abated somewhat, in part because widespread bank acquisitions by foreign individuals have not occurred and in part because enactment of the Change in Bank Control Act of 1978 (CBCA) has given federal regulators new powers to review proposed acquisitions [102].

CBCA subjects any proposed change in control of a federally insured bank, i.e. all national banks and the vast majority of state banks, to a prior notice rule requiring the filing of extensive information with the appropriate federal banking agency [103]. The federal regulator may disapprove any proposed change in control on the basis of (i) anticompetitive effect; (ii) the financial condition of the acquiring person jeopardizing the financial stability of the bank or prejudicing the interest of depositors; (iii) the competence, experience, or integrity of the acquiring person or proposed management; or (iv) failure to provide required information [104]. Although the CBCA does not authorize the regulators to disapprove a change of control because of the nationality of the person proposing to make the acquisition, it may provide a basis for conditioning approval on undertakings by the acquirer — for example, submission to U.S. jurisdiction or maintenance of assets in the United States — if deemed necessary because of his nationality.
5.4.2. Acquisitions by foreign corporations

Acquisitions by foreign business entities, including banks, are also subject to CBCA [105]. More importantly, they are subject to review and approval by the Board of Governors of the Federal Reserve System (the Board) pursuant to the Bank Holding Company Act of 1956 (BHCA) [106]. The Board is required to evaluate acquisitions with respect to the financial and managerial capabilities of the acquiring company, the convenience and needs of the community to be served and the effect on competition and concentration of resources in the United States [107].

The Board’s March 1979 approval of three major acquisitions of U.S. banks by foreign banks illustrates the considerations brought to bear on such acquisitions under the BHCA [108]. The Board approved: (i) the acquisition of the $5.3 billion asset Union Bankcorp, Inc. of Los Angeles, a bank holding company whose principal asset, Union Bank of California, was the sixth largest bank in California, by Standard Chartered Bank Limited, an English bank [109]; (ii) the acquisition of 51 percent of the voting shares of the $20 billion asset Marine Midland Bank, Inc., a bank holding company whose principal asset, Marine Midland Bank, was the twelfth largest bank in the United States, by The Hong Kong and Shanghai Banking Corporation, Ltd. ("Hong Kong and Shanghai"), a Hong Kong bank [110]; and (iii) the acquisition of the $4.4 billion asset National Bank of North America, a national banking association whose branches are principally located in and around New York City, by National Westminster ("NatWest") Bank, Limited, an English bank with assets of approximately $38.5 billion [111].

In approving these acquisitions the Board, among other considerations necessary under the BHCA to approval of a bank holding company acquisition, cited the commitments of the acquiring parties to inject new capital into the banks they were seeking to acquire. This was of particular significance in the Marine Midland acquisition where Hong Kong and Shanghai agreed to commit $200 million of new capital to a bank which had a longstanding weak capital position. Of particular interest in the context of acquisitions by foreign banks, the Board noted the undertakings of each applicant to provide financial and other data to the Board to assist it in the conduct of its supervisory and regulatory function. Each determination contained a footnote stating that in reaching its conclusion the Board had reviewed the proportion of banking resources controlled by foreign-owned institutions in markets relevant to each application. A review of such proportion is not called for under either the BHCA or the Board’s rules and regulations and therefore represents an express and unusual recognition of Board awareness of public interest in foreign acquisitions.

In approving the application of NatWest the Board drew attention to its Statement of Policy on Supervision and Regulation of Foreign Bank Holding Companies [112]. In accordance with the provision of the Policy Statement that foreign banks “should meet the same general standards of strength, experience and reputation as required for domestic organizers of banks and bank holding companies”, the
Board stated that it had reviewed NatWest's financial condition, management integrity and record, and its role and standing in the United Kingdom and had requested the views of the bank regulatory authorities in the United Kingdom.

The adequacy of the regulatory framework under which foreign acquisitions of U.S. banks are made must be evaluated against the nettlesome questions which have been raised about such acquisitions. Will foreign-controlled banks be less likely to employ their assets in a manner consistent with our national economic interests, for example by allocating a disproportionate amount of their loans to other foreign-controlled corporations, or using American assets to finance foreign operations? Is this problem exacerbated in the case of foreign banks owned or controlled by foreign governments? How can the acquired bank and its foreign parent be properly supervised [113]? Should reciprocal treatment of American banks seeking to acquire foreign banks be a necessary precondition to foreign acquisitions in the United States [114]? Do foreign banks enjoy an unfair competitive advantage over American banks in making U.S. acquisitions because of the operation of federal antitrust laws [115]? What impact will these acquisitions have on the worldwide competitive position of U.S. banks?

