

Michigan Journal of International Law

Volume 11 | Issue 3

1990

Regulation of Imports and Foreign Investment in the United States on National Security Grounds

David Scott Nance
Stewart and Stewart

Jessica Wasserman
Stewart and Stewart

Follow this and additional works at: <https://repository.law.umich.edu/mjil>



Part of the [International Trade Law Commons](#), [Legislation Commons](#), and the [National Security Law Commons](#)

Recommended Citation

David S. Nance & Jessica Wasserman, *Regulation of Imports and Foreign Investment in the United States on National Security Grounds*, 11 MICH. J. INT'L L. 926 (1990).

Available at: <https://repository.law.umich.edu/mjil/vol11/iss3/10>

This Article is brought to you for free and open access by the Michigan Journal of International Law at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of International Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mjil.repository@umich.edu.

REGULATION OF IMPORTS AND FOREIGN INVESTMENT IN THE UNITED STATES ON NATIONAL SECURITY GROUNDS

*David Scott Nance & Jessica Wasserman**

The second half of the twentieth century has seen what may prove to be a fundamental shift in the focus of economic activity from the national to the global scale. Goods, services, and capital now cross international boundaries with unprecedented speed and ease.¹ Moreover, the trend continues to be in the direction of increasing freedom of trade and investment. Counterpoised against this increasing freedom, however, is perhaps the most fundamental concern of the nation-state: national security.²

Traditionally, concerns over the effects of trade and investment on national security have centered upon the transfer of products and technologies with potential military uses.³ However, national security

* The authors, graduates of the University of Michigan Law School in 1982 and 1984 respectively, practice international trade law with the firm of Stewart and Stewart in Washington, DC. They wish to thank Eugene L. Stewart and Terence P. Stewart for their encouragement and assistance in preparing this article, and Patrick McDonough, Kelly Roberson and Rosemary Winston for their invaluable aid in obtaining the necessary materials.

1. For general discussions of the changes in the international economy, see, e.g., PANEL ON THE IMPACT OF NATIONAL SECURITY CONTROL ON INTERNATIONAL TECHNOLOGY TRANSFER, COMMITTEE ON SCIENCE, ENGINEERING AND PUBLIC POLICY, BALANCING THE NATIONAL INTEREST 54-59 (1987) [hereinafter BALANCING THE NATIONAL INTEREST].

2. See M. McDougal and F. Feliciano, LAW AND MINIMUM WORLD PUBLIC ORDER 250 (1961), quoted in WHITEMAN, 12 DIGEST OF INTERNATIONAL LAW 42-43 (1971). McDougal and Feliciano refer to self-defense as the "first and most basic policy of any legal system," and describe it as the prevention of "unilateral change by destructive coercion." *Id.* Thus, in traditional international law, national defense and the preservation of national security have been viewed in terms of defense against forceful actions by other states as well. The transformation, or rather extension, of the concept of "national security" to include economic strength as well is a theme that will be developed further in this article.

3. For a comprehensive overview of this issue, see BALANCING THE NATIONAL INTEREST, *supra* note 1, at 1-27. This volume was the product of an exhaustive review of the national security dimensions of the export control regime of the United States by a panel operating under the auspices of the National Academy of Sciences. Although the issue of export controls falls outside the scope of this article, the results of the review may bear some relevance to an analysis of the import and foreign investment control laws of the United States, at least insofar as those laws reflect national security considerations.

The panel confirmed that superiority in technology was a matter of strategic importance to the United States and its allies. *Id.* at 151-52. However, the panel found that the export control regime of the United States was too broad (*i.e.*, covering too many products and technologies) to be perceived as credible. See *id.* at 152-53. The panel also concluded that over-strict export controls unnecessarily cost United States companies export sales. *Id.* at 153. The direct, short-run economic costs of the U.S. control mechanism were estimated at \$9.3 billion for 1985, while the indirect costs for the same year were \$17.1 billion, with an estimated loss of 188,000 jobs. *Id.*

concerns also arise with respect to the economic and military impact of imports and of foreign acquisition of domestic assets. The United States has a longstanding statute, section 232 of the Trade Expansion Act of 1962,⁴ that allows the President to restrict imports of goods on national security grounds. More recently, another statute, popularly referred to as the Exon-Florio Act,⁵ provides the President with authority to bar the acquisition of United States companies or businesses by foreign persons on national security grounds. Thus, United States law provides for the regulation of inward flows of both goods and capital for reasons of national security. This article will examine the substance, interpretation, and application of these laws, and comment upon possible future developments in light of evolving trends in the global economy.

In particular, the article will focus upon the concept of "national security" in this context, a concept that is central to both statutes, yet is not defined or described in either. As will be shown below,⁶ the focus of both statutes has been on the military implications of imports and foreign investment. Such an approach is consistent with the traditional interpretation of "national security" under international law.⁷ This article will, among other things, explore whether such a definition accurately reflects current international conditions. If, as is argued, such a definition is not sufficiently broad, the central question becomes whether these statutes are flexible enough to take a revised, broader definition of national security into account.

I. SECTION 232

Section 232 of the Trade Expansion Act of 1962 is entitled "Safeguarding national security." The overall purpose of the section is to permit the restriction of imports of particular products if such imports might constitute a threat to the national security of the United States.⁸

at 264. The panel's ultimate conclusion was that U.S. export controls were tighter than necessary for national military security, and that these excessive controls had weakened the economic vitality of the country, thus impairing the equally important economic component of national security. *See id.* at 177. Of course, recent events in Eastern Europe and the Soviet Union have caused many to question the current strictness of export controls. *See, e.g., Kenworthy, U.S. High-Tech Exports to East Bloc Urged*, Washington Post, Dec. 18, 1989, at A11, col. 1. Nonetheless, the extent to which controls will actually be relaxed remains to be seen. *But see Auerbach, U.S. Drafting Plan to Relax Technology Export Curbs*, Washington Post, Dec. 20, 1989, at F1, col. 2.

4. 19 U.S.C. § 1862 (1988).

5. 50 U.S.C. App. § 2170 (West Supp. 1989).

6. *See infra* text accompanying notes 75 and 178.

7. *See supra* note 2.

8. *See, e.g., S. REP. NO. 71, 100th Cong., 1st Sess. 135-36 (1987) [hereinafter S. REP. NO. 71].*

The section consists of three general parts, providing respectively for the application of national security considerations to trade negotiations, presidential authority to limit imports on national security grounds, and the procedural framework for the application of the section. The most important feature of the section is its provision for investigations of the national security effect of imports upon the petition of private parties.

A. *Limitations on Duty Reductions under Trade Agreements*

The first subsection of section 232 prohibits the President from decreasing import duties or removing other import restrictions under his authority to conclude trade agreements, where such action would threaten to impair the national security.⁹ This section entered the law as part of the Trade Expansion Act of 1954, which authorized the President to negotiate tariff reductions within the context of the General Agreement on Tariffs and Trade.¹⁰ The purpose of the provision was to prevent the President from using this authority to lower tariffs on articles or to take other action, where such action could harm the national security. Congress was concerned in particular that indus-

One obvious question arising from a consideration of the section and its purpose is the extent to which it is consistent with the obligations of the United States under the General Agreement on Tariffs and Trade. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, art XXI, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187. In fact, national laws such as section 232 are specifically provided for under article XXI of the General Agreements on Tariffs and Trade, which provides for "Security Exceptions." *Id.*, art. XXI. Among other provisions, this article provides that nothing in the GATT shall be construed as preventing a member state from taking "any action which it considers necessary for the protection of its essential security interests" "relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying the military establishment." The notes to the GATT do not otherwise discuss this exception.

Commentators have noted that this article provides a very broad exception to the operation of the GATT. On the infrequent occasions when the section has been discussed, the result has generally been an affirmation of the absolute right of states to disregard GATT rules on grounds of national security. The most recent, and most significant, invocation of the article was by the United States to justify a total ban on trade with Nicaragua, a member of GATT. The United States explicitly based its action on article XXI. Nicaragua in turn argued that it could not realistically be considered a threat to the national security of the United States. A GATT panel was appointed to consider the matter; as yet, no decision has been reached. See J. JACKSON & W. DAVEY, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 915-16 (1986).

9. 19 U.S.C. § 1862(a) (1988). The text of the subsection reads:

No action shall be taken pursuant to section 1821(a) of this title [basic authority of the President to negotiate trade agreements] or pursuant to section 1351 of this title [promulgation of foreign trade agreements] to decrease or eliminate the duty or other import restriction on any article if the President determines that such reduction or elimination would threaten to impair the national security.

Of course, the Constitution allocates to Congress the power to fix import duty levels. See U.S. CONST. art. I, § 3. The authority of Congress to delegate such power to the President is well-established. Section 232 represents only one of many circumstances under which Congress has delegated the power to regulate foreign commerce to the President.

10. See Trade Agreements Extension Act of 1954, ch. 445, § 2, 68 Stat. 360 (1954).

tries in the United States producing goods viewed as vital to national security could be harmed by exposure to the increased competition from imports that tariff reductions could bring.¹¹

Three features of this amendment merit comment. Although the subsection is in the form of a prohibition, it is a prohibition without essential substance. The subsection prohibits action to decrease duties or otherwise to eliminate trade barriers pursuant to trade agreements if the President determines that to do so would threaten to impair the national security. Yet it is the President who determines in the first place whether such reductions or eliminations will occur.¹² Accordingly, the actual effect of the subsection is to direct the President to take national security considerations into account in negotiating trade agreements, something he presumably would do in any case. The second significant feature of the subsection is that there is no provision for involvement by any party other than the President in this determination. A private party, therefore, would not be able to challenge such actions as duty reductions on national security grounds. Finally, there is no record that this subsection has ever been explicitly invoked, a result that is unsurprising in light of the subsection's practical insubstantiality.

B. *Restriction of Imports on National Security Grounds*

Of more interest, and more relevance, are the remaining provisions of section 232. Under section 232(b),¹³ upon the request of the head of any department or agency or upon application by an interested party, the Secretary of Commerce must initiate and conduct an investigation of the effects of imports of a specific article on the national security of the United States. The Secretary may also initiate such investigations on his own. Upon the conclusion of the investigation, the Secretary files a report with the President stating whether he has determined that imports have been imported in such quantities or under such circumstances as to "threaten to impair the national security [of the

11. See H.R. REP. NO. 1761, 85th Cong., 2d Sess. 13-15 (1958) [hereinafter H.R. REP. NO. 1761].

12. See 19 U.S.C. § 1821(a) (1988) (authority for President to enter into trade agreements when he determines that existing duties or other import restrictions of the United States or other countries unduly burden the foreign trade of the United States); 19 U.S.C. § 1351(a) (1988) (authority of President to enter into foreign trade agreements and to proclaim reductions in United States customs duties and other import restrictions).

13. 19 U.S.C. § 1862(b)(1)(A) (1988). The text of this subsection reads:

Upon request of the head of any department or agency, upon application of an interested party, or upon his own motion, the Secretary of Commerce [hereafter in this section referred to as the "Secretary"] shall immediately initiate an appropriate investigation to determine the effects on national security of imports of the article which is the subject of such request, application, or motion.

United States]."¹⁴ The President must then determine whether he agrees with the Secretary's findings, and if so, determine what action, if any, is to be taken to "adjust" imports of such articles so that the imports will not pose a threat to national security.¹⁵

On its face, section 232 gives the President broad powers to restrict or even bar imports of products if he determines that such imports "threaten to impair" national security. Significantly, the section also provides a means for private parties to seek action under this provision. As will be shown below, however, in practice section 232 has been applied relatively seldom, and only under very limited circumstances. The remainder of section I of this article will examine the terms of section 232, the standards that are applied to its invocation, and the conditions under which action has actually been taken under this provision.

Section 232 first entered the law as section 2 of the Trade Expansion Act of 1954, which provided that no reduction in duty rates could be made pursuant to a trade agreement if such reduction would threaten domestic production needed for projected national defense requirements.¹⁶ In 1955, the section was amended to provide further that the Director of the Office of Defense Mobilization could conduct an investigation into whether an article was being imported in such quantities as to threaten to impair national security, and that, if the President agreed with an affirmative determination, he could take such action "as he deem[ed] necessary" to adjust imports to a level that would not threaten to impair the national security.¹⁷ Although there

14. 19 U.S.C. § 1862(b)(3)(A) (1988). The text of this subsection provides that by no later than the date that is 270 days after the date on which an investigation is initiated under paragraph (1) with respect to any article, the Secretary shall submit to the President a report on the findings of such investigation with respect to the effect of the importation of such article in such quantities or under such circumstances upon the national security and, based on such findings, the recommendations of the Secretary for action or inaction under this section. If the Secretary finds that such article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, the Secretary shall so advise the President in such report.

15. 19 U.S.C. § 1862(c)(1)(A) (1988). The text of this subsection reads:

Within 90 days after receiving a report submitted under subsection (b)(3)(A) of this section in which the Secretary finds that an article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, the President shall—

(i) determine whether the President concurs with the finding of the Secretary, and
(ii) if the President concurs, determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security.

16. See *supra* note 10, at 360.

17. See Pub. L. No. 84-86, § 7, 69 Stat. 166 (1955). See also H.R. REP. NO. 1761, *supra* note 11. The impetus for the amendment appears to have been concern over the importation of specific commodities in large volumes. However, rather than single out such commodities, Congress chose simply to provide the President with the general power to regulate imports where he de-

have been a number of changes in the law since 1955, the most significant being the transfer of investigatory powers to the Secretary of Commerce, the substance of the law remains essentially that fixed in 1955.¹⁸

The legislative history reveals that section 232 was intended to be applied only in cases involving national security. Congress stated specifically that section 232 was not intended to provide an alternative to the relief available to domestic industries under the so-called "escape clause."¹⁹ Thus, while injury to a domestic industry may be a consideration in a section 232 investigation, remedying that injury is not the object of such a proceeding. Rather, "[t]he interest to be safeguarded is the security of the Nation, not the output or profitability of any plant or industry except as these may be essential to national security."²⁰

C. Operation of Section 232

To understand the potential scope of section 232, it is necessary first to understand something of the mechanics of how the section op-

decided that such imports were having a deleterious effect upon national security. See S. REP. NO. 232, 84th Cong., 1st Sess. 4-5 (1955); 101 CONG. REC. 5298 (1955) (remarks of Sen. Barkley). The specific commodities of concern were petroleum, fluorspar, lead, and zinc. See S. REP. NO. 232 at 4-5.

18. The most significant amendment to section 232 was enacted in 1958, where for the first time the factors to be considered in determining whether imports threatened to impair national security were enumerated. See H.R. REP. NO. 1761, *supra* note 11, at 15. The section became the present section 232 in 1962, which essentially recodified the previous law. See H.R. REP. NO. 1818, 87th Cong., 2d Sess. 41 (1962). Section 232 was amended most recently by the Omnibus Trade and Competitiveness Act of 1988. The most significant change made in 1988 was the addition of a formal requirement that the Secretary of Defense conduct a separate assessment of the defense needs with respect to the article in question. See H.R. REP. NO. 576, 100th Cong., 2d Sess. 709-13 (1988) [hereinafter H.R. REP. NO. 576]. This requirement, and its implications, will be discussed further below. Although the 1988 amendment took the form of a total revision of the section, in fact the current provision is relatively little-changed from that adopted in 1955 and modified in 1958.

19. See H.R. REP. NO. 1761, *supra* note 11, at 13. The House Ways and Means Committee report on the 1958 amendment stated that

[T]he national security amendment is not an alternative to the means afforded by the escape clause for providing industries which believe themselves injured a second court in which to seek relief. Its purpose is a different one — to provide those best able to judge national security needs, namely, the President . . . a way of taking whatever action is needed to avoid a threat to the national security through imports.

Id.

The "escape clause" referred to is, in its present form, sections 201 *et seq.* of the Trade Act of 1974, 19 U.S.C. §§ 2251-53 (1988). Under this section, a domestic industry may obtain relief from foreign competition, in the form of additional tariffs, quotas, or other measures, if the International Trade Commission determines that imports have been a substantial cause of serious injury to the industry, and if the President determines that such relief is in the national interest. For an overview of the operation of the escape clause, see J. JACKSON & W. DAVEY, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 541-95 (1986).

20. H.R. REP. NO. 1761, *supra* note 11, at 14.

erates. Section 232 is administered by the International Trade Administration ("ITA"), an agency within the U.S. Department of Commerce. An investigation under section 232 commences upon receipt by the Secretary of Commerce of a request from "the head of any department or agency," an application from an "interested party," or upon the Secretary's own motion.²¹ Neither the statute nor the ITA's regulations define "interested party," but the provision plainly contemplates the filing of requests by private parties. In the past, investigations have been initiated following receipt of applications both from individual companies producing a product and, more commonly, from associations of producers.²²

The Department of Commerce's regulations specify that applications shall be filed with the Director of the Office of Industrial Resource Administration, an office within the International Trade Administration. An application must provide a great deal of detailed information regarding the product in question, its effect upon the national security of the United States, the domestic industry producing the product, and the effect of imports upon the U.S. industry.²³

21. 19 U.S.C. § 1862(b)(1)(A) (1988).

22. *See, e.g.*, U.S. DEP'T OF COMMERCE, THE EFFECTS OF IMPORTS OF GLASS-LINED CHEMICAL PROCESSING EQUIPMENT ON THE NATIONAL SECURITY 4 (1982) [hereinafter GLASS-LINED EQUIPMENT REPORT] (request for investigation filed by single company producing subject merchandise); U.S. DEP'T OF COMMERCE, THE EFFECT OF IMPORTS OF PLASTIC INJECTION MOLDING MACHINES ON THE NATIONAL SECURITY I-1 (1989) [hereinafter PIMM REPORT] (request filed by trade group). It is not clear whether the association need be a formal body, or whether a filing by an ad hoc group is permissible, but this is essentially a moot question, as individual members of a group would clearly have standing to file if they produce the product in question. It is possible, if improbable, that questions of standing to file a request could emerge, as the ITA may request information from other interested parties, including, presumably, parties opposed to the request. *See* 15 C.F.R. § 3705.7(a) (1989). Such information could include claims that the requestor was not an interested party within the meaning of the statute. In such a case the Department of Commerce could apply a definition of "interested party" similar to that contained in the antidumping and countervailing duty definitional statute which defines interested parties as domestic producers of a product, associations of such producers, or unions whose members work in the relevant industry. *See* 19 U.S.C. § 1677(9) (1988).

23. 15 C.F.R. § 705.4(c) (1989). The specific information which the request must contain includes:

1. Identification of the applicant;
2. A precise description of the article;
3. A description of the domestic industry affected, including information regarding companies and their plants, locations, capacity, and current output;
4. Statistics regarding imports and domestic production showing both value and quantity;
5. The nature and degree of competition created by imports;
6. The effect that imports may have upon restoration of domestic production capacity in the event of a national emergency;
7. Employment and any specialized skills involved in production of the article domestically;
8. The extent to which the national economy, employment, investment, specialized skills, and productive capacity are or will be adversely affected by imports;
9. Governmental revenues which will be lost;

The statute provides "heads of agencies" the right to file requests for investigations as well.²⁴ This method of initiation has been used frequently. Of the twenty section 232 investigations conducted since 1962, thirteen resulted from applications by companies or associations, four from requests by agency heads, and three from Presidential requests.²⁵

Upon receipt of a request or application, the statute requires the ITA "immediately" to commence an investigation.²⁶ Neither the statute nor the agency regulations specify what is meant by "immediately." In past cases, notice of initiation of an investigation has generally followed within one month of the filing of an application or the placement of a request.²⁷ The various agencies charged with administering section 232 typically publish notices of initiation in the Federal Register.²⁸ The ITA is also required to notify the Secretary of Defense immediately of the initiation of an investigation.²⁹

After commencing a section 232 investigation, the ITA is required to consult with the Secretary of Defense "regarding the methodologi-

10. Uses of the article for national security purposes, including data on contracts and sub-contracts; and

11. Any other relevant information.

Id.

From these requirements, it is clear that the preparation of a section 232 application is a substantial task requiring the accumulation of large amounts of data. If the domestic industry is composed of more than one producer, cooperation is probably necessary to gather and explain the required data. This raises the obvious problem of inter-firm cooperation where a domestic producer is related to a foreign exporter, and is not willing to assist the rest of the industry by providing the needed data for an application. There is no legal means to compel cooperation, so that industry-wide consensus could be considered a practical prerequisite for the filing of an application. On the other hand, successful applications have been filed in cases where a substantial part of the domestic industry was related to foreign producers, as was true in the investigation of anti-friction bearings. See U.S. DEP'T OF COMMERCE, THE EFFECT OF IMPORTS OF ANTI-FRICTION BEARINGS ON THE NATIONAL SECURITY II-2-3 (1988) [hereinafter BEARINGS REPORT].

24. 19 U.S.C. § 1862(b)(1)(A) (1988). The statute does not specify the officials entitled to file requests under this section; all requests from agency heads in the past have been by Secretaries. See U.S. DEP'T OF COMMERCE, THE EFFECT OF IMPORTS ON NATIONAL SECURITY 13-15 (1984) [hereinafter EFFECT OF IMPORTS ON NATIONAL SECURITY]. Although not stated explicitly, the President obviously qualifies as a "head of agency."

25. See EFFECT OF IMPORTS ON NATIONAL SECURITY, *supra* note 24, at 13-15.

26. 19 U.S.C. § 1862(b)(1)(A) (1988).

27. See EFFECT OF IMPORTS ON NATIONAL SECURITY, *supra* note 24, at 13-15.

28. *Id.*

29. 19 U.S.C. § 1862(b)(1)(B) (1988). This provision was added to section 232 in 1988. See Omnibus Trade and Competitiveness Act of 1988, Pub. L. 100-418, § 1501(a). Before the change, the ITA and the President were already required to consider the defense-needs aspects of the imports in question. The amendment formally brought the Secretary of Defense into the process by requiring the ITA to notify the Secretary of Defense of the initiation of a section 232 investigation, and by requiring the Secretary of Defense in turn to provide a written defense-needs assessment, if requested by the ITA. See H.R. REP. NO. 576 *supra* note 18, at 710-11.

cal and policy questions" raised in the investigation.³⁰ The Secretary is further directed to seek information from, and consult with, other appropriate officers of the United States.³¹ The ITA cannot, however, publicize communications from other government agencies, or information received from foreign governments.³² In addition to advice, the ITA may seek other forms of assistance from other government agencies in conducting the investigation.³³ The ITA may also, "if it is appropriate," hold public hearings, or otherwise afford interested parties an opportunity to present information and comments relevant to the investigation.³⁴

The ITA must complete its investigation and submit a report to the President within 270 days of the date of initiation.³⁵ In its report, the agency must describe its findings and submit its recommendations. Specifically, if the agency determines that the article in question is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, it must so advise the President.³⁶ The agency is required to publish in the Federal Register any portion of its report that does not contain confidential information.³⁷

Upon receipt of the ITA's report, the President has ninety days to determine whether he agrees with its findings and to decide what action, if any, to take. If he determines to act, he must implement such action within fifteen days of the date of his determination. Within thirty days of his determination, the President must submit a written statement to Congress explaining the basis for his decision.³⁸ The President is also required to submit a report to Congress annually regarding the overall operation of section 232.³⁹

30. 19 U.S.C. § 1862(b)(2)(A)(i) (1988); *see also* 15 C.F.R. § 705.7(d) (1989).

31. 19 U.S.C. § 1862(b)(2)(A)(ii) (1988); *see also* 15 C.F.R. § 705.7(d) (1989).

32. 15 C.F.R. § 705.7(d) (1989).

33. *Id.*

34. 19 U.S.C. § 1862(b)(2)(A)(iii) (1988); *see also* 15 C.F.R. § 705.8(a) (1989).

35. The addition of time limits to section 232 occurred as part of the amendments to the law made in 1988. *See Omnibus Trade & Competitiveness Act*, Pub. L. No. 100-418 § 1501, 102 Stat. 1107, 1207 (1988). There formerly was no requirement regarding the time within which either the ITA or the President must act. The addition of time limits thus ensured private parties to section 232 proceedings that a resolution of the proceedings would occur within a relatively restricted time. In addition, the shorter time limits arguably increased the effectiveness of section 232 as a means of safeguarding the national security, by ensuring that an investigation was not so prolonged that the relevant domestic industry had already suffered irreparable injury by the time the investigation was completed.

36. 19 U.S.C. § 1862(b)(3)(A) (1988).

37. 19 U.S.C. § 1862(b)(3)(B) (1988); *see also* 15 C.F.R. § 705.10(c) (1989).

38. 19 U.S.C. § 1862(c) (1988).

39. 19 U.S.C. § 1862(e)(2) (1988).

Actions by the President under section 232 are not normally subject to further review or action. However, any action taken by the President with respect to imports of petroleum or petroleum products may be overridden by a disapproval resolution by either house of Congress.⁴⁰ The constitutionality of this provision is questionable in light of the Supreme Court's decision in *Immigration and Naturalization Service v. Chadha*.⁴¹

D. *Application of Section 232*

The purpose of a section 232 investigation is to determine whether imports are entering the United States in such quantities, or under such circumstances, as to threaten to impair the national security.⁴² Significantly, the phrase "threaten to impair the national security" is neither defined nor discussed in the statute or in the agency's regulations. Nor is there any meaningful discussion of the standard in the legislative history.⁴³ This omission highlights the extent to which determinations under section 232 were intended to be discretionary, and emphasizes the flexibility accorded both the ITA and the President in making such determinations.

Despite the paucity of guidance for interpreting the phrase "threaten to impair the national security," the statute does provide a detailed list of factors for the ITA and the President to consider in making their determinations. An examination of these factors will thus serve as a starting point for interpreting the phrase. This analysis then can be refined further by reviewing the factors actually considered, in varying degrees, by the ITA in an investigation.

The statute provides that the ITA and the President "shall, in the light of the requirements of national security and without excluding other relevant factors," consider the following factors:

1. Domestic production of the article needed for projected national defense requirements;
2. The capacity of domestic industries to meet such requirements;
3. Existing and anticipated availabilities of the human resources,

40. See 19 U.S.C. § 1862(f) (1988).

41. *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983) (provision in statute for Congressional veto of Presidential determination held unconstitutional).

42. See text accompanying note 14, *supra*. Before 1958, the statute referred only to articles imported "in such quantities" as to threaten to impair national security. The second provision was added in that year to address situations in which the conditions under which imports occurred, rather than the quantities of such imports, created the threat to national security. See H.R. REP. NO. 1761, *supra* note 11, at 15.

43. Indeed, the only significant reference to what was meant by "national security" is a statement in a floor debate in 1955 that the section is intended to address imports of articles that are essential to national defense. See 101 CONG. REC. 5298 (1955) (remarks of Senator Barkley).

products, raw materials, and other supplies and services essential to the national defense;

4. The requirements of growth of such industries and such supplies and services, including the investment, exploration, and development needed to ensure such growth; and

5. The importation of goods in terms of their quantities, availabilities, character, and use; and their effect on the ability of United States industries to satisfy national defense needs.⁴⁴

The statute also provides that, in considering these factors, the ITA and the President should recognize the close connection between economic welfare and national security, so that they should consider the impact of imports upon individual domestic industries. The ITA and the President are also directed to consider the loss of jobs or skills, governmental revenues, or investment resulting from the displacement of domestic products by excessive imports. The ITA and the President may of course consider other relevant factors as well.⁴⁵

These factors reveal that, although "national security" is not defined in the statute, the focus is upon national defense. Most of the factors to be reviewed apply to products having specific military uses. Similarly, the statute requires the ITA to consult with the Secretary of Defense,⁴⁶ who must make an assessment of the defense requirements for the article in question if the Secretary of Commerce so requests.⁴⁷ Beyond this, the legislative history indicates that the ITA and the President should, in determining whether imports threaten to impair the national security, consider in particular the role of imports of the product during periods of national emergency,⁴⁸ a still narrower standard. The statute does encourage the ITA and the President to take into account the connection between economic welfare and national security,⁴⁹ an exhortation which, if followed, could allow these parties to define "national security" more broadly than the enumerated factors would suggest. On balance, however, the statute, with the accompanying legislative history, appears to define national security

44. 19 U.S.C. § 1862(d) (1988); *see also* 15 C.F.R. § 705.4(a) (1989). The House Ways and Means Committee report regarding the amendment by which this part of the statute was added to the law in 1958 stated that these factors were intended to "guide" the President in determining whether imports were threatening to impair the national security. The report stated further that "in considering factors affecting national security, attention should be given to the continued accessibility, in periods of national emergency, of imports from areas close to the United States." H.R. REP. NO. 1761, *supra* note 11, at 15.

45. *See* 19 U.S.C. § 1862(d) (1988).

46. 19 U.S.C. § 1862(b)(2)(A) (1988).

47. 19 U.S.C. § 1862(b)(2)(B) (1988). *See also* S. REP. NO. 71, *supra* note 8, at 135-36.

48. *See* H.R. REP. NO. 1761, *supra* note 11, at 15.

49. *See* 19 U.S.C. § 1862(d) (1988).

essentially in terms of military requirements for the product in question.

The best guide to the scope of section 232 and, in particular, to the manner in which the phrase "national security" has been interpreted, is the results of individual ITA investigations, along with subsequent Presidential determinations whether to act on the basis of those results. As the following examination will reveal, the ITA has interpreted section 232 fairly narrowly, equating national security with national defense. Moreover, actions following affirmative findings by the ITA have been rather rare, indicating that, as a political matter, the United States prefers not to take direct, unilateral action under section 232. This conclusion is confirmed by a review of the few cases in which the President has taken action under section 232 to limit imports.

The starting point for an ITA investigation is the factors listed in the statute and in the ITA's regulations, such as national defense and essential civilian requirements, the domestic production needed to meet such needs, the capacity of the domestic industry, and the quantity and quality of imports.⁵⁰ Where necessary or appropriate, the ITA will also consider additional factors unique to the product in question.⁵¹

In the actual conduct of an investigation, the ITA must first determine the importance of the article to national security. To make this determination, the ITA examines the use of the article in both defense and essential civilian applications.⁵² The ITA will examine particular military applications of the product, such as its incorporation in individual weapons systems.⁵³ Past ITA studies have been less specific as to what are considered "essential civilian applications," but have noted where a product is "basic and vital to the health, welfare and

50. See U.S. DEP'T OF COMMERCE, *THE EFFECT OF IMPORTS OF CHROMIUM, MANGANESE, AND SILICON FERROALLOYS AND RELATED MATERIALS ON THE NATIONAL SECURITY* 4-5 (1982) [hereinafter *FERROALLOYS REPORT*].

51. See *id.* at 5-6. In the ferroalloys investigation, for example, the ITA stated that it would also consider chromium and manganese ore requirements, steel capacity, and surplus blast furnace capacity in making its determination. These were factors of a type not enumerated in the statute, but which the ITA found had a direct bearing upon the question of whether imports of ferroalloys threatened to impair the national security of the United States. *Id.* Similarly, in its investigation of plastic injection molding machines, the ITA noted that developments and conditions in other sectors of the economy, such as robots, molds, and other products used in conjunction with injection molding machines, could be relevant to the investigation. See *PIMM REPORT*, *supra* note 22, at II-6.

52. See *BEARINGS REPORT*, *supra* note 23, at I-3; *PIMM REPORT*, *supra* note 22, at ES-1, IV 1-6.

53. See *BEARINGS REPORT*, *supra* note 23, at I-3-4.

thus the security of the United States."⁵⁴ The ITA will commonly rely upon Department of Defense studies and information, as well as other sources, in making this determination.⁵⁵

The ITA may next divide the articles covered by the application or request for investigation into specific product categories. It may do so on the basis of chemical composition, uses,⁵⁶ or physical characteristics.⁵⁷ Such a division is significant, as the ITA will then analyze the role of each product in the national security,⁵⁸ and will make an independent determination of the impact of imports and an individual recommendation regarding each product category.⁵⁹

The ITA will next calculate total available supply of the product with anticipated demand during a "specified national security emergency."⁶⁰ The ITA defines "supply" as the sum of (1) domestic mobilization capacity; (2) importer and domestic inventories; and (3) reliable imports.⁶¹ The aim of this step is to determine the supply of the product upon which the United States could depend in a national security emergency. Demand for the product is normally determined through an input/output analysis of end-use product requirements contained in the 1984 Stockpile Study by the National Security Council.⁶² The purpose of this step is to determine whether supply

54. GLASS-LINED EQUIPMENT REPORT, *supra* note 22, at 9.

55. See BEARINGS REPORT, *supra* note 23, at I-3.

56. See FERROALLOYS REPORT, *supra* note 50, at 13-14.

57. See BEARINGS REPORT, *supra* note 23, at II-18-23. In the investigation of antifriction bearings, the ITA divided the merchandise into two general classes, regular precision bearings and superprecision bearings, and then subdivided these classes into a number of subcategories, such as ball bearings under 30mm, ball bearings 30-100mm, tapered roller bearings, etc. See *id.* at ES-3. Similarly, in the ferroalloys investigation, the ITA divided the merchandise into a number of different products, such as high carbon ferrochromium, high carbon ferromanganese, chromium metal, etc. See FERROALLOYS REPORT, *supra* note 50, at 24-41.

58. See BEARINGS REPORT, *supra* note 23, at II-18-23.

59. See *id.* at VII-1-12.

60. See *id.* at ES-1.

61. *Id.* at ES-2. The ITA has noted that it defines supply as (1) the ability of the domestic industry to expand production during emergency conditions; (2) the ability to convert the existing stock of the product from civilian to military use; and (3) reliable imports. The agency bases its estimates of the ability of the domestic industry to expand production upon a survey of the capabilities of the leading manufacturers of the product. See PIMM REPORT, *supra* note 22 at ES-1-2. In considering the possibility of expansion of production, the ITA will attempt to identify the factors necessary for expansion and possible obstacles to expansion, such as shortages of raw materials, equipment, and skilled labor. See BEARINGS REPORT, *supra* note 23, at VI-8-18. Of particular interest is whether plants that produced the product have recently closed, so that production could expand by reopening them. See *id.* at VI-18.

Another obvious component of supply is inventory. Such inventory may include inventories held by domestic producers and consumers, see FERROALLOYS REPORT, *supra* note 50, at 42, as well as any supplies of the good contained in the National Defense Stockpile. *Id.* at 49-51.

62. See BEARINGS REPORT, *supra* note 23, at ES-2; PIMM REPORT, *supra* note 22, at I-2. Where the NSC Stockpile Study does not provide direct information for the specific product concerned, however, the ITA has derived demand by taking study data for a product related to

shortfalls of the product would occur during a "national security emergency," which is essentially a period of mobilization followed by a conventional war. In recent investigations, the ITA has defined the period of national emergency as a one-year mobilization followed by the first year of a conventional war of indefinite length.⁶³ For those products where a shortfall is identified, the ITA's final step is to determine whether imports have been a significant cause of the domestic industry's inability to meet national security requirements. Beyond examining just this static picture, however, the ITA will also analyze current and prospective market trends to evaluate domestic ability to meet national security requirements in the future.⁶⁴

To determine supply, the ITA will examine the structure of the worldwide industry and the competitive forces and trends at work within the industry, with an emphasis on sources of exports to the United States. Of special importance is the level of import penetration in the United States.⁶⁵ In this way, the ITA determines external sources of supply, and the reliability of those sources.⁶⁶ The ITA conducts a detailed examination of shipments, consumption, and trade in the relevant product.⁶⁷ It will also consider what, if any, substitutions for the product under investigation are available,⁶⁸ and whether and to

the product in question and extrapolating. Thus, in the injection molding machines investigation, the ITA utilized study data on plastic resin requirements, as plastic resin is the main raw material for plastics, the product produced by plastic injection molding machines, and calculated from this the number of plastic injection molding machines that would be necessary to process this amount of resin. The ITA also relied upon independent estimates of the total amount of plastic resin used for military purposes, information obtained from interviews with industry officials regarding the extent of their defense-related operations, and Defense Department projections. *See id.* at I-2-3.

63. *See* BEARINGS REPORT, *supra* note 22, at VI-1; PIMM REPORT, *supra* note 22, at VIII-1. The ITA formerly used Scenario 3A of the Stockpile Study, which contemplated a one-year mobilization effort followed by a three-year war. The agency has more recently altered its approach by using a scenario based on a one-year mobilization period followed by the first year of a war of indefinite length, as it believes that this scenario is more realistic than the gradual increases over a three-year period contemplated by Scenario 3-A. *Id.* at VIII-1. As will be discussed below, whether this scenario continues to be realistic is debatable.

64. *See* BEARINGS REPORT, *supra* note 23, at VI-1; PIMM REPORT, *supra* note 22, at ES-2.

65. *See* BEARINGS REPORT, *supra* note 23, at II-1-7.

66. *See* BEARINGS REPORT, *supra* note 23, at V-1-11; FERROALLOYS REPORT, *supra* note 50, at 11. In determining the reliability of imports, the ITA has turned to the Department of State to identify sources that can be considered reliable. In making this determination, the State Department will consider both the political and logistical reliability of the exporting country. *See id.* at 11. In at least one study, it was assumed that no imports could reach the United States by sea. Thus, only imports from Canada were considered reliable. *See* PIMM REPORT, *supra* note 22, at VII-5. There is no official procedure for participation by private parties in the State Department's determination regarding reliability, so that this determination, which is of great importance in the ITA's vital determination of available supply, represents essentially a variable outside the control of private parties.

67. *See* BEARINGS REPORT, *supra* note 23, at V-1-11.