The Carter administration and the Board of Governors of the Federal Reserve System, after reviewing these questions, have concluded that the regulatory framework appears adequate to deal with foreign acquisitions of U.S. banks on a rational, case-by-case basis. Although regulation of banks which operate across national boundaries presents difficult problems, federal bank regulators have indicated that they have sufficient power to prohibit acquisitions which would prejudice the safety and soundness of banks to be acquired [116]. In addition, the Cooke Committee established by the Bank for International Settlements is undertaking an important initiative to increase cooperation among bank regulators internationally [117].

Recognizing that foreign investment in American banks has generally brought to the banking system additional capital, management skills, and increased competition, the Carter administration [118] and the Board [119] have opposed any new legislation directed at inhibiting such investment.

6. Conclusion

Although its depth ebbs and flows with the rate of investment, there appears to be continuing concern over foreign investment in the United States. That concern is likely to remain intense. At the moment, concern appears to be centered on the acquisition of banks and real estate; other investment media will likely occupy center stage in the future. These concerns cannot be ignored. The United States needs to build a reliable data base on foreign investment so that it can address each new expression of concern in an informed manner.

There must also be a thorough exploration of questions repeatedly raised rela-
ing to unintended advantages which federal law may give to foreign bidders over domestic competitors in takeovers. For example, do our antitrust laws provide advantages to foreigners with a relatively small presence in the United States but worldwide market strengths equivalent to those of their American competitors? Do our banking laws make sense if, because of interstate branching prohibitions, they in effect require federal regulators to turn to a foreign, rather than domestic, bank to acquire a failing bank [120]? Do foreign bidders have unfair tax advantages over domestic competitors for the same investment?

If the facts indicate that adjustments in the law are warranted, they can be made without inappropriately deviating from the generally hospitable treatment which the United States has traditionally extended to foreign investment.

Notes

[1] The genesis of U.S. Government policy has been traced to the first Secretary of the Treasury, Alexander Hamilton:

Instead of being viewed as a rival [foreign direct investment] ought to be considered as a most valuable auxiliary, conducing to put into motion a greater quantity of productive labor, and a greater portion of useful enterprise than could exist without it.


Since then, the policy has enjoyed bipartisan support. President Ford, at the signing of the Foreign Investment Study Act of 1974, S.2840, stated:

As I sign this act I reaffirm that it is intended to gather information only. It is not in any sense a sign of change in America's traditional open door policy toward foreign investment. We continue to believe that the operation of free market forces will direct worldwide investment flows in the most productive way ... .


For more recent articulations and discussions of the policy, see Bergsten, supra; Hearings on
This article is concerned principally with measures that discriminate against foreign investment. The recent multilateral trade negotiations (MTN) agreements seek to discourage trade distorting subsidies.

In 1978, U.S. direct investment overseas was approximately $16.7 billion while foreign direct investment in the U.S. was $6.3 billion. Bergsten, supra n. 1, at 61.

The increase in foreign investment can be attributed to a variety of factors. Perhaps most important are the strength of the American economy and the fundamental protections afforded by our legal system. These attractions are not new, of course. The most significant new development is the relative decline of the dollar. This decline, which began in 1971, coupled with the relative stagnation of early prices, enhanced the attractiveness to foreign investors of acquisitions in the U.S. It also affected some foreign enterprises which found that significant price increases on their exports to American markets made production in the U.S. an effective means to preserve their shares of the American market.


Bergsten, supra, n. 1 at 61.

E.g., Hearings on Oversight on the International Banking Act, the New Edge Act Regulations and the Issue of Foreign Acquisition of United States Banks before the Senate Committee on Banking, Housing, and Urban Affairs, 96th Cong., 1st Sess. (July 16 and 20, 1979).

E.g., S.J. Res. 92, 96th Cong., 1st Sess. (June, 1979) (introduced by Sen. Heinz), reprinted in Hearings, supra at 12–15. This proposed resolution would impose a ban on foreign acquisitions of U.S. banks, except failing banks, pending completion of a report to Congress by the Board of Governors of the Federal Reserve System. The report would have to include an analysis of the consequences of such acquisitions for the American economy and banking system. It also would have to specify measures by which Congress could (a) restrict hostile takeovers, (b) restrict anticompetitive takeovers, (c) prevent any takeover which would result in more than 10 percent of total aggregate deposits and loans in U.S. financial institutions being owned or controlled, either directly or indirectly, by foreigners, (d) prevent any takeover by a foreigner whose government does not have a reciprocity agreement with the U.S., and (e) grant federal regulatory authorities supervisory and investigatory powers with respect to foreign persons owning or controlling U.S. financial institutions as they already have with respect to domestic persons. As of the time of this writing, no Congressional hearings have been called to discuss the proposed resolution.

See Statement of C. Fred Bergsten, Assistant Secretary of the Treasury for International Affairs, before the Subcommittee on Family Farms, Rural Development, and Special Studies of the House Committee on Agriculture (June 20, 1978).


See Bergsten, supra n. 1 at 60–61.

Niehuss, Foreign Investment in the United States: A Review of Government Policy,
16 Va. J. Int'l L. 65 (1975) at 71, n. 34. Prior to 1974, the most recent comprehensive review of foreign direct investment had been made in 1959; the most recent comprehensive review of foreign indirect investment had been made in 1941. Report to Congress by the Comptroller General of the United States, Controlling Foreign Investment in National Interest Sectors of the U.S. Economy (Oct. 7, 1977) at 2.


[19] Foreign direct investment is defined as foreign ownership of 10 percent or more of the voting securities of an incorporated business enterprise or an equivalent interest in an unincorporated business enterprise. 22 U.S.C. § 3102(1) (1976).

For Treasury Department regulations concerning the portfolio investment survey, see 31 C.F.R. §§ 129.1-14 (1979).
[22] Report to Congress by the U.S. Treasury Department, Foreign Portfolio Investment in the United States (Aug. 1976) at 1, 8, 14.

[23] IISA also requires the President to conduct a survey at least once every five years of United States direct investment abroad. 22 U.S.C. § 3103(b) and (c) (1976).
[24] IISA defines direct investment as "the ownership or control, directly or indirectly, by one person of 10 per centum or more of the voting securities of an incorporated business enterprise or an equivalent interest in unincorporated business enterprise". 22 U.S.C. § 3102(10) (1976). IISA defines portfolio investment as "any international investment which is not direct investment". 22 U.S.C. § 3102(11) (1976).

[28] The information required to be reported includes the type of interest in the land; its acreage, purchase price and intended agricultural use; and the citizenship of the new interest holders. Pub. L. No. 95–460, R 2, 92 Stat. 1263 (1978). Failure to comply with these reporting requirements results in the levying of a fine in the amount of 25 percent for the fair market value of the interest in the land. Pub. L. No. 95–460, § 3, 92 Stat. 1265 (1978).

[30] See e.g., Carswell, supra n. 1 at 19.
[31] Carswell, supra n. 17, § 1(a).
[32] Id. § 1(b).

[33] E.g. in July of 1975 the Committee reviewed a proposed joint venture between the Government of Romania and the Island Creek Coal Co., a subsidiary of Occidental Petroleum, to open a new coal mine in Virginia; in June of 1976 the Committee reviewed the proposed acquisition of cumulative voting preferred and common stock warrants of Occidental Petroleum by the Government of Iran.

The Committee's mode of operation is exemplified by yet another case, this one involving a tender offer for the common shares of Copperweld Corp. by Societe Imetal, a French corporation. The Committee initially became aware of the tender offer because of Press reports concerning it. It did not become involved officially in the matter until the target management wrote a letter in September 1975 asking the Committee to review the tender offer. The grounds for the request were that the tender offer, if successful, would be against the national interest
of the United States, and that the Government of France was involved in the tender offer. The Committee received assurances from the French Government that it was not involved in the management of Societe Imetal and reviewed possible defense implications of the proposed acquisition. It concluded that it did not have any basis upon which to interpose itself in the transaction.