68. *See* GLASS-LINED EQUIPMENT REPORT, *supra* note 22, at 6-7.

what extent the industry can shift production to products that are the subject of the investigation.⁶⁹

The ITA will then examine the structure and condition of the domestic industry, including ownership (in particular, whether firms are foreign-owned), shipments, and employment.⁷⁰ The ITA will then examine in detail the competitive factors relevant to foreign producers that affect the domestic industry's ability to satisfy national security requirements. These factors include the structure of individual country industries (concentrated v. diffuse), the existence of protected markets or strong domestic sales bases, and developments such as international rationalization of production.⁷¹ The ITA also will examine competition from other products as potential substitutes.⁷² The ITA will pay particular attention to the profitability of the domestic industry, and thus its ability to generate future investment in both research and new production facilities. The agency will also examine past investment in capital facilities and in research and development.⁷³

In addition, the ITA will examine sources of raw materials.⁷⁴ It

69. See FERROALLOYS REPORT, *supra* note 50, at 16-17. In the Ferroalloys Report, the ITA noted that the flexibility to shift production into necessary areas "can be extremely important during an emergency," so "the degree of flexibility available can have direct consequence on the assessment of the national security threat as certain operations may be able to compensate for decreases in production from other areas." *Id.* at 16. With respect to ferroalloys, for example, the ITA found that there were 101 ferroalloy furnaces in the United States, of which eighty-two could be used to produce more than one type of product. *Id.* at 17. Because of the importance of flexibility in production shifting to its assessment of the national security threat, the ITA will examine not just current flexibility, but also potential trends towards either more or less ability to shift production among products. The ITA will also take into account the negative aspects of production flexibility, such as higher levels of off-specification production and the loss of the economies generated by continuous production of a single product. *Id.*

70. See, e.g., BEARINGS REPORT, *supra* note 23, at II-9-15. With respect to foreign ownership, the ITA has noted that "[t]hrough unlikely, it is conceivable that in times of emergency, companies owned by foreign firms may receive directions to operate in a manner not fully consistent with U.S. national security interests . . ." FERROALLOYS REPORT, *supra* note 50, at 47. Therefore the ITA considers foreign ownership of U.S. firms in calculating available supply in a national security emergency.

71. See BEARINGS REPORT, *supra* note 23, at III-1-8. The ITA will undertake a competitive analysis of the foreign producers similar to that performed regarding the domestic industry. Among the factors considered, besides such obvious ones as availability of raw materials and labor costs, are the political situation in the country, its infrastructure, effect of environmental regulations on costs, and government support of the industry, including tariff levels for the product in question. See FERROALLOYS REPORT, *supra* note 50, at 52-55.

72. See GLASS-LINED EQUIPMENT REPORT, *supra* note 22, at 6-7.

73. See BEARINGS REPORT, *supra* note 23, at III-8-13.

74. See FERROALLOYS REPORT, *supra* note 50, at 15; BEARINGS REPORT, *supra* note 23, at III-14-16. Of obvious importance is whether key raw materials must also be imported, and whether the sources of such imports are themselves dependable. To the extent that the domestic industry depends upon imported raw materials, examination of imports of the product under investigation alone may result in an understatement on the vulnerability of the domestic industry during a national security emergency. In the Antifriction Bearings investigation, for example, the ITA found that import penetration figures understated the reliance of the United States on external sources of supply for antifriction bearings because the U.S. industry relied heavily upon

will analyze the effects of price, lead time for delivery, and service upon competitiveness.⁷⁵ Taken together, these data allow the ITA to reach a conclusion regarding the overall competitiveness of the United States industry, and the probable effects of the competitive situation on the future of the domestic industry.⁷⁶ The ITA will consider relevant governmental programs, both those that affect industry competitiveness directly, such as Department of Defense procurement regulations and adjustment assistance,⁷⁷ and laws and regulations that may have more indirect, but just as important effects, such as environmental regulations.⁷⁸

The final step in the ITA's methodology is its national security assessment. The agency first identifies mobilization requirements in a national security emergency.⁷⁹ From this, the ITA estimates total requirements for the product. The ITA then derives "mobilization capacity," representing the ability to satisfy mobilization requirements from domestic production, inventories, and secure imports.⁸⁰

Although the ITA conducts the investigation, it normally depends upon other agencies for much of its data, and may even depend upon them for key determinations. As was noted above, the Department of Defense has an official function under the statute through the requirement that it provide a defense assessment of the product in question. The ITA will also generally consult with other agencies on key areas, such as projected supply, the availability of skilled labor or the factors

imported bearing-quality steel as the main input into the finished product. See BEARINGS REPORT, *supra* note 23, at III-16.

To make the determination of the vulnerability of the domestic industry to imports of raw materials, the ITA will apply the same mobilization scenario used for the products under investigation and the U.S. Department State's factors of reliability for such imports. See FERROALLOYS REPORT, *supra* note 50, at 5. The ITA will also of course consider domestic sources for the raw materials, and where those sources are inferior to sources abroad, whether the United States could nonetheless rely upon domestic sources, and what the costs of development of these resources would be. See *id.* at 15; see also BEARINGS REPORT, *supra* note 23, at III-16.

75. See BEARINGS REPORT, *supra* note 23, at III-17-23.

76. See *id.* at III-23.

77. See *id.* at IV-1-4; GLASS-LINED EQUIPMENT REPORT, *supra* note 22, at 6. The government program having the most obvious effect upon imports is the level of U.S. tariffs. See *id.* at 6. Other programs exerting a direct effect upon the domestic industry are Department of Defense procurement programs, such as Defense Production Act Title III funds to support development of production or, most importantly, Federal Acquisition Regulations that may require the Department of Defense to purchase the product in question from domestic sources only. See BEARINGS REPORT, *supra* note 23, at IV-1.

78. See FERROALLOYS REPORT, *supra* note 50, at 16. Among the programs and policies considered in past investigations are environmental regulations, U.S. antidumping and countervailing duty laws, antitrust laws, the provision of trade adjustment assistance to firms and workers adversely affected by imports, export controls, export promotion activities, and the U.S. Generalized System of Preferences. See BEARINGS REPORT, *supra* note 23, at IV 2-4.

79. See, e.g., BEARINGS REPORT, *supra* note 23, at VI-1-2.

80. See *id.* at VI-4-18.

affecting the competitiveness of the U.S. industry.⁸¹

Having completed its investigation, the ITA can then compare needs and availabilities to determine whether shortfalls exist. It can also determine the extent to which these shortfalls are the result of imports. To assess the relationship between supply shortfall and imports, the ITA examines the magnitude of imports relative to the total market, *i.e.*, import penetration, and trends in imports and domestic capacity.⁸² The ITA accordingly makes its formal findings, states whether it has concluded that imports have entered the United States in such quantities or under such circumstances as to threaten to impair national security, and recommends to the President what action, if any, should be taken.⁸³ The ITA has stated that, in deciding what recommendations to make, its primary aim is to alleviate projected shortfalls so that national security needs can be met, and that the recommendations proposed must embody the most efficient means of satisfying this requirement.⁸⁴ The agency's recommendations are not limited to whether or not imports should be restricted; it is also able to recommend other, non-import-related measures if it believes such steps will remedy the problem.⁸⁵

81. *See, e.g.*, FERROALLOYS REPORT, *supra* note 50, at 10. In that investigation, the ITA consulted with the Department of Labor regarding labor trends and the availability of the skilled labor necessary for the ferroalloys industry; the Department of the Treasury regarding the revenue effect of imports and the effect of currency fluctuations and exchange rates on competitiveness; the United States Trade Representative and the Council of Economic Advisers regarding the possible impact of any action limiting imports upon the U.S. economy in general; the Department of the Interior regarding domestic and foreign sources of the ores that are the raw materials for ferroalloys; and the Federal Emergency Management Agency regarding the projected supply of ferroalloys that would be available during an emergency. *See id.*

82. *See* BEARINGS REPORT, *supra* note 23, at VII-1. Among the factors the ITA has treated as indicating that imports are a cause of the shortfall are declines in domestic shipments (both by volume and value), declines in exports, increases in import volume or value, and increases in import penetration. The ITA will also consider whether U.S. producers have left the market in the recent past. *See id.* at VII-4. Even if domestic shipments have increased, increases in consumption and imports greater than the growth in domestic production may serve to link imports and the shortfall. *See id.* at VII-6.

83. *See id.*, at VII-13.

84. *See* FERROALLOYS REPORT, *supra* note 50, at 65. The ITA applies the following criteria in making its recommendations:

1. The primary purpose of the remedy proposed must be to alleviate the shortfall to meet national security needs.
2. The remedy must result in the maintenance of domestic production at levels sufficient to satisfy demand that cannot be filled from inventories and reliable imports.
3. The proposed remedy must incorporate U.S. trade policy goals to the greatest extent possible.
4. The proposed remedy must represent the lowest possible direct and indirect costs of action.
5. The proposed remedy must be feasible.

Id.

85. *See, e.g.*, FERROALLOYS REPORT, *supra* note 50, at 65-67. Recommendations that would affect imports directly include recommendations for the imposition of quotas, tariffs, or breakpoint tariffs on imports of the product under investigation, or the elimination of duty-free

The President is entirely free to accept or reject the ITA's findings and recommendations. The statute states that the President shall decide whether he agrees with the ITA's findings. If the President agrees with an affirmative determination, he shall determine the nature and duration of the action to be taken. However, the statute modifies this requirement by explicitly providing that the President shall decide what action, in his judgment, is necessary to adjust the imports of the article so that these imports will not threaten to impair the national security.⁸⁶ Thus, the decision whether to act is left entirely to the discretion of the President. There is no judicial review of this decision, and, with the possible exception of decisions relating to petroleum imports, no provision for overriding action by Congress outside of the normal legislative process.⁸⁷ Therefore, despite the elaborate machinery for investigation, the ultimate decision is that of the President alone, and he is free to make it on any grounds, including avowedly political ones, that he sees fit.

E. *Actions Possible Under Section 232*

As was noted above, the President has the power to determine what action is necessary to "adjust" imports to the necessary levels.⁸⁸ The statute does not specify what means the President may use. Obvious measures, however, would include the imposition of additional tariffs, quotas, "import fees," licenses, or even outright bans on importation.⁸⁹ An arguably less disruptive, but equally direct, means of limiting imports has been through voluntary restraining agreements ("VRAs") with selected exporters to limit the flow of imports into the United States.⁹⁰ In other cases, where the ITA has found a shortfall,

treatment for the product under the Generalized System of Preferences. *Id.* at 66-67. In the ferroalloys investigation, the ITA recommended instead that the United States upgrade the National Defense Stockpile holdings of products for which it had found a shortfall as the most efficient and least disruptive means of ensuring that the United States possessed sufficient stocks of these products. *Id.* at 67. Even if the ITA finds a shortfall, it may recommend that the President defer action until he is able to assess whether other government programs, such as Federal Acquisition Regulations requiring the Department of Defense to purchase the product from domestic sources only, has alleviated the problem. See BEARINGS REPORT, *supra* note 23, at VII-13.

86. See 19 U.S.C. § 1862(c)(1)(A) (1988).

87. See *supra* text accompanying notes 40 and 41.

88. See *supra* text accompanying note 15.

89. See, e.g., FERROALLOYS REPORT, *supra* note 50, at 65-67 (discussion of imposition of quotas, import duties, breakpoint tariffs, and termination of GSP status).

90. See Statement by the President announcing decision to seek Voluntary Restraint Agreements on machine tool imports. 22 WEEKLY COMP. PRES. DOC. 1654 (Dec. 16, 1986) [hereinafter Presidential Statement dated December 16, 1986]. The President stated that the United States had concluded VRAs with Taiwan and Japan on certain specified products. At the same time, he announced that the Department of Defense would also implement an Action Plan to

but recommended deferral of action, the President has chosen not to take action to restrict imports until the effect of other U.S. government actions intended to remedy the situation could be observed.⁹¹ Presidential power under section 232 is subject to some restrictions; however, the section does empower the President to impose controls on domestically produced goods, either through monetary mechanisms or quantitative devices.⁹²

Although section 232 represents a potent weapon of trade policy, it has rarely been used. Between 1962 and the present, eighteen section 232 investigations have been conducted.⁹³ In nine of these, either the

integrate U.S. machine tool manufacturers in the defense procurement process, and that the government would also provide funds to finance research and development in the machine tool sector. The President also stated that the government would consider whether antitrust laws could permit the various companies in the industry to cooperate in research and development activities. Finally, the President noted that, although no formal agreements had been concluded with West Germany and Switzerland, the Secretary of Commerce had informed these countries that their exports of machine tools to the United States should not exceed certain limits, and that the United States would be prepared to take unilateral action if these limits were breached.

The United States subsequently concluded VRAs with Japan and Taiwan to limit imports of machine tools from those countries. In each case, the limit for a specific product was set as a percentage of apparent U.S. consumption during a stated period. See Arrangement between the Coordination Council for North American Affairs and the American Institute in Taiwan Concerning Trade in Certain Machine Tools at 2; Agreed Minutes between the United States and Japan at 2. The actual mechanism for control was an agreement by the exporting country not to allow exports without an export license. *Id.*

The use of VRAs by the United States in international trade has been the subject of great controversy. See, e.g., J. JACKSON & W. DAVEY, *supra* note 8, at 615-22. It is interesting to note that, in the case of the agreement between the United States and Japan, the governments dealt directly with one another, so that there can be no doubt that the agreement represented an agreement between governments, rather than between the United States and individual Japanese exporters. Whether such agreements are truly voluntary on the part of foreign exporters is a separate issue; in the case of the agreement with Taiwan, the Taiwanese machine tool industry has made it clear that it believed the presentation of the agreement was a *fait accompli* on the part of the United States, and that it was accepted only because the alternative could have been even more restrictive quotas or higher tariffs.

The machine tool case represents the first use by the President of VRAs. The statute contains no explicit authority to make such agreements. The Senate passed an amendment to section 232 in 1988 that would have provided explicit authority for the conclusion of VRAs as an action under section 232. In conference, however, the amendment was dropped. The legislative history makes it clear that Congress considers the authority to adopt VRAs to reside with the President under his general authority under section 232, so that no additional authority was necessary. See H.R. REP. NO. 576, *supra* note 18, at 712. At the same time, it is significant that Congress avoided providing the President with formal authority to conclude VRAs, so that the constitutional status of such agreements remains debatable.

91. See Notice of Termination of Investigation: Antifriction Bearings, 51 Fed. Reg. 14,470 (Dep't Comm. 1986).

92. See *Indep. Gasoline Marketers Council, Inc. v. Duncan*, 492 F.Supp. 614 (D.D.C. 1980).

93. The products that have been the subjects of section 232 investigations include manganese and chromium ferroalloys; tungsten mill products; antifriction bearings; watches, movements and parts; miniature and instrument precision ball bearings; EHV power circuit breakers and EHV power transformers and reactors; oil; nuts, bolts, and large screws of iron or steel; glass-lined chemical processing equipment; machine tools; plastic injection molding machines; and uranium. Some products, including chromium and manganese ferroalloys, antifriction bearings, and oil, have been the subject of more than one investigation.

administering authority or the President concluded that imports did not threaten to impair national security.⁹⁴ In two investigations, involving chromium, manganese, and silicon ferroalloys and related materials and antifriction bearings, the ITA determined that imports did threaten national security. In the ferroalloys case, the President determined that imports did not pose a threat, in light of action taken to remove these materials from the Generalized System of Preferences list and to upgrade the stockpiles of these products.⁹⁵ With respect to antifriction bearings, the ITA found a threat, but recommended no action in light of changes in the Department of Defense's procurement regulations that would restrict defense purchases to domestically produced bearings.⁹⁶ In an investigation of machine tools, the ITA found a threat, and the President took action in the form of negotiation of voluntary restraining agreements to limit exports to the United States.⁹⁷

The only product regarding which the United States has taken unilateral action is petroleum. In 1957, a system of supplemental fees upon petroleum imports was imposed;⁹⁸ this system was later dismantled.⁹⁹ However, section 232 was used to continue to ban imports of petroleum from Libya, on grounds that such import threatened the national security of the United States.¹⁰⁰ This last action is a vivid illustration of the extent to which section 232 is subject to political considerations and influences.¹⁰¹

This record is one of very conservative application of section 232. In light of the extremely narrow definition of "national security" employed by the ITA, and thus the infrequency with which that agency has in fact found that imports threatened to impair the national security, such conservatism appears unwarranted. Precisely because the ITA applies such a stringent standard, the assumption should be that, in cases where the ITA does find a threat, that threat is quite severe indeed. In such a circumstance, a valid presumption would be that decisive action by the President is necessary to assure that the threat does not transmute into actual harm to the national security.

94. See BUREAU OF EXPORT ADMIN., OFF. OF INDUS. RESOURCE ADMIN., U.S. DEP'T OF COMMERCE, SECTION 232 INVESTIGATIONS (1989).

95. See *Presidential Decision on the Impact of Ferroalloy Imports on the National Security*, 49 Fed. Reg. 21,391, 21, 392 (Dep't Comm. 1984).

96. See Notice of Termination of Investigation: Antifriction Bearings, *supra* note 91.

97. See Presidential Statement dated December 16, 1986, *supra* note 90.

98. See Proclamation No. 3279, 24 Fed. Reg. 1781 (1957).

99. See Proclamation No. 5141, 48 Fed. Reg. 56,929 (1983).

100. See *id.*

101. See J. JACKSON & W. DAVEY, *supra* note 8, at 925.

Yet, as discussed above, in those cases involving products other than petroleum, the President has declined to take any concrete action, with the possible exception of the insistence on the conclusion of voluntary restraint agreements in the *Machine Tools* case. Rather, the President has adopted the position that no further action was warranted until the effect of other, less-disruptive measures became clear. In fact, in neither the *Antifriction Bearings* nor the *Ferroalloys* case has the President taken any further action. Given the implied seriousness of the threat, in light of the ITA's reluctance to find a threat at all, one may question whether such a policy represents a sufficiently diligent application of the law.

F. Comments on Section 232

In theory, section 232 represents a powerful instrument of U.S. foreign and trade policy. In fact, section 232 has been invoked very rarely. Therefore, any hope by a domestic industry that it can obtain meaningful relief from import competition under section 232 is probably misplaced. This does not mean, however, that section 232 has no useful purpose for such industries; request of a section 232 investigation can serve to focus governmental attention upon the problems of a particular industry, and it can lead to ameliorating action other than direct adjustment of imports under section 232. Such action occurred in the *Antifriction Bearings* case, where the Department of Defense adopted regulations restricting purchases of certain types of bearings to domestic sources, and the *Ferroalloys* case, where the domestic industry received at least marginal relief when various ferroalloy products were removed from the eligible list of the Generalized System of Preferences.

The application of section 232 has always been avowedly political in nature. This in itself is not necessarily a bad thing. Although the trend in the United States has been towards the "legalization" of governmental action, so that action is taken on the basis of allegedly objective criteria, the determinations involved in a section 232 proceeding are inextricably intertwined with considerations of foreign policy and national security so that it would be difficult to restrict the President's power in ways that would not potentially violate the Constitution.

That section 232 is inherently political in interpretation and application cannot obscure or explain the lacuna that exists at the very heart of the law, namely, the definition of national security. As was noted above, the statute carefully does not define what is meant by "national security." In fact, as was discussed above, the ITA and the

President have defined "national security" in a very narrow, technical manner. Briefly put, "national security" in the context of imports refers to the ability of the United States to mobilize for and fight a conventional war. Although the statute does exhort the President to consider the national security aspects of economic welfare as well, the ITA has interpreted the statute in a purely mechanical fashion in this respect.

This interpretation, and with it section 232, is on the threshold of becoming obsolete, unless a new approach to what constitutes national security is created. The ITA has explicitly defined national security in terms of military needs. Although the exact details of the scenario on which the ITA bases its estimate of national security needs for a product are often classified, it is known that the ITA calculates national security needs for a product on the basis of one year of military mobilization, followed by one year of conventional war.¹⁰² Against whom such a conventional war would be waged is unstated, but it is reasonable to assume that the war contemplated would be fought in Central Europe against the forces of the Warsaw Pact. This represents a reasonable assumption, as such a scenario would provide the most realistic "worst case" for military needs.

The problems with this scenario have become evident in the last few months. Although one hesitates to make sweeping pronouncements on the basis of recent events, it appears that the Warsaw Pact represents a reduced potential military threat to the United States. Specifically, given current and probable future conditions in Eastern Europe and the Soviet Union, a conventional war between the United States and the Warsaw Pact in Central Europe is exceedingly unlikely.¹⁰³ Therefore, any definition of national security based upon military needs in such a war is premised upon a scenario that does not provide a reasonable measure of national security needs.

Three alternative approaches to national security within the context of section 232 are possible. The first is to continue to apply the current test, where national security is defined in terms of defense needs for the product in question using the current scenario. Although the actual occurrence upon which the scenario is based may be unlikely, it can be argued that this scenario represents a conservative estimate of U.S. national security requirements. Moreover, this approach has the benefits of consistency with past ITA experience and practice.

102. See *supra* text accompanying note 63.

103. See, e.g., Goshko & Cody, *Sheverdnadze to Visit NATO Amid Review of Soviet Threat*, Washington Post, Dec. 15, 1989, at 1, col. 5.

An alternative approach would be to continue to define national security in terms of defense needs of the product, but to alter the scenario under which those needs are calculated. One such alternative scenario might be limited to United States involvement in a ground war against local countries in the Middle East; another could be United States intervention in a civil war in one or several Latin American countries. The choice of the best scenario under this approach is not the proper function of an article of this type. This approach has the obvious benefit of being more realistic, at least under current conditions. It should be noted, however, that implementation of this approach would have one predicted effect. Because the military requirements of the United States in one of these lesser scenarios would almost certainly be smaller than those present in a large-scale conventional war, it is more likely that no shortfall of supply would be found, and thus no adjustment recommended. Under these conditions, section 232 could be expected to be applied even less often than it has been in the past.

The third, and most radical, approach is to redefine national security in terms of economic security. Thus, national security would be defined not in terms of ability to fight a war, but to compete internationally. Congress has given at least limited support to this approach to national security by directing the President to consider the relationship of economic welfare to national security.¹⁰⁴

The drawbacks to this approach are obvious. It is a very complex matter to determine even direct military requirements for a given product under even a relatively simple scenario, such as that used by the ITA in the past. However, a shift to a definition of "national security" based upon long-term economic welfare would require an even more complex determination. In the first place, for this approach to be feasible at all, the United States government would have to derive a relatively integrated, quantifiable scheme of what the United States economy should look like at any given time to maintain its competitiveness. More specifically, the government would have to assess the importance of a particular product, not just for defense purposes, but for general economic welfare. This could, in the end, require nothing less than a full-blown "industrial policy," as the government would decide what industries are necessary for continued economic health, and which of these may be allowed to succumb partially or totally to foreign competition.

The foreign policy ramifications of this approach also would be

104. See 19 U.S.C. § 1862(d) (1988).

negative. As it is, actions under section 232, based even as they are on narrow, essentially technical criteria, can be expected to draw negative reactions from the trading partners of the United States. Use of section 232 to pursue the still more elusive goal of national security through economic welfare would inevitably be viewed as protectionist by the trading partners of the United States, and would probably lead to challenges before the General Agreement on Tariffs and Trade,¹⁰⁵ as well as possible unilateral retaliation.

Given these drawbacks, it is unlikely that "economic welfare" can play more than an unquantifiable role in the application of section 232. Yet the foregoing examination of 232 does highlight the increasingly erroneous assumptions that form the basis of this area of U.S. trade policy. For this reason, the future operation of section 232 will depend upon reassessment by the United States of what is truly meant by "national security."

Beyond these broader concerns, section 232 in its present form and manner of application presents some very real problems. As initially conceived, section 232 was directed towards the importation of certain commodities in large volumes.¹⁰⁶ In recent years, however, maintenance of the requisite state of military preparedness has become directly related to technological capability. The current interpretation and application of section 232, with its emphasis on an essentially mechanical examination of defense needs in terms of quantities required of a particular product, appears to be ill-suited to grapple with the problem of determining how much of a high-technology item is enough. Current interpretation of the statute is even less able to take into account the effects upon national security of the very rapid changes in technology that can occur.

Under such circumstances, continued use of the current approach could fail to take into account the threat to national security that importation of even small amounts of certain high-technology products could cause. Such circumstances could arise, for example, where the costs of the product were high and the market limited, so that even a

105. Some commentators have noted that the language of GATT Article XXI appears to give the right of interpreting this provision to individual governments. See J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 748 (1969). This indicates that it would be difficult to challenge actions under Article XXI before the GATT. Indeed, in a case involving a complaint by Czechoslovakia against restrictions by the United States on exports to Czechoslovakia, it was stated that "every country must have the last resort on questions relating to its own security." See *id.* at 749. Significantly, in the relatively few cases involving this exception that have come before the GATT, the security measures involved were invoked on explicitly political grounds, and did not appear to involve direct concerns of military security. See *id.* at 749-51; see also JACKSON & DAVEY, *supra* note 8, at 915-16.

106. See *supra* note 17.

low level of importation could cause irreparable harm to the domestic industry. The loss of technological superiority can occur very quickly. There is nothing in the language of section 232 that would prevent its successful application in such instances, but past interpretation, if continued, could lead to a contrary result.

Closely related to the pace of change in technology is that of infant or future industries. The ITA has applied section 232 by focusing upon the effect of imports upon existing industries. Yet, given the rapidity of technological change, imports could prevent the emergence of an industry producing a product with military applications. One such example would be high-definition television, a technology with obvious military potential. In light of the high cost of developing this technology, imports of high-definition television receivers before such a product has gone into production in the United States could well destroy any infant high-density television industry.

The obvious solution to this problem would be the adoption of an interpretation where the ITA would find a threat to national security if imports retarded or prevented the development of an industry in the United States making the product in question. This would be analogous to the "material retardation" standard already found in the injury provisions of the antidumping and countervailing duty law.¹⁰⁷ The language of section 232 is broad enough to allow for such a test. The question is whether, absent legislative direction, the ITA or the President will in fact implement such a test.

A final question that arises in connection with section 232 is the effect of the emergence of the multinational corporation upon the law. International trade, especially in high-technology products, is increasingly dominated by companies operating in more than one country. As part of rationalization of production, it is common for such firms to shift production of various products between different locations, often in different countries. The past cases involving section 232 have not yet confronted this change, so it is unclear how the ITA would react when the imports under examination are from the same company whose operations in the United States constitute part or all of the domestic industry.

In its present form, section 232 is sufficiently far reaching in its language to allow interpretations and applications that would address all of these emerging issues. Yet, as has been shown, the actual interpretation of section 232 has been quite rigid, and would not, as cur-

107. See *e.g.*, 19 U.S.C. § 1671d(b) (1988) (injury determination in countervailing duty law); 19 U.S.C. § 1673d(b) (1988) (injury determination in antidumping law).

rently conceived, allow these developments to be taken into account. The statute in its present form appears to be sufficiently flexible to allow the ITA and the President to adopt a broader interpretation of "national security." Failure to do so, and the potential loss of key industries to foreign competition, could raise the possibility of legislative intervention in the form of amendments that would describe with greater specificity the definition of "national security" and the conditions under which threat should be found, and that could limit the President's discretion by requiring action under such conditions.

II. THE EXON-FLORIO ACT

The Exon-Florio Act¹⁰⁸ is the equivalent of section 232 with regard to foreign investment in the United States. It addresses specifically the issue of the acquisition of control in United States companies by foreign persons, where the acquisition could threaten to impair the national security of the United States. The act authorizes the President to investigate such acquisitions, and to bar them for reasons of national security. The potential scope of this authority is sweeping: the operative provision of the Act states simply that, if the President determines that foreign control of a U.S. company threatens the national security, he "may take 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 . . . by or with foreign persons so that such control will not threaten to impair the national security."¹⁰⁹

The Exon-Florio Act represents a dramatic change in United States investment policy. Traditionally, the United States has been among the most open economies in the world with respect to foreign investment. Indeed, it is one of the few countries that have not in the past prohibited foreign ownership of companies in "critical" industries, *i.e.*, those whose activities are vital for national defense.¹¹⁰ The Exon-Florio Act could change this by allowing the President to bar the acquisition of U.S. firms by foreign persons on national security grounds, to specify the conditions under which the transaction will be allowed, or even to require the divestment of such firms after acquisition of control has already occurred.¹¹¹ The President's decision is absolute, as there is no provision for either judicial review or Congress-

108. 50 U.S.C.A. app. § 2170 (West Supp. 1989).

109. 50 U.S.C.A. app. § 2170(e) (West Supp. 1989).

110. See Brown, *Foreword* to B. SCHWARTZ, *FOREIGN OWNERSHIP OF U.S. DEFENSE COMPANIES* (1988).

111. See 50 U.S.C.A. app. § 2170(c) (West Supp. 1989).

sional veto.¹¹² Given the authority it affords for broad intervention by the U.S. government in foreign investment decisions, it is unsurprising that many of the United States' trade and investment partners have expressed deep concern over this law.¹¹³

The Exon-Florio Act is of quite recent vintage, becoming law as part of the Omnibus Trade and Competitiveness Act of 1988.¹¹⁴ Even in the short time since its enactment, however, it has been invoked several times. Thus, there is sufficient experience with the law to perform an initial analysis of how it has been applied, and under what circumstances, as well as to identify areas in which the law is ambiguous or deficient. Beyond this, however, this article will examine some of the assumptions and factors that are likely to affect the interpretation of the Exon-Florio Act in the future. In particular, this article will focus on the same central issue that was examined above with respect to section 232: what is the definition of "national security?"

A. *Legislative History*

The Exon-Florio Act is the product of a combination of economic and political forces, including the massive influx of foreign investment into the United States during the 1980s and the transformation of the United States from a creditor to a debtor nation during the same period.¹¹⁵ Although the situation giving rise to the law was complex, its direct impetus was a single event: the highly-publicized threatened foreign takeover in 1987 of a U.S. semiconductor firm, Fairchild, by Fujitsu of Japan. Following news of the pending acquisition of Fairchild, Senator J. James Exon (D-Neb.) met with President Reagan to protest the proposed acquisition as a threat to national security, and to urge the President to prohibit it. The President declined to act, stating that, short of declaring a national emergency, he had no au-

112. See 50 U.S.C.A. app. § 2170(d) (West Supp. 1989). Congress noted, however, that the elimination of judicial review applied only to determinations and actions by the President. Thus, other matters, such as the timeliness of action taken by the Attorney General, would be reviewable. See H.R. REP. NO. 576, *supra* note 18, at 925. This ambiguity raises the issue of whether actions taken by other government officials at the direction of the President pursuant to a determination under this section could be reviewable, and under what circumstances. Given the possible variety of such circumstances, this issue can be resolved only in light of actual events.

113. See A. HEATH, BRITISH EMBASSY COMMENTS ON DRAFT REGULATIONS (1989); L. PHILLIPS, THE BELGIAN AMERICAN CHAMBER OF COMMERCE COMMENTS ON DRAFT REGULATIONS (1989); *Buy America While Stocks Last*, ECONOMIST, Dec. 16-22, 1989, at 63.

114. See Omnibus Trade and Competitiveness Act of 1988, § 5021, 50 U.S.C.A. app. § 2170 (West Supp. 1989).

115. Foreign takeovers of U.S. firms increased from 4.9% of total takeovers in 1983 to 13.5% in 1988. Total foreign holdings of U.S. assets amounted to about \$1.7 trillion or 12% of all U.S. net wealth at the end of 1988, up from 5% in 1980. The amount of foreign direct investment (investment in U.S. corporate stock where the foreign investor owns more than 10 percent of the voting securities) currently constitutes about 3% of all fixed capital in the U.S.

thority to bar the takeover.¹¹⁶

In response to this event, Senator Exon and Representative James Florio (D-NJ) simultaneously submitted legislation to authorize the President to block the acquisition of U.S. companies by foreign persons where he determined that such an acquisition could threaten the national security of the United States.¹¹⁷ The Administration initially opposed the bill, on the grounds that the bill ran contrary to the established United States policy of encouraging foreign investment, both in the United States and by the United States in foreign countries.¹¹⁸ The Administration also argued that existing laws were adequate to address situations involving the national security.¹¹⁹ The bill was ulti-

116. See Nathans, *Meet Wall Street's New Bugaboo: CFIUS*, BUS. WK., June 12, 1989, at 88.

117. S. 907, 100th Cong., 1st Sess., § 603 (1987). The original draft of what became the Exon-Florio amendment was an amendment to S. 907, introduced on June 4, 1987 in an executive session of the Senate Committee on Commerce Science and Transportation. Hearings on the amendment were conducted on June 10, 1987 and the committee adopted the amendment by voice vote on June 16, 1987. See S. REP. NO. 80, 100th Cong., 1st Sess. 6 (1987). Later, by mutual agreement with the Senate Banking Committee, the bill was included within Banking's portion of S. 1420. See CONG. REC. S10,357-58 (daily ed. July 21, 1987) (statement of Sen. Hollings) In describing the legislation, Rep. Florio stated that this legislation

would give the President authority to block foreign takeovers of U.S. companies, if the takeover threatens national security. When Fujitsu, a Japanese semiconductor firm, tried to takeover Fairchild, a United States-based semiconductor firm, earlier this year, the President found that he had very little authority to act. This provision would give the President important powers to protect our national security.

134 CONG. REC. H2,320 (daily ed. Apr. 21, 1988) (statement of Rep. Florio). Similarly, Senator Exon stated that

this legislation was in part the result of my efforts to encourage the administration to protect the interest in Goodyear/Goldsmith and Fujitsu/Fairchild takeover attempts. These efforts revealed that our investment policy regarding national security needed to be improved. With the reduced value of the dollar and the reduced value of stock prices, American firms are increasingly vulnerable to foreign takeovers.

134 CONG. REC. S4833 (daily ed. Apr. 27, 1988) (statement of Senator Exon).

The Goodyear/Goldsmith takeover attempt referred to was a bid by Sir James Goldsmith, a British financier, to acquire Goodyear Tire & Rubber Company. At the time, there was concern both that Goldsmith would dismantle Goodyear and that, given the importance of the rubber industry to national defense, it would be unwise to allow a major producer of rubber and rubber goods to fall into foreign hands. Goldsmith ultimately abandoned his attempt, allegedly for unrelated reasons. See Krieger, *Acquisition of U.S. Businesses by Foreign Buyers: The Impact of Exon-Florio*, in INTERNATIONAL SECURITIES TRANSACTIONS 341, 342 (ABA Nat'l Inst. 1989).

118. See *Acquisition by Foreign Companies: Hearings Before the Senate Committee on Commerce, Science, and Transportation*, 100th Cong., 1st Sess. 3, 19 (1987). At these hearings, Secretary of Commerce Baldrige testified against the Exon-Florio bill, stating "[w]e are opposed to the Exon proposal because we think it will mean a diversion away from the principles that we have been trying to espouse around the world and the other nations, which is national treatment for investment, open investment policy, and everything that goes with it."

119. See *Foreign Takeovers and National Security, 1987: Hearings on Section 905 of H.R. 3 Before the Subcomm. on Commerce, Consumer Protection, and Competitiveness, of the House Committee on Energy and Commerce*, 100th Cong., 1st Sess. 21-22 (1987) (statement of David C. Mulford, Assistant Secretary International Affairs, Department of the Treasury). The Administration noted in particular that, on a number of previous occasions, CFIUS had reviewed contemplated takeovers, and the U.S. government had been able to take action to prevent or regulate the takeover. In 1983, for example, CFIUS had reviewed the takeover by a Japanese firm of a U.S. specialty steel company. During the review, the Department of Defense classified

mately incorporated into the Omnibus Trade and Competitiveness Act of 1988, but only after significant changes, the most important of which was deletion of a provision for a legislative veto of Presidential determinations under the act.¹²⁰

The key feature of the legislative history of this act is its discussion of what the act is intended to accomplish, and the circumstances under which it is intended to operate. The act provides the President with authority to investigate "mergers, acquisitions, or takeovers" which *could* result in foreign control of persons engaged in interstate commerce in the United States.¹²¹ To initiate an investigation, the

the technology and the Japanese company withdrew its takeover offer. In 1985, a Japanese company made a takeover bid for a ball bearing manufacturer that specialized in the production of high-precision ball bearings with a variety of military uses. During the CFIUS review, the Department of Defense raised the concern that a cut-off of U.S. supply could result if production was shifted abroad. The transaction went forward with the stipulation that the production of ball bearings supplied to the military take place in the United States. In 1987, a French firm attempted to merge with a subsidiary of the computer division of a U.S. multinational. The Department of Defense was concerned because the U.S. subsidiary was engaged in classified work for the military. The problem was solved by transferring the work to the U.S. parent company, which was not subject to the takeover.

The Administration also presented testimony describing other U.S. laws that it characterized as useful in this context. Among the alternative sources of authority for action noted were the authority of the Justice Department to block takeovers with potential anticompetitive effect and that of the Department of Defense, under the Defense Industrial Program, to require a corporate restructuring when the target company in an acquisition has classified government contracts. The Administration also explained that the export control laws, administered by the Department of Commerce, regulate exports when there is the possibility that sensitive technology might be diverted as the result of a foreign takeover. Finally, controls on foreign investment in certain sectors of the economy, such as atomic energy, aviation, shipping, radio broadcasting and mining, were already in place. Given these alternative approaches, the Administration argued, there was no need for the explicit authority that would be conferred by the bill. *See id.* at 17 (statement of J. Michael Farren, Deputy Undersecretary for International Trade, Department of Commerce).

The Administration's testimony was accurate in describing both past CFIUS practice and possible alternative approaches to regulating foreign investment on national security grounds. Yet the conclusion reached, that the bill was not necessary because the President already possessed adequate authority to act, is directly at odds with the President's own justification for not intervening in the Fujitsu case, namely, that he did not have the power to do so. Possibly as a consequence of the presence of alternatives, however, the final version of the bill, and thus the act, permits the President to act only if he determines that he cannot reach the same result employing his authority under a different statute. *See infra* text accompanying note 144.

120. *See* H.R. REP. NO. 576, *supra* note 18, at 924-27.

The bill as originally introduced had provided for a legislative veto, but this provision was deleted from the versions passed by the two houses of Congress prior to going to conference. *See* INSIDE U.S. TRADE 10 (Mar. 25, 1988). In the final version of the bill, a House provision that designated the Secretary of Commerce as the official responsible for conducting investigations under the section was also dropped. The final bill also deleted a provision that would have allowed either the head of any agency (the House version) or certain named officials (the Senate version) to request an investigation of whether an acquisition threatened the national security. Consequently, what officials can request an investigation has been fixed by regulation. *See infra* text accompanying note 129. More importantly, as will be discussed in detail below, the criteria considered in determining whether an acquisition threatened to impair the national security. *See* H.R. REP. NO. 576, *supra* note 18, at 924-25.

121. *See* H.R. REP. NO. 576, *supra* note 18, at 925.