[34] Bergsten, supra, n. 1 at 63–64.
[36] See BT Investment Managers, Inc. v. Lewis, 461 F. Supp. 1187 (N.D. Fla. 1978), appeal pending. [In that case the issue was the constitutionality under the Commerce Clause of a Florida statute that prohibited out-of-state banks and holding companies from owning or controlling a Florida business furnishing investment advisory services and barring out-of-state corporations from exercising various trust powers and duties in the state. The court stated: “Florida unquestionably may act by legislation to control or prevent undue concentrations of economic power in the banking, investment and trust businesses. In order not to run afoul of the Commerce Clause, though, this legislation must impact evenhandedly upon instate and out-of-state firms alike.”]


For a brief discussion of the historical development of State real property law with respect to foreign ownership, see Morrison, Limitations on Alien Investment in American Real Estate, 60 Minn. L.R. 621 (1976) at 622–624 [hereinafter cited as Morrison].

[43] This lack of uniformity among state laws requires that questions about particular real property acquisitions be addressed in the context of the law of the particular state involved. The discussion which follows is, of necessity, generalized.

[45] Id. at 626–627.

[49] See e.g., Sugarman v. Dougall, 413 U.S. 634 (1973) (a New York statute excluding aliens from permanent positions in the competitive class of the state civil service denied equal protection), in re Griffiths, 413 U.S. 717 (1973) (a Connecticut statute excluding aliens from taking the state bar examination denied equal protection under the fourteenth amendment); Graham v. Richardson, 403 U.S. 365 (1971) (Arizona and Pennsylvania statutes denying welfare benefits to aliens who have not resided in the U.S. for a specified number of years denied equal protection).

But see Ambach v. Norwich, 441 U.S. 68 (1979) a New York statute forbidding public school certification to any teacher who is not a U.S. citizen unless that person manifests an intention to apply for citizenship did not deny equal protection under the fourteenth amendment.
See Morrison, supra n. 42 at 639–663, for a discussion about limitations on the ability of state and federal law to restrict alien land ownership under the treaty obligations of the United States and the constitutional doctrines of equal protection and substantive due process and, with respect to state law, the foreign relations powers and the power to regulate interstate and foreign commerce which the Constitution grants exclusively to the federal government, and the doctrine of federal preemption. See also Note, State Regulation of Foreign Investment, 9 Cornell Int’l L.J. 82 (1974–75) at 91–98.

[50] See e.g., Lehndorff Geneva, Inc. v. Warren, supra n. 42 (Wisconsin statute making it unlawful for a nonresident alien and a corporation or association which has more than 20 percent of its stock owned by nonresident aliens to acquire or to own more than 640 acres of land in Wisconsin did not violate the Fourteenth Amendment).

See also Treaty of Friendship, Commerce and Navigation between the United States and the Netherlands (1957), 8 U.S.T. 2034, art. IX, paras. 1 and 2 at 2056, T.I.A.S. No. 3942.

[51] Comptroller General, supra n. 48.
[52] Morrison, supra n. 42 at 663.
[53] Id. at 663–664.

See Statement of Donald C. Lubick, Assistant Secretary of the Treasury for Tax Policy before the House Committee on Ways and Means (Oct. 25, 1979) [hereinafter cited as Lubick].

See also Statement of C. Fred Bergsten, Assistant Secretary of the Treasury for International Affairs before the Subcommittee on Family Farms, Rural Development, and Special Studies of the House Committee on Agriculture (June 20, 1978) at 5–6, and addendum, which discusses relevant tax considerations; Young, supra n. 5 at 121–128; Phillips, Foreign Investment in the United States: the Defense Industry, 56 B.U.L. Rev. 843 (1976) at n. 76, 77, and 86.

[55] See Lubick, supra n. 54. The House Ways and Means Committee has been in the process of considering seven different bills to provide tighter capital gains treatment with respect to foreign-owned real estate.


The discussion in the text which follows is intended merely to outline the activities covered by such legislation. For a more detailed review of such legislation and for a deeper understanding of the subject, consult the sources cited throughout this article and also the Treasury Summary, when it becomes available.


See also Phillips, op. cit. supra n. 54 at 898–901; Elmer and Johnson, Legal Obstacles to Foreign Acquisitions of U.S. Corporations, 30 Bus. Law 681 (1975) at 693–694; Comptroller General, supra n. 48 at 16, 17.


See also Comptroller General, supra n. 48; Elmer and Johnson, supra n. 59 at 692.

The examples cited in the text are but two of the numerous and complex limitations on foreign involvement in U.S. maritime industries. See also Elmer and Johnson, supra n. 59 at 689–692; Phillips, supra n. 54 at 901–905.