President must find that there is "credible evidence" which leads him to believe that the foreign interest exercising control "might take action that threatens to impair the national security."¹²² Congress also noted that it intended the President to invoke this section only if he found that other provisions of law do not provide him with adequate authority to act.¹²³

Having set forth the general parameters of the law, Congress then attempted to explain what the law was supposed to do. It noted first that the law was not intended to impose barriers to foreign investment, and that it was not intended to permit investigations of investments that could not result in foreign control of a U.S. company or that would have no effect on national security. Congress stated that the standard of review in this section is "national security," a term that is not defined explicitly. Congress stated further, however, that "[t]he term 'national security' is intended to be interpreted broadly, without limitation to specific industries."¹²⁴ Congress concluded by noting that the statute provided powers to the President in addition to those already existing, but was not intended to abrogate existing U.S. treaty commitments.¹²⁵

The evolution of the bill's coverage is especially significant. The House bill would have allowed the Secretary of Commerce to determine the effects of proposed or pending transactions on "national security, essential commerce, and economic welfare,"¹²⁶ and would have required the President to act if the Secretary determined that foreign control would threaten to impair the national security and essential commerce, unless the President determined that there was no such threat. The House bill specified as covered transactions mergers, acquisitions, joint ventures, licensing, and takeovers by or with foreign companies.¹²⁷ The Senate bill was similar, except that the criteria for assessing the effects of a transaction would be "national security, or essential commerce which relates to national security," and the President was allowed rather than required to act if a threat were found. Application of the act would be limited to mergers, acquisitions, and

122. *Id.*

123. *Id.*

124. *See id.* at 926. Congress explained that the term "national security" was not intended to imply any limitation on the term "national defense," as used in the Defense Production Act, and noted that "national defense" had been correctly interpreted in the past to include the provision of a broad range of goods and services, including technological innovations and economic stabilization efforts. *Id.* at 926-27.

125. *See id.* at 927.

126. *Id.* at 924.

127. *Id.*

takeovers, but not joint ventures or licensing arrangements.¹²⁸

In conference, Congress altered the coverage of the bill so that the test for action depended upon whether a transaction threatened to impair the national security.¹²⁹ This is, on its face, a narrower test than that proposed by either the House or Senate versions, even though the Conference Committee stated that it intended that "national security" be interpreted broadly.¹³⁰ The final version of the bill also adopted the Senate approach to Presidential action, making it discretionary rather than mandatory. In summary, the final bill restricts its coverage to mergers, acquisitions, and takeovers.¹³¹ Thus, having decided to act, Congress finally agreed to a bill that is relatively narrow in scope, and that clearly leaves the President with essentially unfettered discretion to act or not, as he sees fit.

B. Operation of the Exon-Florio Act

Action under the Exon-Florio Act occurs in two stages. First, the President, or his designee, *investigates* the effects of a proposed or pending merger, takeover, or acquisition on the national security.¹³² Based on the results of this investigation, the President then decides what, if any, action to take.¹³³

The statute provides 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 . . . by or with foreign persons which could result in foreign control of persons engaged in interstate commerce in the United States."¹³⁴ The President has designated the Chairman of the Committee on Foreign Investment in the United States ("CFIUS") as his designee for these purposes.¹³⁵ The statute states that if it is decided that an investiga-

128. *Id.* at 925.

129. *Id.*

130. *Id.* at 926.

131. *Id.* at 925.

132. 50 U.S.C.A. app. § 2170(a) (West Supp. 1989).

133. 50 U.S.C.A. app. § 2170(c) (West Supp. 1989).

134. 50 U.S.C.A. app. § 2170(a) (West Supp. 1989).

135. Regulations Pertaining to Mergers, Acquisitions and Takeovers by Foreign Persons, 54 Fed. Reg. 29,744 (Dept. Commerce 1989) (to be codified at 31 C.F.R. pt. 800) [hereinafter Proposed Regulations]. The Treasury Department has stated that it intends to issue final regulations by the Summer of 1990.

CFIUS is a cabinet-level interagency group chaired by a Treasury representative. CFIUS predated the Exon-Florio amendment as it was created in 1975 out of concern over Arab investment in U.S. companies. Before Exon-Florio, however, its mandate was to monitor the impact of foreign investment in the United States. The agencies represented on CFIUS include Treasury, Commerce, State, Defense, and Justice as well as the Office of Management and Budget, the Council of Economic Advisors, and the Office of the U.S. Trade Representative. The various

tion shall be undertaken, it must commence within thirty days of the receipt by the President of written notification of the proposed transaction, as prescribed by regulation.¹³⁶

The receipt of notice of a transaction triggers the Exon-Florio investigatory process. The statute contemplates that the President will be notified of mergers, acquisitions, or takeovers with national security implications as a matter of course, and that the form and content of such notification, as well as the circumstances under which notification must be provided, will be established by regulations.¹³⁷ In its proposed regulations,¹³⁸ CFIUS establishes a "voluntary" system of notice in which any party to a subject transaction may choose to give notice of the transaction.¹³⁹ CFIUS's proposed regulations describe in detail the contents of a voluntary notice, which consists essentially of a detailed description of the contemplated transaction.¹⁴⁰ In addition,

agencies have differing institutional interests: Treasury favors free flow of investment capital; Defense may have a fear of foreign parties and a belief that they pose national security risks; Commerce may consider both the protection of U.S. business from foreign encroachment on the one hand and the danger of cutting off foreign capital on the other. For this reason, the designation of the Treasury Department rather than the Department of Commerce as the agency with primary power over implementation of Exon-Florio was widely viewed as an indication that the act would not be vigorously applied.

136. 50 U.S.C.A. app. § 2170(a) (West Supp. 1989). The legislative history states that this 30-day limit is jurisdictional, so that if the President does not act within 30 days, he cannot commence an investigation. See H.R. REP. NO. 576, *supra* note 18, at 925. Because the exemption from judicial review applies only to findings by the President, *id.*, any attempt by the President to commence an investigation after the 30-day period would presumably be subject to judicial challenge.

137. 50 U.S.C.A. app. § 2170(a) (West Supp. 1989); H.R. REP. NO. 576, *supra* note 18, at 925. However, the President's power to investigate transactions vested immediately. The legislative history explicitly explains that the President's power to investigate is not contingent upon the promulgation of implementing regulations. *Id.* at 925.

138. Proposed Regulations, *supra* note 135, at 29,744.

139. *Id.* at 29,753, § 800.401(a). Notice can be filed by a party to an acquisition even if the proposed acquisition is "hostile." See *id.* at 29,748. This opens up the possibility of Exon-Florio being used as a tool in takeover battles, a possibility discussed further below.

140. See *id.* at 29,753, § 800.402(b). Among the data required to be included in the notice are: (1) a complete description of the transaction, including its nature (merger, takeover, etc.); the name, address, etc. of the foreign person making the acquisition; the name and address of the U.S. person being acquired; the name, address, and nationality of the parent of the foreign person making the acquisition; the name, address, and nationality of the persons or interests which will exercise control over the U.S. person being acquired, and an explanation of the manner in which such control will be exercised; and the expected date for concluding the transaction; (2) a description of the assets of the U.S. person being acquired, if the acquisition is structured as an acquisition of assets or a business; (3) specific information regarding the U.S. person being acquired and any of its subsidiaries, including their business activities; identification of products or services that they provide to the U.S. Department of Defense or which have technology with military applications; the location of facilities producing such products or providing such services; and identification of each contract with an agency of the U.S. Government involving any classified information, technology, or data; (4) the business of the foreign person making the acquisition; and (5) the plans of the foreign person for the U.S. person with respect to defense-related goods or services or goods or services that affect the national security, including reduction, elimination, or sale of research and development or facilities; changes in product quality;

any CFIUS member may submit an "agency notice" if it has reason to believe that a proposed acquisition is subject to the Exon-Florio Act and may have adverse effects upon national security.¹⁴¹ Although notification by a party to a transaction is voluntary, a consequence of not giving notice is that even a concluded transaction remains subject to Presidential action, should the President subsequently investigate it and determine that it threatens to impair the national security.¹⁴² It is therefore in the interests of the parties to a transaction to provide notice at as early a stage in the transaction as possible, so that this matter is resolved before substantial time and resources are committed to an acquisition that may have to be altered significantly, or may even be barred, by Presidential direction.

As was noted above, upon receipt of notification of a transaction, the President, through CFIUS, must decide within thirty days whether to initiate an investigation.¹⁴³ In reviewing a notice, CFIUS will consider (1) whether the acquisition is by or for a foreign person, and could result in foreign control of a U.S. person; (2) whether there is "credible evidence to support a belief that a foreign interest exercis-

shutting down, moving offshore, or relocating facilities within the United States; or consolidating or selling product lines or technology. *Id.*

In addition, the notice must state whether the U.S. person being acquired exports products or technical data for which validated licenses are required or articles and services under the International Traffic in Arms Regulations (the Munitions List). *Id.*, § 800.402(c). The notice must also list any reports or findings by other government agencies regarding the proposed acquisition. *Id.* at 29,754, § 800.402(d). Finally, the notice must have as appendices the annual reports of all the parties concerned. *Id.*, § 800.402(f). In the case of joint ventures, the information in the notice must be prepared on the assumption that the joint venture is in fact an acquisition of the U.S. partner. *Id.* § 800.402(e). CFIUS retains the right to reject voluntary notices if they do not comply with the requirements, or if CFIUS was not notified of a material change in the transaction. *Id.* § 800.402(h).

141. *Id.* at 29,753, § 800.401(b). The agencies thus eligible to submit notices are listed in note 124, *supra*. If CFIUS receives an agency notice, it must send a copy of the notice to the parties to the transaction within two business days after its receipt. *Id.* at 29,754, § 800.403(b).

142. *See Id.* at 29,748. In its comments on the proposed regulations, CFIUS stated:

Although the regulations create a voluntary notice scheme, it is important to note that if a transaction comes under section 721 [of the Defense Production Act of 1950] and neither party, nor a Committee agency, submits notice to the Committee, it remains indefinitely subject to divestment should the President subsequently make the required findings as described in § 800.601(b).

Id. The indefinite authority to impose divestiture may not be in accord with legislative intent. The conference report on the final bill states that Congress expects that, through regulation, the President will "provide parties to the transactions with a clearly delineated beginning and ending point to the time during which a transaction would be subject to review." H.R. REP. NO. 576, *supra* note 18, at 925. On the other hand, indefinite authority to review a transaction may be a necessary means of ensuring that the President and CFIUS are in fact notified of all transactions which are properly reportable.

143. Nonetheless, it is CFIUS that decides when the notice was actually filed. It can do so by rejecting a notice, or by otherwise suggesting that the filing party amend or supplement the notice. In this manner, CFIUS can both effectively provide the parties with a period to restructure the transaction in a manner that is more likely to gain the approval of CFIUS.

ing control of the U.S. person to be acquired might take action that threatens to impair the national security"; and (3) whether other provisions of the law provide adequate authority to protect the national security.¹⁴⁴ Essentially, CFIUS's initial review determines whether the transaction raises national security concerns. If it does not, CFIUS will not undertake an investigation. If, on the other hand, CFIUS concludes that the transaction could threaten to impair the national security, and that no other law would adequately protect the interests of the United States, it will initiate an investigation.¹⁴⁵ The investigation must commence within the thirty-day period following the receipt of notification of a transaction.¹⁴⁶ CFIUS must inform the parties to the acquisition of the investigation's commencement,¹⁴⁷ although there is no specified time limit for doing so.

Having initiated an investigation, CFIUS has 45 days to complete it.¹⁴⁸ At the end of the investigation, CFIUS reports to the President with a recommendation.¹⁴⁹ The focus of the investigation is the effect of proposed or pending mergers, acquisitions, or takeovers by or for foreign persons which could result in foreign control of a U.S. person engaged in interstate commerce.¹⁵⁰ In its investigation, therefore, CFIUS must answer four questions: (1) is a foreign person involved in the transaction; (2) is the target U.S. person engaged in interstate commerce; (3) will the transaction result in foreign control of the U.S. person; and (4) what will be the effects of the transaction on the national security of the United States? The first two questions are relatively straightforward, although what constitutes a "foreign person" may be subject to interpretation. The determination of whether the transaction will result in foreign control of a U.S. person is more difficult. The proposed regulations define "control," but there remains a good deal of discretion in interpretation. The final issue, the effects of the transaction on national security, is obviously the most complex,

144. Proposed Regulations, *supra* note 135, at 29,754, § 800.501. The phrase "credible evidence" mirrors the statement in the legislative history that "The President must find that there is credible evidence which leads [him] to believe that a foreign interest exercising control of a person engaged in interstate commerce in the United States might take action that threatens to impair the national security." H.R. REP. NO. 576, *supra* note 18, at 925.

145. See Proposed Regulations, *supra* note 135, at 29,749.

146. See 50 U.S.C.A. app. § 2170(a) (West Supp. 1989). Proposed Regulations, *supra* note 135, at 29,754, § 800.503.

147. See Proposed Regulations, *supra* note 135, at 29,754, § 800.503(b).

148. See 50 U.S.C.A. app. § 2170(a) (West Supp. 1989).

149. See Proposed Regulations, *supra* note 135, at 29,754, § 800.504(b). The report and recommendation must be unanimous; otherwise, the report shall set forth the different views of the committee members and present the issues involved to the President for resolution.

150. See 50 U.S.C.A. app. § 2170(a) (West Supp. 1989); see also H.R. REP. NO. 576, *supra* note 18, at 926.

and represents the area in which CFIUS has the most discretion in making its recommendations to the President.

CFIUS procedures include submission of a questionnaire to the parties involved, follow-up questions, and an informal hearing.¹⁵¹ This process may begin during the initial thirty-day consideration period, so that CFIUS may request very specific information on a transaction before it decides whether or not to investigate. Cooperation of the parties to a notified transaction in providing information is mandatory,¹⁵² although it is unclear what, if any, penalties would apply for non-cooperation, other than the possibility of a recommendation that the President prohibit the transaction. Generally, all information submitted in an investigation is treated as confidential, and is exempt from disclosure under the Freedom of Information

151. See Krieger, *supra* note 117, at 370-72; *Foreign Buyers Beware: CFIUS Review Nightmare*, 6 CORPORATE CONTROL ALERT 1 (Mar. 1989) [hereinafter *CFIUS Review Nightmare*]. "Acquisition of U.S. Businesses" provides an excellent overview of the genesis of Exon-Florio, as well as descriptions of early cases under the statute.

The draft questionnaire published by CFIUS requests information on four main topics: (1) acquisition arrangements; (2) effect on the U.S. market; (3) effect on U.S. security; and (4) new owner's plans. Under (1), the parties are asked to describe the acquisition and to identify the parties involved, including their nationalities. CFIUS gauges the potential effect of the acquisition on the U.S. market by requesting information regarding the market share of the target firm and alternative sources of domestic supply. The longest part of the questionnaire involves information requested regarding the potential effects of the acquisition on national security. CFIUS asks, *inter alia*, whether the purchaser will acquire classified or sensitive technology or control over a scarce supply of goods "which bear on" national security; the percentage of defense-related production by the target firm; whether the target firm, including its subsidiaries, is engaged in classified work for the Department of Defense; whether it is a sole-source supplier to the Department of Defense; whether it holds validated export licenses or exports products on the Munitions List; and whether it has undertaken any research and development for the Department of Defense.

The final section of the questionnaire requests information regarding the new owner's plans regarding production lines, levels of production, product quality, and facility locations. The questionnaire asks specifically whether the new owner will continue to make in the United States all defense-related goods currently being made by the target firm, and whether there are any plans regarding consolidation, expansion, or relocation of defense-related product lines. The questionnaire also asks whether the new owner will continue to supply the Department of Defense or its contractors with the same products currently being supplied, and what the effect of the acquisition will be on suppliers and customers of the target firm. Finally, the questionnaire asks what the new owner's plans are regarding research and development. See Krieger, *supra*, note 117, at 370-71.

In addition to these standard questions, CFIUS may also request transaction-specific data, such as the identity of major customers of the target firm, sales volume, and manufacturing techniques. See *CFIUS Review Nightmare, supra*, at 2. CFIUS may ask follow-up questions as well; in one past investigation, these questions focused on whether the foreign acquirer intended to transfer technology from the target firm to foreigners, as well as more general information regarding the corporate structure of the acquirer. See *id.* at 3.

CFIUS's proposed regulations do not provide for hearings. In at least one past investigation, however, two hearings were held, both in the initial thirty-day period prior to CFIUS's decision to investigate. Attendance at the hearings, and the ability to ask questions, is apparently not restricted to the member agencies of CFIUS, as CFIUS has allowed the participation of any Executive Branch agency interested in the case. See *id.*

152. Proposed Regulations, *supra* note 135, at 29,755, § 800.701(a).

Act.¹⁵³

The most notable feature of the Exon-Florio procedure, as set forth in the proposed regulations, is its total lack of transparency. Once an investigation is commenced, it basically disappears into a "black box." There is no regulatory requirement that CFIUS accept comments by any parties, or that CFIUS hold hearings. There is no provision that CFIUS notify potentially interested parties, such as other U.S. companies in the same industry, or allow them to participate in the proceedings. Once an investigation has commenced, CFIUS is not required to keep the parties abreast of what the committee is doing. "This lack of transparency, and the restriction on the opportunities of other parties to participate in an investigation, could hamper the efforts of CFIUS itself to obtain and analyze all the relevant information, and could limit the utility of CFIUS decisions as guidelines for future conduct."

Finally, and most importantly, there is no requirement that CFIUS explain the basis for its final decision or that it publish its decisions. This gap in the law is especially confusing because CFIUS's decisions, as explained by the committee, would provide the best guide for parties in future transactions. Instead, the public (including Congress) is forced to rely upon press accounts of CFIUS decisions, an unsatisfactory alternative.

Having received the recommendation from CFIUS, the President must decide within fifteen days whether to take action regarding the transaction.¹⁵⁴ The President may act only if he finds that (1) "there is credible evidence that leads the President to believe that the foreign interest exercising control might take action that threatens to impair the national security," and (2) that other provisions of the law do not provide him with adequate authority to address the problem.¹⁵⁵ As was noted above, these findings are not subject to judicial review.¹⁵⁶ If the President does decide to act, he must "immediately" transmit a report to the Senate and the House that includes a detailed explanation of his findings.¹⁵⁷

The statute affords the President near-unfettered discretion in acting, stating that "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

153. *Id.* at 29,755, § 800.702(a).

154. 50 U.S.C.A. app. § 2170(c) (West Supp. 1989).

155. 50 U.S.C.A. app. § 2170(d) (West Supp. 1989).

156. *Id.*; see also H.R. REP. NO. 576, at 925.

157. 50 U.S.C.A. app. § 2170(f) (West Supp. 1989).

in the United States . . . by or with foreign persons so that such control will not threaten to impair the national security."¹⁵⁸ Among the actions the President may take are directing the Attorney General to seek the appropriate relief, including divestiture, in the federal district courts.¹⁵⁹ The legislative history stresses that the term "appropriate relief" is intended to be interpreted broadly, and that this provision gives the President the flexibility to deal with the wide range of facts and circumstances that may be present in covered transactions.¹⁶⁰ The statute gives the President the power to suspend or prohibit transactions. However, as a practical matter, it is clear that the President also has the power to allow a transaction to proceed only if certain conditions are met.¹⁶¹ There is no provision for judicial review of the President's decision to act, although the legislative history indicates that some aspects of the action, such as the timeliness of action taken by the Attorney General, may be subject to judicial challenge.¹⁶²

Three features of the operation of Exon-Florio deserve special emphasis. The first is the extremely tight schedule built into the statute. The maximum period from receipt of notification of a transaction to the announcement of Presidential action is ninety days. This is a very short period within which CFIUS and the President must analyze a proposed transaction, identify its national security implications, and determine whether action is necessary. Given the potentially substantial impact the investigation and decision can have upon both the economy and security of the United States, as well as its relations with other countries, and the complexity of the transactions that may be subject to investigation, the obvious question is whether a sufficiently thorough investigation can be performed and a truly informed decision made within this short amount of time.¹⁶³

However, as mentioned above, any party to a transaction may request an investigation, even if the proposed acquisition is hostile. Exon-Florio could thus serve as a defense by existing management in a hostile takeover situation. The short time limits for investigation and action would serve to limit the utility of this defense by ensuring that

158. 50 U.S.C.A. app. § 2170(c) (West Supp. 1989).

159. *Id.*; see also Proposed Regulations, *supra* note 135, at 29,755, § 800.601(c).

160. See H.R. REP. NO. 576, *supra* note 18, at 927. The legislative history notes that the President possesses broad injunctive and equitable powers under this act, including the power to seek divestment of control. The President should seek divestment relief, however, only if the transaction is completed after notification of the transaction is received and before the end of the 15-day period for Presidential action.

161. See text accompanying note 213, *infra*.

162. See H.R. REP. NO. 576, *supra* note 18, at 925.

163. In fact, as noted above, CFIUS can effectively extend this period by manipulating the date on which it considered the notice as having been filed. See *supra* note 143.

the issue would be resolved within ninety days, and there are in any case a number of other, more directly effective methods of corporate defense. Nonetheless, this relatively short period of delay may be sufficient to sabotage a proposed acquisition, especially if existing management can use the time either to strip the corporation of assets, thereby making it an unattractive target, or to seek another buyer, *i.e.*, a "white knight." Even the short time limits embodied in the CFIUS procedures could allow the target corporation to take some defensive measures, but any further shortening of time limits for investigation and action is probably unrealistic, and could lead to still hastier results.

A second noteworthy aspect of Exon-Florio is that, if the time limits within which the President must act after receiving notice of a transaction are short, the period within which a transaction can be reviewed is not. The Presidential duty to act does not arise until the President is notified of a transaction. Thus, the fact that a transaction has been completed is no guarantee that Exon-Florio does not apply; there is no "statute of limitations" for application of the statute. On the contrary, CFIUS can initiate an investigation and the President can act any time after notice is received. Accordingly, parties who are concerned that national security problems may arise in connection with a transaction cannot hope to avoid these problems by completing the transaction without notification.

The final, obvious feature of the operation of Exon-Florio is the extent to which the President and CFIUS enjoy discretion. There is no judicial review of CFIUS's decision whether to investigate a transaction, its recommendation to the President, or the President's final decision whether and how to act. As was discussed above, Congress enacted the law to provide the President with authority he did not formerly have, but has left the utilization of that authority almost entirely to the President's discretion. This implies not only that Congress recognized that the application of Exon-Florio would be highly political, but also that it intended that state of affairs. Nonetheless, this does not necessarily imply that Congress intended the President to apply the statute in a manner less aggressive than contemplated by it.

C. *Coverage of Exon-Florio*

If the operation of Exon-Florio is relatively straightforward, its coverage is not. Neither the statute nor the proposed regulations define precisely what transactions are potentially covered. Given the President's power to investigate an acquisition and even to order divestment, it is important for would-be acquirors to know whether the

transaction could be subject to Exon-Florio. The existing ambiguity is perhaps unavoidable, given the novelty and lack of administrative experience with the law, but it nonetheless presents a source of confusion and concern. Beyond this, the statute and the regulations are also deliberately vague regarding the very focus of the statute: what constitutes the national security?

On its face, Exon-Florio could affect mergers, acquisitions, or takeovers, in which a foreign person obtains control of a United States person engaged in interstate commerce. There are thus, from the start, four key terms requiring definition and elucidation: the types of covered transactions, "foreign person," "U.S. person," and "control." The proposed regulations seek to define all of these terms, with varying degrees of precision and confusion.

A general statement of the coverage of Exon-Florio is found in the proposed regulations under a section entitled "Scope," which describes the purpose of the act as authorizing the President to suspend any acquisition of control by a foreign person of a U.S. person where such control threatens to impair the national security.¹⁶⁴ The act applies to transactions concluded on or after the effective date of the act,¹⁶⁵ August 23, 1988.¹⁶⁶ This includes both transactions that were proposed and those that were actually pending as of the effective date.¹⁶⁷ The regulations further define covered transactions schematically as acquisitions "by or with foreign persons" "which could result in foreign control of persons engaged in interstate commerce in the United States."¹⁶⁸

The statute states that the President has authority to investigate and suspend or prohibit "mergers, acquisitions and takeovers."¹⁶⁹ The regulations do not define "merger," "acquisition," or "takeover." Rather, they use the term "acquisition" as including all three types of transactions.¹⁷⁰ "Acquisition" is defined essentially in terms of ownership of securities or assets. Thus, an acquisition includes the purchase

164. See Proposed Regulations, *supra* note 135, at 29,750, § 800.101.

165. *Id.* at 29,570, § 800.103.

166. See *id.* at 29,750, § 800.202.

167. See *id.* at 29,572, § 800.301(a)(1); see also 50 U.S.C.A. app. § 2170(a) (West Supp. 1989).

168. See Proposed Regulations, *supra* note 135, at 29,572, § 800.301(a).

169. 50 U.S.C.A. app. § 2170(a) (West Supp. 1989).

170. See Proposed Regulations, *supra* note 135, at 29,746. However, in its comments on the proposed regulations, CFIUS does partially define "takeover" by providing that a proxy solicitation constitutes a takeover, and thus falls within the scope of the statute, if it could result in the control of a U.S. person by a foreign person. Accordingly, it would appear that proxy solicitations on subjects other than corporate control would not constitute reviewable transactions under the regulations.

of the voting securities of a U.S. person, the conversion of convertible voting securities, or the acquisition of convertible voting securities if such acquisition results in a transfer of control.¹⁷¹ Reviewable acquisitions also include the acquisition of a business, including the acquisition of production or research and development facilities if certain conditions are met.¹⁷² Finally, a consolidation is a reviewable acquisition.¹⁷³

Although they do not define "acquisition" further, CFIUS's proposed regulations do provide examples. These include: (1) proposed or completed acquisitions by or with foreign persons that have or could have resulted in foreign control of a U.S. person;¹⁷⁴ (2) a proposed acquisition by a foreign person of a U.S. person that could result in foreign control, including an offer to purchase all or a substantial portion of the securities of a U.S. person;¹⁷⁵ (3) proposed or completed acquisitions by entities organized in the United States if those entities are "foreign persons" and if the acquisition could or did result in a new foreign interest controlling the U.S. person to be acquired;¹⁷⁶ (4) acquisition of businesses that could result in the foreign control of businesses located in the United States;¹⁷⁷ and (5) joint ventures be-

171. *See id.* at 29,750, § 800.201(a). The regulation defines "voting securities" as securities that entitle the owner or holder to vote for the election of directors or, for unincorporated entities, officers exercising similar functions. *Id.* at 29,751, § 800.217. A "convertible voting security" is a voting security that does not currently entitle its owner or holder to vote for directors. *Id.* § 800.218. "Conversion" refers to the exchange of non-voting for voting securities. *Id.* § 800.219.

172. *See id.* at 29,750, § 800.201(b). This provision allows the treatment of a purchase of assets as a reviewable acquisition. It does not, however, include the purchase of assets if the purchase does not result in the acquisition of control of "an ongoing, sustainable business." Thus, the ordinary sale of equipment would not be reviewable. *See id.* at 29,746. For an acquisition of assets to constitute an "acquisition" within the meaning of the regulations, it must be likely that the foreign acquirer will use the technology of the acquired U.S. person, or personnel previously employed by it. *See id.* 29,750, § 800.201(b).

173. *Id.* § 800.201(c).

174. *See id.* 29,752, § 800.301(b)(1). Such an acquisition would be reviewable regardless of the actual arrangements for control. Thus, in such an acquisition foreign control could be assumed even if the existing directors retain their positions and even if all of the directors are U.S. nationals. The focus is rather on whether the foreign person has the legal right to appoint directors and other primary officers. *See id.* examples 1 and 2; *see also id.* at 29,747.

175. *See id.* at 29,752, § 800.301(b)(2). This provision thus treats tender offers as "proposed transactions" that are reviewable under the statute. *Id.* at 29,747-48.

176. *See id.* at 29,752, § 800.301(b)(3). This provision accordingly includes within the coverage of the statute acquisitions by U.S. subsidiaries of foreign corporations, and serves as an additional means of preventing circumvention of the statute by using a company organized in the United States but controlled by a foreign person as the acquirer. Significantly, the provision describes the acquisition of control by a "new" foreign interest. This implies that the acquisition of the U.S. subsidiary of a foreign company by another foreign company or person could nonetheless be covered by the statute. This point is explored further in the discussion of "U.S. person," *infra* text accompanying note 180.

177. *See Proposed Regulations, supra* note 135, at 29,752, § 800.301(b)(4). The regulation gives as an example the purchase of a branch office business in the United States. Such an acqui-

tween a foreign person and a U.S. person, where the circumstances are such that a foreign business could gain control over the business of a U.S. person.¹⁷⁸ The proposed regulations also enumerate a number of types of transactions that are not "acquisitions" within the meaning of the act, thus creating "safe harbors" from the operation of the act.¹⁷⁹

The next key terms in defining the coverage of Exon-Florio are "United States person" and "foreign person," as the statute applies only to the acquisition of control of a U.S. person by a foreign person. A "U.S. person" is defined as "any entity but only to the extent of its business activities in interstate commerce in the United States, irrespective of the nationality of the individuals which control it."¹⁸⁰

The definition of "foreign person" is more complex. The regulations define foreign person as "any foreign national" or "any entity

sition is covered even if the company owning the branch office is also a foreign person; the key factor is that the business is physically located in the United States. *See id.* example 1. On the other hand, a start-up investment does not fall within this provision, even if the investment involves acquisition of shares of a subsidiary newly incorporated in the United States. The focus is thus whether the foreign person is acquiring control of an ongoing business in the United States. *See supra* note 158.

178. *See Proposed Regulations, supra* note 135, at 29,752, § 800.301(b)(5). In its comments on the proposed regulations, CFIUS notes that neither the statute nor the legislative history address the status of joint ventures. Indeed, the final version of the bill omitted the explicit reference to joint ventures that appeared in the House version of the bill. Under the proposed regulations, a joint venture could be treated as the acquisition of control if the arrangements and circumstances of the joint venture would allow the exercise of control by a foreign person over a business in the United States. *See id.*

179. *See id.* at 29,752, § 800.302. Transactions exempt from Exon-Florio include (1) an acquisition of voting securities pursuant to a stock split or pro rata stock dividend; (2) acquisition of one subsidiary of a foreign person by another subsidiary of the same person; (3) an acquisition of convertible voting securities that does not involve control; (4) the purchase of voting securities solely for purposes of investment, if the foreign person would hold ten percent or less of the outstanding voting securities of the U.S. person or if the foreign acquirer is a bank, trust company, insurance company, investment company, pension fund, mutual fund, finance company, or brokerage company in the ordinary course of business for its own account, provided that a significant portion of the business of such company does not consist of the acquisition of entities; (5) the acquisition of assets that do not constitute a business in the United States; (6) the acquisition of securities by a securities underwriter in the ordinary course of business and in the process of underwriting; and (7) an acquisition pursuant to a condition in an insurance contract.

With respect to an acquisition "solely for purposes of investment," that term is defined as the acquisition of securities with no intention of participating in the business decisions of the issuer. *See id.* at 29,751 § 800.220(a). Significantly, acquisitions by insurance companies, brokerage companies, etc. are exempt only if a significant portion of the business of the acquiring company does not consist of the acquisition of entities. *See id.* at 29,752-29,753, § 800.302(d)(2). Thus, acquisitions by merger and acquisition firms or investment bankers who frequently purchase entire companies would fall within the scope of Exon-Florio. The treatment of a purchase of assets as an acquisition, and the circumstances under which such a purchase will not be treated as an acquisition, are discussed in note 172, *supra*.

180. Proposed Regulations, *supra* note 135, at 29,751, § 800.210. Examples of U.S. persons include the branch office or U.S. subsidiary of a foreign company. Accordingly, even a company in the United States wholly-owned by a foreign company could be considered a U.S. person. However, the mere sale of goods or services in the United States by a foreign company, where the company has no branch office, subsidiary, or fixed place of business, does not render that company a "United States person." *See id.* at 29,747.

over which control is or could be exercised by a foreign interest.”¹⁸¹ A foreign national is, logically, “any individual other than a United States national,”¹⁸² while a foreign interest is defined as any individual other than a U.S. national.¹⁸³ Two features of the extended definition of “foreign person” merit comment. The first is that the United States subsidiary of a foreign company would qualify as a “foreign person” if it engages in a covered acquisition. Thus, a U.S. subsidiary of a foreign company will be treated as a U.S. person if it is the target of an acquisition, but as a foreign person if it is the acquiring party. The second feature of the definition is that the identification of “foreign person” depends upon the concept of “control.”

“Foreign control” is the essential fact triggering operation of the statute with respect to a transaction. The concept of foreign control is relevant in two ways: the President may investigate a transaction that could result in foreign control of persons engaged in interstate commerce in the United States, and he may suspend, prohibit, or take other action regarding a transaction if foreign control of a U.S. person threatens to impair the national security.¹⁸⁴ In addition, as discussed above, a person may be a foreign person if it is controlled by a foreign interest.

Control is defined by the proposed regulations very broadly; it is essentially “the power, direct or indirect, whether or not exercised, . . . to formulate, determine, direct or decide matters affecting the [acquired] entity”¹⁸⁵ The regulations describe the manner in which control may be exercised as including the ownership of a majority or dominant minority of the voting securities of an issuer, by proxy voting, by contractual arrangements, or by other means. The exercise of control is not restricted to these methods, however.¹⁸⁶ The focus is rather on whether a foreign person can, as a practical matter, exert control over a U.S. person, by whatever means. However, the “re-

181. *Id.* at 29,751, § 800.211.

182. *Id.* at 29,751, § 800.209. A “United States national” is a United States citizen or a non-citizen who “owes permanent allegiance to the United States.” *Id.* at 29,750, § 800.208.

183. *Id.* at 29,751, § 800.212. The regulations explicitly provide that a foreign government can be a “foreign interest.”

184. *See id.* at 29,747.

185. *Id.* at 29,751, § 800.213. In particular, control exists where the person in question has the power to affect or effect decisions regarding (1) the sale, lease, or other disposition of assets of the entity, whether or not in the ordinary course of business; (2) the dissolution of the entity; (3) the closing or relocation of production or research and development facilities of the entity; (4) termination or non-fulfillment of contracts by the entity; or (5) amendments to the Articles of Incorporation or constituent agreement of the entity regarding the matters enumerated in (1) - (4). *See id.*

186. *See id.*

mote, eventual possibility of control," as might exist where a foreign investor holds shares in a U.S. company solely for investment, does not constitute "control" under the regulations.¹⁸⁷ As with so many other aspects of Exon-Florio and CFIUS's proposed regulations, the definition of "control" is sufficiently ambiguous and flexible, and allows CFIUS and the President great discretion both in deciding whether to investigate a transaction and in determining whether the completed transaction is likely to result in foreign control of a U.S. person.

The final, and most difficult, concept in identifying the scope and coverage of Exon-Florio is that of "national security." As with control, this concept is central to the ability of CFIUS to investigate a proposed transaction and to the ability of the President to act. Specifically, CFIUS may investigate a transaction only if it will have an effect upon the national security, and the President may suspend or prohibit it only if the foreign person gaining control as a consequence of the transaction is likely to exercise that control in a manner that threatens to impair the national security. "National security" thus occupies the same position in the Exon-Florio statutory scheme that it holds under section 232. Moreover, as with section 232, this central concept is left essentially undefined.

The absence of a definition for "national security" under Exon-Florio is deliberate. The legislative history notes that the term "national security" is not otherwise defined.¹⁸⁸ Similarly, the comments on the proposed regulations state flatly that "the proposed regulations do not attempt to define 'national security.'"¹⁸⁹ Nevertheless, it is possible to formulate, if not a definition of "national security" for purposes of application of the statute, at least a description of it.

Although Congress did not define "national security," it did stress

187. *See id.* This exception would appear to cover one potentially troublesome area for application of Exon-Florio, international loan agreements. Concerns have been expressed that the possible reach of Exon-Florio could interfere with even routine international financing, e.g., if a U.S. borrower defaults on a loan given by a foreign lender, control could switch to the creditor. *See* Nathans, *supra* note 116, at 91. Similarly, it is quite common for international loan agreements (like many agreements with domestic banks) to restrict the ability of the U.S. borrower to pledge, mortgage, or otherwise use the principal assets of the borrower as security for additional debt, without the approval of the lender. When financing agreements give lenders rights in the event of default, the transaction could arguably be covered by the statute, as these contractual arrangements could result in the ability of the lender to influence the decisions enumerated as examples of control. In most cases, however, the actual exercise of this control would presumably be considered remote, so that the statute would not apply. Beyond this, loans would not appear to fall within the statutory language of the statute as "mergers, acquisitions, or takeovers," and would not constitute "acquisitions" within the meaning of the proposed regulations.

188. *See* H.R. REP. NO. 576, *supra* note 18, at 926.

189. *See* Proposed Regulations, *supra* note 135, at 29,746.

that it intended that the term be interpreted broadly.¹⁹⁰ Beyond this, the statute provides the President with a number of factors he and CFIUS may consider in their determinations. These factors thus provide guidance to the President and CFIUS in determining whether a transaction will affect the national security negatively, but do not limit their ability to consider other factors as well.¹⁹¹ The factors include (1) domestic production needed to satisfy projected national defense requirements; (2) the capability and capacity of domestic industries to meet national defense requirements, including the availability of human resources, products, technology, materials, and other supplies and services; and (3) the control of domestic industries and commercial activities as it affects the ability of the United States to meet the requirements of national security.¹⁹²

A review of these factors indicates that Congress intended that the term "national security" be interpreted in the context of national defense. Two of the three factors listed in the statute deal explicitly with national defense matters, while the third uses the more ambiguous term "national security." In context, it appears that the third factor should also be interpreted in terms of national defense. Similarly, although CFIUS's proposed regulations do not otherwise discuss what is meant by national security, they do note that national security concerns would be present in an acquisition involving products or key technologies essential to the U.S. defense industrial base.¹⁹³ A defense orientation for "national security" under Exon-Florio would be consistent with the approach in section 232 which, as discussed above, has been to concentrate almost solely on military needs for the particular product.

Even given the apparent focus of Exon-Florio on military needs, it is not always simple to determine even whether a particular product or service that would be involved in an acquisition has military uses, or whether the acquisition could otherwise affect the national security. This is especially true if "national security" is given an expansive definition so as to include economic welfare. The proposed regulations give some guidance in this respect, providing that, for example, a party giving notice must include in the notice such information as whether it provides products or services to the Department of Defense, whether it has technology that could have military applications, whether it has contracts with the U.S. Government involving classified technology or

190. See H.R. REP. NO. 576, *supra* note 18, at 926.

191. See *id.*

192. See 50 U.S.C.A. app. § 2170(e) (West Supp. 1989).

193. See Proposed Regulations, *supra* note 135, at 29,746.

information, and whether it exports products that are either on the Munitions List or which require a validated export license.¹⁹⁴ An acquisition for which the notice would contain such information can be assumed to have national security aspects, so that Exon-Florio could apply.