See also Comptroller General, supra n. 48 at 7, 21; Note, Foreign Direct Investment in the United States: Possible Restrictions at Home and a New Climate for American Investment Abroad, 26 Am. U.L. Rev. 109 (1976–77) at 118.

The Mining Law of 1872, 30 U.S.C. § 22 (1976), limits exploration and purchase of valuable mineral deposits in federal land to American citizens and persons who have declared their intentions to become citizens. However, for these purposes, any corporation organized under the laws of the United States or of any of its states or territories, is considered a U.S. citizen. See 30 U.S.C. § 24 (1976). See also, Elmer and Johnson, supra n. 59 at 696–697.


Each trustee of the voting trust is required to have a personal security clearance. Department of Defense, Defense Supply Agency, Industrial Security Operating Manual, DSAM 8500.1 (June, 1975) Ch. 2 § 2. See also Phillips, supra n. 54 at 876–894; Comptroller General, supra n. 48 at 8–13.

Carswell, supra n. 1 at 18.

National Westminster Bank, Ltd., an English bank, acquired the $4.4 billion asset National Bank of North America of New York City, and Standard Chartered Bank, Ltd., an English bank, acquired the $5.3 billion asset Union Bancorp, Inc. of Los Angeles, a bank holding company whose principal asset, Union Bank of California, was the sixth largest bank in California.

In this proposed acquisition, the Hong Kong & Shanghai Banking Corp., Ltd., a Hong Kong bank, seeks to acquire a controlling interest in the approximately $20 billion asset Marine Midland Banks, Inc., a holding company whose principal asset is a New York State bank, Marine Midland, which is the twelfth largest bank in the United States. The proposed acquisition has been the subject of much controversy. The Board of Governors of the Federal Reserve System, under authority of Section 3 of the Bank Holding Company Act of 1956 (12 U.S.C. § 1841 et seq. (1976)) approved the acquisition. The Board recognized the problems that Marine Midland was experiencing in finding needed new capital and the ability and willingness of Hong Kong & Shanghai to provide such capital. However, since Marine Midland was a New York State chartered bank, the acquisition also required approval by the New York State Banking Department. After a lengthy delay, considerable media attention, and a public disagreement about the acquisition between the Governor of New York and his appointee, the Superintendent of Banks, the Superintendent indicated that she would not approve the acquisition. She stated that her views were based upon (1) Marine Midland's unique position as the leading bank in upstate New York and the need for it to maintain a local orientation in its policies, (2) concern over the political future of the Crown Colony of Hong Kong, and its implications for Hong Kong & Shanghai, (3) the difficulty of evaluating Hong Kong & Shanghai's financial condition and prospects because of differences in accounting, disclosure, and regulatory procedures, (4) concern over the precedential value of the acquisition, and (5) concern over possible adverse effects upon the Marine Midland's minority shareholders. See New York
State Banking Department, Report of the Superintendent of Banks of New York State on the Proposed Acquisition by Hong Kong and Shanghai Banking Corporation of Marine Midland Banks, Inc. (June 28, 1979) [hereinafter cited as Seibert Memorandum]. Before any formal action was taken on the application in New York, it was withdrawn, and Marine Midland applied to the Comptroller of the Currency in order to convert to a national bank charter. If a national bank charter is granted, no further regulatory approval of the Hong Kong & Shanghai acquisition will be necessary.

[80] Hearings on Oversight on the International Banking Act, the New Edge Act Regulations and the Issue of Foreign Acquisition of United States Banks before the Senate Committee on Banking, Housing, and Urban Affairs, 96th Cong., 1st Sess. (July 16, 1979) (Statement of Henry C. Wallich, Governor, Federal Reserve Board) at 7 [hereinafter cited as Wallich].


[82] News Release of House Committee on Banking, Finance, and Urban Affairs (March 1, 1979); Seibert Memorandum, supra n. 79.

[83] E.g. Franklin National Bank, then one of the twenty largest banks in the United States, was acquired by a consortium of European banks in 1974.


[85] Prior to its amendment in 1978, 12 U.S.C. § 72 (1976) provided that every director of a national bank “must during his whole term of service be a citizen of the United States”. The amending statute, the International Banking Act of 1978, provides that “the Comptroller of the Currency may in his discretion waive the requirements of citizenship in the case of not more than a minority of the total number of directors”. Pub. L. No. 95–369, § 2, 92 Stat. 607 (1978).