Other sources can also illuminate what constitutes "national security" in the Exon-Florio context. The most obvious example is, of course, section 232. The sort of determinations made by the ITA in identifying the military uses of a product, and the methods used to determine whether imports of the product threaten to impair the national security, could serve as guides to CFIUS in making its decisions under Exon-Florio, and to the President in deciding whether to act. Indeed, the ultimate standard for both statutes is the same: whether a given act (importation of an article for section 232, acquisition of a U.S. person for Exon-Florio) threatens to impair the national security. By the same token, however, the comments on the shortcomings of the definition of "national security" under section 232¹⁹⁵ are equally relevant to Exon-Florio.

Another approach to determine whether a transaction should be acted upon by the President is to identify "key" industries or technologies, foreign acquisitions of firms that could be presumed to affect the national security. The General Accounting Office has reported a list of industries critical to national security.¹⁹⁶ Similarly, the Departments of Defense and Energy have established a list of technologies considered crucial to national security.¹⁹⁷ The problem with this approach is that, while all of the technologies identified affect national security, many are also relevant to purely civilian, non-security related products.

A variation of this approach would be to identify excluded industries, *i.e.*, industries in which acquisitions would be presumed not to have national security ramifications.¹⁹⁸ Similarly, CFIUS could estab-

194. *See supra* note 129.

195. *See supra* text accompanying notes 98-99.

196. *See* U.S. GENERAL ACCOUNTING OFFICE, INDUSTRIAL BASE: DEFENSE-CRITICAL INDUSTRIES, Briefing Report to Sen. John Heinz (Aug. 1988).

197. *See* Tolchin, *Crucial Technologies: 22 Make the U.S. List*, N.Y. Times, Mar. 17, 1989, at D1, col. 3. The critical technologies listed are microelectronic circuitry; preparation of gallium arsenide and other compound semiconductors; software design productivity; parallel processing for high-speed computers; robotics; simulation and modeling; integrated optics using light instead of electricity; fiber optics; sensitive radars; passive sensors; automatic target recognition; phased array radar; data fusion; signature control used in creating hard-to-detect weapons; computational fluid dynamics; air-breathing (jet engine) propulsion; high-power microwaves; mobile high-power lasers; kinetic kill energy; light-weight composite materials; superconductivity; and biotechnology materials and processing. *See id.*

198. *See, e.g., Greater Certainty, Narrower Scope Urged for Exon-Florio Final Rules*, Regula-

lish a presumption that transactions below a certain dollar value do not have national security effects.¹⁹⁹ The obvious drawback of this approach is that even a very small acquisition could have an impact upon the national security if it involved a company with state-of-the-art technology or that was the sole producer of a critical defense good.

Other sources are also helpful in determining whether the potential transfer of control over technology raises national security concerns. For example, the Defense Department's Industrial Security Regulation defines critical technology as militarily significant technology that is not possessed by potential adversaries and which, if acquired by them, would permit a substantial advance in their military capabilities.²⁰⁰ Critical technology (a) contributes to the superior characteristics of current military systems; (b) relates to specific military deficiencies of a potential adversary and would contribute significantly to the enhancement of their military mission; or (c) is an emerging technology with a high potential for having a major impact upon advanced weapon systems.²⁰¹ The Department of Defense maintains a list of critical technologies.²⁰² Thus, an acquisition involving transfer of control of such technology to a foreign person would have national security implications, and should be reported.

Besides assessing the potential effects of a transaction upon the national security, the President (and by implication CFIUS) must also determine whether the foreign acquiror is likely to exercise its control in a manner that threatens to impair the national security.²⁰³ This is analogous to the determination made by the ITA under section 232 in identifying reliable sources of imports. Some practices by the ITA, such as its reliance upon the State Department's analysis,²⁰⁴ would no doubt be of use to CFIUS. However, the determination made by the ITA under section 232 differs qualitatively from that necessary under Exon-Florio. The ITA has interpreted section 232 in a fairly narrow

tion, Economics and Law (BNA), at A-3 (Oct. 4, 1989). Examples of potential excluded industries are hotels and real estate, food and agriculture, and securities, insurance, and financial services.

199. *See id.* at A-4. During the period 1984-88, approximately 55% of transactions involving acquisitions of companies or assets involved the assets valued between \$1 million and \$15 million. However, a \$15 million threshold would exempt only about 4% of the total value of assets involved in transactions involving foreign purchasers. Bureau of Economic Analysis, Dept. Commerce (unpublished data).

200. *See* U.S. Dept. of Defense 84/DoD 5220.22-R, app. D, at D-102 (Dec. 4, 1985).

201. *See id.* at 21-22.

202. *See* U.S. DEPT. OF DEFENSE, CRITICAL TECHNOLOGIES PLAN FOR THE COMMITTEES ON ARMED SERVICES (Mar. 15, 1989, revised May 5, 1989).

203. *See* 50 U.S.C.A. app. § 2170(d)(1) (West Supp. 1989).

204. *See supra* note 62.

manner, and in particular has defined "threatens to impair the national security" in a manner that allows a relatively mechanical test. Specifically, as discussed above, the ITA essentially bases its determination on whether there will be a shortfall of the necessary product in a defined situation. Although the performance of this test is complex, the test is at least straightforward. The calculus the President must perform under Exon-Florio is much more complicated, as the focus of the Act is not simply on whether imports are having a demonstrable present effect. Instead, Exon-Florio requires the President to predict future developments, from such obvious factors as whether the foreign acquiror is likely to close down facilities producing key defense products or misuse confidential information to such subtle considerations as whether the foreign acquiror will continue to fund research and development adequately. With regard to this aspect of Exon-Florio, therefore, little useful precedent and guidance exist.²⁰⁵

Even with this minimal guidance, determining whether Exon-Florio should or does apply to a given transaction is difficult. Despite difficulties in applying section 232 discussed above, the ITA's task is the relatively limited one of determining the effect of imports upon production of a specific product. CFIUS and the President have the much more complex task of assessing the probable effects upon the national security of the acquisition of a U.S. company or business. In particular, the requirement that the President determine that "there is credible evidence that leads [him] to believe that the foreign interest exercising control might take action that threatens to impair the national security" before acting under the Exon-Florio Act requires him

205. As was noted above, the Treasury Department has stated that it intends to issue final regulations by summer 1990. Preparatory to this, the Treasury Department requested comments from interested persons, and has received approximately sixty-five submissions.

Many of the submissions were made by foreign investors concerned about the potentially broad application of Exon-Florio. The most frequently raised issues were: the lack of a definition for "national security"; the unclear definition of the types of transactions covered; and the indefinite risk of divestiture. Many of the comments suggested that Treasury establish a list of exempted industries or products to create a safe harbor and narrow the application of Exon-Florio. Another suggestion common to many of the submissions was that joint ventures explicitly be excluded from coverage. Some comments addressed the issue of the continued possibility of divestiture when notification has not occurred or material information is omitted or there is a material change in the transaction. The comments suggested that "omission of material information" be defined to include only information explicitly required by the regulations and that "material change" be further defined.

Another major issue raised in the comments was the definition of "control." Some commentators called for more certainty in the definition, such as a requirement of a certain percentage ownership. Another frequently raised issue was financial thresholds, requiring notification only for deals over a certain amount. In light of the time sensitivity of many mergers, a fast-track procedure for transactions that clearly posed no national security threat was a common suggestion. In regard to agency procedure many submissions included the suggestion that CFIUS publish its decisions and their basis in the *Federal Register*.

to make a sophisticated calculation involving predictions of both the actions of a specific person (the foreign acquiror) and the effects of those actions upon the national security of the United States. If determinations under section 232, which are relatively limited in scope and effect, have economic and foreign policy consequences, then those under Exon-Florio are doubly wide-ranging in their potential ramifications.

D. *Application of Exon-Florio*

Because of its relative youth, the Exon-Florio Act has yet to give rise to a large body of administrative interpretation. Moreover, CFIUS is not required to publish its final determinations and recommendations. Nonetheless, sufficient information exists regarding the cases CFIUS has considered to make at least some tentative conclusions regarding the manner in which the statute has been interpreted and applied.

Since the enactment of Exon-Florio, a great many cases have been reported to CFIUS, but very few have actually been investigated. As of the end of 1989, CFIUS had been notified of 170 acquisitions, but had investigated only six.²⁰⁶ With regard to these six, CFIUS has made recommendations to the President regarding only four. In no case has the President acted under Exon-Florio, although in one case the transaction went ahead after the foreign acquiror agreed to certain conditions "suggested" by the United States government.

The first case before CFIUS under the new law was the proposed sale of Monsanto Electronic Materials Co., a unit of Monsanto Co., a major United States chemical company, to Heuls AG, a subsidiary of VEBA AG of West Germany. The Monsanto division produced silicon wafers, the basic material for making semiconductor devices. CFIUS initiated an investigation upon the request of the Department of Defense and the Department of Commerce, which expressed concerns over the possible transfer of wafer technology outside the United States.²⁰⁷

After a full investigation, CFIUS recommended that the sale be allowed to proceed.²⁰⁸ Before CFIUS made its decision, however, two events of significance occurred. First, two trade associations of raw materials and equipment suppliers to the semiconductor industry,

206. See Tolchin, *U.S. Will Scrutinize a Chinese Deal*, N.Y. Times, Dec. 5, 1989, at D4 col. 1.

207. See *Sale of Silicon Wafer Maker to German Firm Cleared After National Security Review*, 6 Int'l Trade Rep. (BNA) 152 (Feb. 1, 1989).

208. See *id.*

SEMI and SEMATECH, contacted CFIUS and explained their opposition to the sale.²⁰⁹ This is noteworthy because the proposed regulations contain no provision for the participation of parties other than those involved in the subject acquisition. The experience in the Monsanto investigation indicates that CFIUS will consider comments by such outside parties.

Second, Heuls transmitted a letter to the Secretary of the Treasury, in which the West German company promised to function as an American company, to cooperate with SEMATECH, not to condone transfers of technology to foreign entities, and to attempt to make the purchased Monsanto unit profitable.²¹⁰ Heuls also promised to keep production in the United States for five years, to continue research and development operations in the United States, and to make products available to the U.S. semiconductor industry.²¹¹ These commitments by Heuls were widely viewed as integral to CFIUS's decision to recommend no action to the President.²¹² The statutory language gives neither CFIUS nor the President direct authority to impose conditions for the approval of a transaction. As a practical matter, however, such authority plainly exists, for if the foreign acquiror does not agree to the conditions, the President could simply prohibit the transaction, a determination not subject to judicial review.²¹³

In the end, CFIUS apparently based its decision upon the conclusion that the purchase by Heuls was necessary for the Monsanto unit to survive, as Monsanto had lost hundreds of millions of dollars and was effectively liquidating it by allocating capital to other divisions.²¹⁴ CFIUS may have been particularly impressed by the fact that the Department of Defense had actually offered to purchase half of the Monsanto unit, although no other U.S. company was willing to purchase

209. See *CFIUS Review Nightmare*, *supra* note 150, at 5.

210. See *id.* at 4.

211. See Tolchin, *Agency on Foreign Takeovers Wielding Power*, N.Y. Times, Apr. 24, 1989, at D6, col. 4.

212. See *id.*

213. See 50 U.S.C.A. app. § 2170(d)(2) (West Supp. 1989). An interesting question is what, if anything, CFIUS or the President could do should a foreign acquiror renege on its commitments. One possible ground for action would be the provision in the proposed regulations allowing CFIUS to reject a voluntary notice if, after the notice has been submitted, a material change in the transaction occurs. See Proposed Regulations, *supra* note 134, at 29,754, § 800.402(g). CFIUS could argue that this provision allows it to reconsider transactions even after it has approved them and they have been consummated, on the theory that the failure to keep commitments constitutes a material change. While this rationale has some appeal where the acquiring party made the commitments in bad faith, its equity is doubtful when failure to satisfy the commitments arises from external events, such as a sharp decline in the profitability or market of the acquired U.S. company.

214. See *CFIUS Review Nightmare*, *supra* note 151, at 11.

the other half.²¹⁵ Yet, even under these circumstances, where the apparent choice was to allow the transaction or to risk the U.S. producer simply going out of business, and where the foreign acquiror was a national of West Germany, a close military ally of the United States, CFIUS's decision aroused political opposition, as witnessed by letters from twenty-nine Congressmen to President Bush following CFIUS's decision urging him to block the purchase.²¹⁶ This episode demonstrates the extent to which decisions under Exon-Florio have political implications. Despite this opposition, the President accepted CFIUS's recommendation and approved the sale.²¹⁷

CFIUS reached a different result in the proposed acquisition of General Ceramics Inc. by Tokuyama Soda Co. of Japan. General Ceramics manufactures high temperature, high stress ceramics which have some defense uses, including in nuclear weapons. The Departments of Treasury, Commerce, Defense, and Energy requested that CFIUS investigate the proposed acquisition after General Ceramics informed the Department of the Treasury of the proposed transaction. The specific grounds for their request was that General Ceramics held a classified defense research and development contract with the Department of Energy connected with nuclear weapons, and that, through the acquisition, Tokuyama could gain access to the confidential information contained in the contract.²¹⁸

CFIUS subsequently initiated a full investigation, in which it focused on the classified contract and the possibility of a transfer of sensitive technology.²¹⁹ At the end of the investigation, CFIUS unofficially informed the parties that it would recommend to the President that he bar the deal. Consequently, General Ceramics formally withdrew its notification, thus ending the review process and removing the need for CFIUS to make a formal recommendation to the President. General Ceramics stated that it was discussing with the U.S.

215. See Nathans, *supra* note 116, at 91. One Department of Defense official summarized CFIUS's reasoning by explaining, "The issue was for Monsanto to close it or sell it to someone who would build it up. CFIUS made the reasonable decision that it would be better to have it in stronger hands than evaporate." *Id.*

216. See *Bush Clears Sale of Monsanto Wafer Unit to West German Firm Despite Opposition*, 6 Int'l Trade Rep. (BNA) 182 (Feb. 8, 1989). The main concern expressed was that the Monsanto unit was the last domestic producer of silicon wafers, and that its sale to Heuls would make U.S. silicon chip producers wholly dependent upon foreign sources of raw materials. This in turn could have long-term effects upon the high technology infrastructure of the United States. *Id.*

217. See *id.*

218. See *Administration Investigates Foreign Merger with U.S. Weapons Contractor*, Inside U.S. Trade, Mar. 10, 1989, at 12 [hereinafter *Administration Investigates Foreign Merger*].

219. See *Nuclear Contractor Sale to Japanese Firm Under National Security Investigation*, 6 Int'l Trade Rep. (BNA) 339-40 (Mar. 15, 1989).

government ways to resolve the classified contract issue,²²⁰ and that it and Tokuyama would explore ways of restructuring the transaction that would satisfy CFIUS's concerns.²²¹ General Ceramics ultimately agreed to assign its classified contract to another U.S. company and to sell the related assets, so that after renotification it obtained CFIUS's approval for the proposed acquisition.²²²

The General Ceramics case represents a relatively clear-cut type of transaction in which CFIUS is likely to intervene. The acquisition of General Ceramics could have allowed a foreign purchaser access to highly confidential information regarding nuclear weapons, a relatively obvious threat to national security. The identity of the purchaser was probably significant as well. Tokuyama was a Japanese firm, and there had recently been concern over sales of sensitive military equipment by other Japanese companies to the Soviet Union. Moreover, there were no concerns that, without the acquisition, General Ceramics would go out of business.

Finally, Tokuyama's role as a member of the Japanese soda cartel could not have helped it. The existence of this cartel has been an ongoing source of trade friction between the United States and Japan.²²³ CFIUS stressed that it made its determination on national security grounds alone, but it is possible that other factors were involved as well.²²⁴ Even under these circumstances, CFIUS notified the parties of its intended recommendation, thus allowing them to withdraw notification and attempt to restructure the transaction, rather than risk a formal negative recommendation and a prohibition of the acquisition by the President.²²⁵ Moreover, Tokuyama and General Ceramics subsequently agreed that General Ceramics would sell the part of the company holding the classified contract that had been the source of CFIUS's concern, so that the acquisition was ultimately completed.²²⁶

220. See *Japanese Bid for Firm Put on Hold After CFIUS Decides to Urge Block*, 6 Int'l Trade Rept. (BNA) 491-92 (April 19, 1989).

221. See Farnsworth, *U.S. Blocks Japanese Acquisition*, N.Y. Times, Apr. 18, 1989, at D1, col. 6.

222. See Nathans, *supra* note 116, at 91. It was noted, however, that the sensitivity of Japanese companies to controversies of this sort could persuade the Japanese purchaser not to go through with the acquisition, even with U.S. approval.

223. See *Administration Investigates Foreign Merger*, *supra* note 218, at 1, 13.

224. See Tolchin, *supra* note 197; see also *Administration Investigates Foreign Merger*, *supra* note 218, at 12.

225. However, it should be noted that there is nothing in the statute or in the regulations that would prohibit a party from restructuring an acquisition and again seeking approval, even following an original negative determination and prohibition.

226. See *Officials from Japan, The Netherlands Differ in Exon-Florio Provision Views, Meeting told*, 7 Int'l Trade Rept. (BNA) 410 (Mar. 21, 1990).

A third case in which CFIUS conducted a full investigation was the proposed acquisition of three divisions of Fairchild Industries by Matra SA of France. The Fairchild divisions were engaged in defense and aerospace technology, while Matra is a French conglomerate involved in aerospace and defense technologies, among others. The Commerce Department requested the investigation to ensure that Matra would comply with U.S. export control laws, as Matra would have access to sensitive U.S. products and technologies as a consequence of the acquisition.²²⁷

CFIUS conducted a full investigation of the proposed transaction. During the course of the investigation, the Commerce Department, which administers the export control laws, worked with Matra to develop a comprehensive export management scheme to prevent the unauthorized exportation of sensitive products and technologies. Matra's final solution was satisfactory, and convinced CFIUS to recommend approval to the President, who subsequently granted approval.²²⁸ Other factors which CFIUS and the President may have considered as well were Matra's decision to use U.S. personnel to run the acquired units, and to transfer responsibility for the units' classified work to a voting trust of three United States proxyholders.²²⁹ As with the Monsanto transaction, the significance of CFIUS's treatment of the Fairchild acquisition was the agency's willingness to, and indeed insistence on, working with the foreign acquiror to resolve the national security aspects of the transaction in a manner that would allow CFIUS to approve the transaction.

Another full investigation involved the proposed joint venture between Westinghouse Electric Corp. and Asea Brown Boveri (ABB), a Swiss-Swedish electrical engineering concern, to manufacture and sell electric power generation products. Under the terms of the joint venture, ABB would hold a forty-five percent stake, but would have the option of acquiring Westinghouse's fifty-five percent stake as well.²³⁰ The investigation was commenced upon the request of the Departments of Defense and Commerce, which were apparently concerned that the proposed venture could limit the availability of high-powered

227. See *Bush Will Not Block French Firm's Acquisition of Fairchild Industries' Space, Defense Units*, 6 Int'l Trade Rept. (BNA) 1096 (Aug. 23, 1989).

228. *Id.*

229. See Marcus, *Fairchild Buy Gives French Matra SA Foot in Door of U.S. Market*, SPACE NEWS, Sept. 18, 1989, at 12.

230. See *Bush Won't Block Swiss Electric Deal After CFIUS Exon-Florio Investigation*, 6 Int'l Trade Rept. (BNA) 664 (May 24, 1989). [Hereinafter *Bush Won't Block Swiss Electric Deal*].

electrical transmission equipment.²³¹ CFIUS ultimately recommended approval of the joint venture, a recommendation the President accepted. Among the factors affecting CFIUS's decision was ABB's affirmation that it intended to continue the manufacture, research, and design of the relevant products in the United States.²³²

The Westinghouse case confirms that CFIUS will treat joint ventures as acquisitions where there is a possibility of the foreign partner gaining control of the assets of the venture. It also demonstrates that CFIUS will examine a transaction where the potential for foreign control exists, even though the foreign acquiror does not presently have and will not necessarily obtain such control. Finally, CFIUS's decision emphasizes that the agency will give weight to assurances that production and research and development activities will be carried on in the United States.

The most recent transaction investigated by CFIUS marks the first time the President has actually used his authority to forbid an acquisition or to order divestiture under Exon-Florio. This investigation involved the sale of Mamco Manufacturing Co., a producer of metal components used in aircraft, to the Chinese Aerotechnology Import-Export Corp. (CATIC), an agency of the government of the People's Republic of China. The focus of the investigation was whether Mamco possessed technology applicable to military as well as civilian uses, and whether the acquisition of Mamco could lead to the transfer of such technology to China.²³³

The notice of the acquisition was filed while the sale of Mamco was still pending, but the transaction was consummated before the investigation was complete. Following a full investigation, CFIUS recommended that the President order CATIC to sell Mamco. Although the precise grounds for CFIUS's decision are unclear, it was reported that CATIC made military fighters, bombers, and helicopters as well as civilian aircraft, and that CATIC had attempted to obtain military technology illegally from the United States in the past.²³⁴ The President accepted CFIUS's recommendation, and ordered CATIC to divest itself completely of Mamco.²³⁵ CATIC was given three months to do so; CFIUS was to monitor the divestiture process.

231. See *CFIUS Investigates Possible Ventures Between Westinghouse Corp., Swiss Company*, 6 Int'l Trade Rept. (BNA) 398 (Mar. 29, 1989).

232. See *Bush Won't Block Swiss Electric Deal*, *supra* note 227, at 665.

233. See Tolchin, *supra* note 206, at D4, col. 1.

234. See Auerbach, *Bush Urged to Bar Deal With China*, Wash. Post, Feb. 2, 1990, at G1.

235. See *Bush Orders Divestiture of Chinese Acquisition on National Security Grounds*, Reg., Econ. & L. (BNA) A-6 (Feb. 5, 1990).

The Mamco case marks possibly the most extreme situation likely to arise under Exon-Florio. It involved a U.S. company with military technology on the one hand, and an agency of a foreign government that was not a military ally of the United States on the other. In addition, the acquiring party had allegedly engaged in previous attempts to acquire U.S. defense technology illegally. Interestingly, MAMCO denied that its products had direct military applications except insofar as some of the Boeing Company commercial planes for which it supplied parts had military counterparts. The company also noted that it had no classified contracts, and that although it did have certain technology subject to export controls, CATIC had received U.S. export licenses on other occasions.²³⁶ Significantly, the President ordered complete divestiture; there was apparently no inclination on the part of CFIUS to negotiate with CATIC for changes in the acquisition or for undertakings regarding transfer of technology, etc. that would have ameliorated CFIUS's security concerns. Despite this, CATIC indicated that it would attempt to restructure the proposed acquisition to attempt to alleviate the national security problems involved.²³⁷ Finally, it is possible that purely political considerations played a role — in this case, the President's desire to appear strong in relations with China in the wake of criticism of what was perceived as a weak reaction to the Chinese government's forceful suppression of democratic dissent in June 1989.²³⁸

In understanding how CFIUS has interpreted the Exon-Florio Act, and in predicting possible directions of future enforcement, it is also helpful to review instances in which CFIUS decided not to initiate an investigation of a transaction. One of the first of these, and the one that probably attracted the most public attention, was the acquisition of Consolidated Gold Fields PLC by Minorco SA in a hostile takeover. Neither of these companies was a U.S. person; Gold Fields is a British company, while Minorco is a Luxembourg investment company controlled in turn by Anglo American Corp. of South Africa and De Beers Consolidated Mines Corp., two South African companies. Gold Fields notified CFIUS of the transaction, however, because it owned a fifty percent interest in Newmont Mining Corp., a leading U.S. gold producer. In its notice, Gold Fields claimed that the acquisition could impair the national security of the United States by con-

236. See *Chinese Company Seeking "Solution" to Order to Divest Aircraft Parts Maker*, 7 Int'l Trade Rept. (BNA) 302 (Feb. 28, 1990).

237. See *id.*

238. See *Chinese Company Objects to Bush Decision on Sale*, Wash. Post, Feb. 20, 1990, at G1, col. 6.

centrating control over certain strategic metals in the hands of foreign nationals.²³⁹

CFIUS determined within the initial thirty-day review period that the transaction did not threaten to impair the national security of the United States, and therefore did not merit a full investigation. The agency based its determination upon a finding that, even if a total interruption of supply resulted, U.S. supplies of the relevant metals were sufficient to meet U.S. needs. Consequently, CFIUS would not take further action regarding the transaction.²⁴⁰

Although CFIUS did not conduct a full investigation, its handling of the Gold Fields transaction is nonetheless highly instructive in several areas. The first is in the agency's functional definition of "national security." In this case, the issue confronting CFIUS was the straightforward one of foreign control over a product, a simpler issue than transactions involving high technology, where factors such as dissemination of technology or future funding of research and development could be present. CFIUS accordingly used a definition of "national security" quite like that employed in section 232 investigations.²⁴¹ It showed no hesitation in investigating the transaction even though the main parties were both foreign companies. Finally, CFIUS's rapid handling of the transaction lessened the utility of notification as a device in a battle against a hostile takeover, although a different result might obviously have been reached had CFIUS decided to launch a full investigation.²⁴²

239. See *CFIUS Finds No National Security Threat in South African Bid for U.K. Minerals Firm*, 6 Int'l Trade Rept. (BNA) 396 (Mar. 29, 1989) [hereinafter *CFIUS Finds No National Security Threat*]; see also Krieger, *supra* note 117, at 350-53.

240. See *id.* In making its determination, CFIUS relied upon the specialized expertise of the Bureau of Mines in assessing U.S. supply and needs for various metals and minerals, including gold, rutile, zircon, and platinum. CFIUS assumed a worst case scenario, under which there was a total interruption of supply of the strategic mineral assets of Minarco and other companies affiliated with South African firms or nationals. The agency found that U.S. strategic stockpiles, production capacity, and existing inventories would be sufficient to satisfy U.S. strategic needs. CFIUS also determined that the purchase would not violate the Comprehensive Anti-Apartheid Act. *Id.*

241. See *supra* text accompanying note 59. Because CFIUS found that there was no threat to the national security, even assuming a total interruption of supply, it did not have to reach the next, highly political question: whether there was credible evidence to believe that foreign control of Newmont could lead to such an interruption. See 50 U.S.C.A. app. § 2170(d) (West Supp. 1989) (the President may act only if "there is credible evidence that leads the President to believe that the foreign interest exercising control might take action that threatens to impair the national security"). Although this subsection is entitled "Findings of the President," CFIUS would presumably have to reach the same conclusion before recommending that the President act to suspend or prohibit a transaction.

242. With respect to the possible use of CFIUS as a weapon in battles for corporate control, it is interesting to note that Gold Fields was able to obtain an injunction from a federal district court on grounds that the acquisition would violate the antitrust laws of the United States. The acquisition of Gold Fields had previously been delayed when it was referred by the government

Besides Minorco, there have been a great number of cases where CFIUS did not proceed to a full investigation. Often, these involved transactions that clearly did not have national security implications.²⁴³ This indicates that CFIUS has some sort of bright-line test, and also calls into question the utility of the routine invocation of Exon-Florio as an anti-takeover device.

From these examples, it is possible to draw some conclusions regarding the manner in which CFIUS has interpreted and applied Exon-Florio. Thus far, the agency's application of the law has been rather conservative. In the only case in which disapproval of a transaction was recommended, highly sensitive technology and products were involved. In determining whether to investigate, and whether to recommend approval or disapproval, CFIUS has focused on such obvious factors as whether the target company held classified contracts or was the last U.S. producer of an item with crucial defense applications. The potential for unauthorized dissemination of sensitive technology has been a source of particular concern. Although CFIUS has generally concentrated on national security concerns only, the fear has been raised that the agency may be considering other, subjective factors as well, such as the identity or nationality of the foreign acquiror.

On the other hand, CFIUS has shown its willingness to work with the parties to structure the transaction in a manner that will satisfy national security concerns, and has in fact essentially made such changes to the transaction a condition for approval. Based on the admittedly limited number of investigations that have occurred, it is nonetheless safe to conclude that CFIUS and the President prefer successful transactions, so long as the national security concerns raised are addressed. CFIUS has also shown itself willing to accept assurances regarding the maintenance of production and research and development in the United States, without the foreign acquiror necessarily undertaking a formal commitment to do so. Finally, CFIUS has handled most cases expeditiously, so that the potential for use of Exon-Florio as an anti-takeover device has been limited.

of the United Kingdom to the Monopolies and Mergers Commission. See *CFIUS Finds No National Security Threat*, *supra* note 234, at 396. This simply illustrates that, in hostile takeovers, the target company has a variety of defensive techniques other than Exon-Florio available to it. This indicates that much of the concern over Exon-Florio as a possible anti-takeover device may be misplaced or exaggerated.

243. See Nathans, *supra* note 116, at 91. Examples of such cases are transactions involving a tulip-bulb grower, a swimming pool company, and a timber owner. On the other hand, CFIUS has also declined to investigate the hostile takeover of a company with classified contracts for hologram technology, a case that on its face would appear to merit investigation. *Id.*

E. *Future Enforcement of Exon-Florio*

As was noted above, the enactment of Exon-Florio was greeted with near-universal dismay by the trading and investment partners of the United States. At the same time, the act has aroused concern and even fear among investors in the United States.²⁴⁴ If the past application of Exon-Florio is any guide to the future, most of these fears appear misplaced. As reviewed above, CFIUS has actually recommended disapproval of only two transactions, one involving perhaps the most sensitive technology possible (nuclear weapons), and the other involving the purchase of a U.S. company by an agency of a Communist government. Even in the first case, CFIUS unofficially informed the parties of its conclusion, allowing them to withdraw notice of the transaction so as to avoid a formal recommendation of approval, and the transaction was subsequently completed after restructuring in a manner that addressed CFIUS's concerns.

One source of special concern has been that Exon-Florio may be routinely invoked as an anti-takeover device in hostile situations.²⁴⁵ So far at least, it has not been a particularly useful weapon, as a review of CFIUS's decision not to initiate a full investigation in the Goldfields case indicates. In fact, of the approximately 240 notices of acquisitions that have been filed with CFIUS, only some twelve have involved hostile takeovers. The CFIUS has barred none of these transactions, nor even intervened to the extent of requiring modification of the terms of the transaction. Furthermore, because of the short time limits within which CFIUS will act, invocation of Exon-Florio is of limited utility as a delaying tactic.

The one situation in which recourse to the act could be successful for an unwilling target is the presently rare one in which the U.S. company can show that control by the foreign acquiror could have a negative effect upon national security. This is likely to occur only where the U.S. company either has access to highly sensitive technology or is the sole producer of an item with defense applications, although it could arise where the target company has state-of-the-art products or technologies, even if it currently has no defense contracts.

Exon-Florio could also have another, indirect use as an antitakeover device. Under the securities laws of the United States, in an acquisition involving the purchase of publicly-traded securities, the tender offer must disclose all material facts relevant to the transac-

244. *Id.* at 88.

245. *Id.* at 91.

tion.²⁴⁶ The filing of an Exon-Florio notice by the target company in a hostile takeover situation would clearly constitute a "material fact," as it could lead ultimately to an undoing of the transaction. Under such circumstances, the filing of a notice alone could raise doubts among shareholders as to the likelihood of success of the takeover attempt, itself a powerful weapon on the part of the target company. For this reason, the acquiror in a hostile Exon-Florio situation might wish to file a notice itself, so that it can attempt to gain control of the situation. The same would be true even in a friendly takeover of a publicly-traded company if there is a possibility that a government agency might file a notice.

Another issue relevant to the future enforcement of the Act arises from its status under the General Agreement on Tariffs and Trade, and in particular the results of the current Uruguay Round of negotiations. In this round, trade-related investment measures have been a subject of discussion, especially by the United States, which has expressed the concern that such measures can be used to restrict trade indirectly.²⁴⁷ Given the high profile of the U.S. position on this issue, and the concern that the Exon-Florio Act has aroused in many of its trading partners,²⁴⁸ it is possible that other countries could point to the Act as a possible trade-restricting investment measure by the United States. It is unlikely, however, that such claims would have much effect. In the first place, although application of the Act could have some effect on trade, that effect is less direct than that of other potential trade-related investment measures, such as local content or export requirements for investment. Furthermore, Exon-Florio would appear to fall solidly within the exception to the GATT for actions taken for reasons of national security.²⁴⁹

Another possibility always present in such situations is that other

246. See 15 U.S.C. § 78n(e) (1988); see also Securities Exchange Act rule 13e-4, 17 C.F.R. § 240.13e-4 (1989), and Schedule 13E-4, *id.* § 240.13e-4(c). Failure to disclose this information would leave the tender offeror open to penalties for securities fraud. In addition, under rule 14e-2, *id.* § 240.14e-2, the target company is required to disclose its recommendation regarding the tender offer to its security holders, with the reasons for its recommendation. That the target company had filed an Exon-Florio notice, and believed that there was a possibility that the acquisition would be prohibited or substantively modified by the President, would clearly be relevant to the company's recommendation.

247. See Office of The United States Trade Representative, *Clarification of U.S. Position stated in "A Structure for Negotiating a Comprehensive Agreement on TRIMs"* (MTN. GNG/NG12/W15), at 2 (Jan. 29, 1990). The United States' position in these negotiations is that all investment performance requirements that could affect trade negatively, such as local content, local procurement, or export requirements, should be prohibited. The U.S. position would also prohibit requirements that restrict the ability to invest because of the nationality of the investor.

248. See *supra* text accompanying note 113.

249. See General Agreement on Tariffs and Trade, art. XXI, *supra* note 8.

countries could threaten to retaliate against the United States by adopting similar measures. In fact, a number of the major trading partners of the United States, including the United Kingdom and Germany, have laws that allow the government to bar acquisitions for reasons of national security. A number of other countries restrict foreign investment in specified industries on national security grounds. Given the presence of these laws, the possibilities for retaliation appear limited.

As with section 232, there are also some concrete problems with the manner in which Exon-Florio has been applied. CFIUS's practice in the past has been to make decisions on a case-by-case basis, with each transaction judged on its own merits. Such a limited approach may not be sufficiently comprehensive, however, in the case of "creeping takeovers," through which a foreign acquiror gains control of an industry first through control of raw materials, then manufacturing equipment, and finally production of the finished article. As with section 232, the language of Exon-Florio is flexible enough to allow for a full consideration of the effects of a takeover downstream. The question is whether CFIUS, given current policies, will take advantage of this flexibility and adopt a broader view of the effect of takeovers.

Another concern similar to those associated with section 232 is the ability of Exon-Florio to deal with high-technology industries. Again, the focus of this concern is the rapidity with which technology change occurs, and the very high expense associated with the development of high technology. CFIUS has shown itself to be sensitive to foreign acquisition of high-technology industries in particular, where the relevant technology has direct military applications. The important question here is whether CFIUS will show the same aggressiveness in interpretation when the technology is in an infant stage, where its ultimate military uses have not yet been established.

The future application of Exon-Florio is inextricably intertwined with the attitude towards foreign investment held by the administration in power. To the extent that foreign investment is viewed positively, as is currently true with the Bush administration, application of Exon-Florio is likely to be restricted to cases clearly and directly involving the national security. Future administrations may have a less sanguine regard for foreign investment, in which case Exon-Florio could be applied in a broader manner. It is unlikely, however, that any administration would apply Exon-Florio in the manner feared by its critics. The United States has become reliant, if not dependent, upon foreign investment, and the indiscriminate use of Exon-Florio could discourage investment in even non-security related areas. Indis-

criminate application would also be at odds with the long-standing U.S. policy of encouraging freedom of investment, with consequent effects upon the ability of U.S. investors to operate in other countries. Another obvious limiting factor is reciprocity and the possibility of retaliation. The decision by the President to use Exon-Florio to affect or prohibit a transaction is essentially a political decision and, thus, subject to political considerations. Given the increasingly integrated structure of the international economy, and the identification of U.S. interests with increased integration, use of Exon-Florio in an indiscriminate manner simply is not consistent with the political and economic interests of the United States. Moreover, as was shown above, application of the statute thus far has been the very opposite of indiscriminate. In fact, at least one Japanese official has indicated that Japan thinks that Exon-Florio has been applied in a fair manner, and that the U.S. government has assisted parties to transactions in putting them into a form that will permit their approval.²⁵⁰ This indicates that concerns over the widespread use of Exon-Florio as a means of barring foreign investment have been exaggerated.

Perhaps the real significance of Exon-Florio lies, not in its commercial or even defense effects, but in its exemplification of a new awareness in the United States of the interrelationship of economics and national security. So long as the United States was unquestionably the predominant economic power in the world, national security was defined solely in terms of military defense. With the passage of U.S. primacy on one hand, and the amazingly rapid disappearance of the military threat from the Warsaw Pact that had so long dominated U.S. strategic thinking on the other, the focus of concern has shifted from military strength to economic competitiveness. The enactment of Exon-Florio indicates an awareness by the United States that both its economic and military situation have changed, a development that must generally be considered positive. The question now is whether "national security" will be redefined within the context of Exon-Florio away from a narrow military defense definition to a broader definition encompassing economic welfare and international competitiveness as an integral element of national security. The problems of such a definition were discussed above with respect to the need for a new definition of "national security" under section 232.²⁵¹

The question of the proper definition of "national security" is, if anything, more pressing with respect to Exon-Florio. Section 232 ad-

250. See *Officials from Japan, The Netherlands Differ on Exon-Florio Provision Views, Meeting Told*, 7 Int'l Trade Rept. (BNA) 410 (Mar. 21, 1990).

251. See *supra* text accompanying notes 102-104.

dresses a relatively narrow problem. The condition towards which Exon-Florio is directed is much broader and deeper. Essentially, Exon-Florio asks when foreign ownership of U.S. assets threatens the national security of the United States. As a purely military definition of "national security" becomes, if not obsolete, increasingly irrelevant, the need to redefine what constitutes the national security of the United States will move ever closer to the fore.

The United States is not the only country experiencing this change. Indeed, what constitutes national security is relevant to all countries as they consider what sort of actions with respect to foreign trade and foreign investment are necessary to protect their vital interests. That this issue has not yet come fully to the fore is reflected by the fact that it is not a subject of direct negotiation in the current Uruguay Round of GATT. It is possible, however, that as this development proceeds, the question of what constitutes "national security" will become an appropriate subject of international discussion and agreement. It is not the province of this article to attempt to resolve that question; it is sufficient for the present merely to realize that it will constitute one of the central issues for the American polity in the coming decade. In this way, examination of a relatively restricted, seldom-invoked law and its application highlights one of the greatest decisions the United States must make regarding itself and its place in the world in the years to come.