[87] See text following n. 98 infra.


[89] See e.g. BT Investment Managers, Inc. v. Lewis, supra n. 36.

[90] As of May 1978, 70 percent, 23 percent, and 3 percent of the total assets of United States offices of foreign banks were concentrated in New York, California and Illinois, respectively.


[93] Id. § 4(b).

[94] Id. § 4(a).

[95] Id. § 5(a).

[96] Id. §§ 5(a)(1) and (2). Edge Act corporations are banking institutions organized under Federal Reserve Act § 25(a), 12 U.S.C. §§ 611–631 (1976). They are not subject to the McFadden Act and, accordingly, provide the opportunity to establish a banking presence interstate. Under Regulation K promulgated by the Board of Governors of the Federal Reserve System, Edge Act corporations are limited in their banking business within the United States to activities incidental to an international or foreign business. Since international and foreign business is of particular interest to foreign banks operating in the U.S., formation of an Edge Act corporation may have been an attractive U.S. banking vehicle to some of these banks.

Prior to enactment of the IBA, foreign banks were discouraged from operations in the United States by the Edge Act requirement that aliens could not own a majority of the capital
stock of an Edge Act corporation and that all directors of such corporations be citizens of the United States. 12 U.S.C. §§ 619, 614 (1976). The IBA amended these provisions by eliminating any citizenship requirement for directors and by permitting foreign banks and institutions organized under the laws of foreign countries which own or control foreign banks or U.S. banks to own 50 percent or more of the shares of capital stock of Edge Act corporations with the prior approval of the Board of Governors of the Federal Reserve System. Pub. L. No. 95–379, §§ 3(a) and (f), 92 Stat. 609 (1976).

[98] Id. § 5(b).
[99] Id. §§ 5(a), 6, 4(g), 7, and 8, respectively.
[103] Id. § 602(j)(1) and (6) (amending 12 U.S.C. § 1817(j) (1976)).
[104] Id. § 602(j)(7).

This article will not discuss the requirements set forth under the Federal Deposit Insurance Act. Note, however, that both this act and the Bank Holding Company Act of 1956 [hereinafter cited as BHCA] govern the vast majority of bank acquisitions by legal entities other than individuals.

[108] Technically, the Board granted the applications by the foreign banking institutions to become foreign bank holding companies under 12 U.S.C. § 1842 (1976).
[110] Id. at 354. See n. 79 supra.
[111] Id. at 350.
[113] The liquidity and fungibility of bank assets make effective supervision particularly important and difficult. In this sense the banking business is different from most other commercial activities. With respect to acquisitions by individuals, the ability to supervise effectively turns on the ability to find and assert jurisdiction over the individual and his assets, an ability which, in turn, may depend upon the nationality of the individual. With respect to acquisitions by foreign banks the ability to supervise effectively may turn on the degree and quality of supervision in the parent's home country, the influence, if any, which the bank may exercise on such supervision, and the extent to which U.S. bank regulatory agencies have satisfactory working relationships with the foreign regulator.
[114] In its report to Congress, pursuant to section 9 of the IBA, the Treasury Department concluded that "very few countries demand reciprocity as an absolute condition for foreign bank entry. A number of countries, however, include reciprocity among the factors to be considered when reviewing foreign bank applications". Department of the Treasury, Report to Congress on Foreign Government Treatment of U.S. Commercial Banking Organizations (Sept. 17, 1979) at 136.
[115] For a discussion concerning the application of federal antitrust law to bank acquisitions, see Hearings on Oversight on the International Banking Act, the New Edge Act Regula-
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ations and the Issue of Foreign Acquisition of United States Banks before the Senate Committee on Banking, Housing, and Urban Affairs, 96th Cong., 1st Sess. (July 16, 1979) (statement of Donald L. Flexner, Deputy Assistant Attorney General, Antitrust Division, Dep't of Justice, Accompanied by Neil Roberts, Chief, Evaluation Section, Antitrust Division) at 21–51.

[116] See Carswell, supra n. 1 at 19; Wallich, supra n. 80.


[119] See Wallich, supra n. 80.

[120] The Board of Governors of the Federal Reserve System has recommended that BHCA be amended to permit domestic banks to acquire a failing bank in another state – this would broaden the range of alternatives that might be open to bank supervisors in cases of failing banks. Id. at 7–8.

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