THE MULTINATIONAL CORPORATION AND FOREIGN INVESTMENT

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The invitation for me to author an article for the Lead Articles Edition of the MERCER LAW REVIEW suggests that we might examine the international impact on the United States of foreign trade and investment. This subject, of course, can be approached in many different ways. I have chosen to focus on the subjects of foreign investment and the multinational corporation as those two matters may have impact on the general subject. These are two subjects which I believe must be given very careful attention as we go forward in developing a position for the United States in changing world economy.

In sharp contrast to traditional U.S. attitudes, the past few years have witnessed a swing of opinion in the United States favoring limitations on foreign investment in the United States as well as investment abroad by Americans. This shift stems from a presumption that U.S. investment abroad costs the United States jobs and weakens the U.S. balance of payments. More recently there has been a growing concern that large-scale foreign investment in the United States, which may increase markedly as the Organization of Petroleum Exporting Countries (OPEC) accumulates capital, is also undesirable.

These conflicting arguments for restricting the international flow of capital and technology ought to be examined seriously.

I. U.S. INVESTMENTS ABROAD

Let us then look at a number of points that need to be made about U.S. investment in other countries.

First, in the future, the world may again be faced with major shortages in key industrial commodities, such as those which contributed to the current world recession and the double-digit inflation of 1973-74. Moreover, there continues to be a need to recycle the massive amounts of funds being accumulated by the Arab oil countries. To meet these two problems a sharp increase in investment, domestic and foreign, is required. It would seem unwise to take measures which would restrict the needed increase in investment.

Second, the greater part of U.S. direct investment abroad is in raw materials and related manufacturing, in distribution facilities for U.S. exports, in foreign utilities, transportation, and other services, and, conse-

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quently, cannot be regarded as displacing U.S. domestic production or employment.

Third, U.S. foreign investment is not as large as the concern about it would lead one to believe. Over the past five years, gross foreign direct investment, including reinvested earnings, has averaged about $8 billion per year.[1] By comparison, gross domestic private investment, minus residential construction, has averaged $120 billion per year over the same period.[2]

Fourth, most U.S. foreign investment in manufacturing seems to be "defensive" in character, that is, American entrepreneurs go abroad to produce when they see that a foreign enterprise would expand and take over the market. In such cases, continued production in the United States is not a realistic alternative. If the American firm had not gone abroad, foreign firms would have preempted the opportunity and U.S. jobs and exports would have been lost in any event.

Fifth, America gains by foreign investment. Income on U.S. private direct investment abroad is rapidly expanding and now amounts to almost $20 billion per year.[3] In addition, American parent companies usually export large amounts of capital goods, component parts and associated products to their foreign subsidiaries. Not all such exports would be made if U.S. foreign investment were curtailed.

Finally, with more flexible exchange rates, the argument that capital outflows must be limited to protect the U.S. balance of payments has lost any validity it may have had.

In short, there is considerable reason to continue to hold to the traditional rationale for free international flow of capital—that it raises U.S. income—and there are reasons to be skeptical of the opposite conclusion. It would follow then that the United States can, with benefit, seek to eliminate undue restrictions to the international flow of capital.

There is no reason, however, to encourage U.S. investment in industrial countries at the expense of domestic investment. With this in mind, a new look should be taken at the deferral of U.S. taxes on American corporations operating abroad and the foreign tax credit. In addition, it would be well to study the impact of foreign investment on the distribution of income between capital and labor in the United States.

II. Foreign Investment In The United States

A number of points should also be made about foreign investment in the United States. According to Department of Commerce figures, at the end

1. U.S. Dep't of Commerce, Survey of Current Business, at 50 (Oct., 1975).
2. U.S. Dep't of Commerce, Economic Report of the President, at 264 (Feb. 1975).
3. U.S. Dep't of Commerce, Survey of Current Business, Table 1, at 45 (Sept., 1975), shows net investments abroad were $17.7 billion in 1974, and this excludes fees and royalties from the foreign investment.

of 1974 foreign direct investment in the United States was $21.7 billion and foreign portfolio investment was $35.5 billion for a total of $57.2 billion. These are small amounts. The comparable figures for U.S. investment abroad were $118.6 billion and $41.4 billion, respectively, for a total of $160 billion.[4]

Fears about foreign investment seem exaggerated. Such investment would add to the real capital which America and its workers have at their disposal. Fear of foreign domination of the economy normally overlooks a number of practical realities:

(1) foreign companies are subject to U.S. laws, antitrust policy, U.S. taxes;
(2) they must bargain with American labor;
(3) their properties can be nationalized or controlled.

Surely, under these conditions foreign investment in the United States may well be preferable to investment abroad.

A. *The Impact Of Arab Investment In The United States*

One should not exaggerate the financial power of the Arabs, great though it is and may become. In the past several months, most experts have reduced their estimates of the level of OPEC financial reserves in the 1980's. This revision is based largely on the expectation that OPEC imports, which rose by over 90 percent in value and 40-45 percent in volume from 1973 to 1974, will continue to rise rapidly (though more modestly than last year) to meet their ambitious plans for economic and military development.[5] Estimates of total OPEC foreign investment resources (its cumulative balance-of-payments surplus) by 1980 vary from less than $200 billion to over $400 billion.[6] We must all agree that this is a very large amount. Yet, at the same time, the size of the world economy will be growing. The stock of the world's capital might well exceed $3 trillion by 1980.[7] Thus, OPEC's share, though significant, may still be modest.

Moreover, one of the few ways we may be able to induce the OPEC countries to maintain and increase their exports of oil in the face of their rising monetary holdings, is to provide profitable investment outlets for their surplus funds. Unless this is done, oil in the ground may become more valuable to them than oil produced, and the proceeds put into productive investments for the benefit of OPEC and the rest of the world.

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4. COMMERCE DEP'T SURVEY, *supra* note 1, Table 3, at 32.

5. INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT, CAPITAL REQUIREMENTS OF DEVELOPING COUNTRIES 19 (1975).

6. A. Reifman, U.S. Energy Policy: A Perspective on Major Immediate Issues, at 28 (July 24, 1975, Library of Congress, Congressional Research Service).

7. Address by Secretary of the Treasury George Schultz, Annual Bankers Association International Monetary Conference, Paris, June 6, 1973.

B. *Potential Problems And Solutions*

Nevertheless, one might ask, could a foreign power take over a strategic industry and, thereby, hold it for ransom or somehow damage U.S. interests? The arguments above suggest the answer is "no." Even if foreign nationals took control of a U.S. defense company, they could not export arms or arms technology except under a U.S. government license, and they could be forced to sell to the U.S. government. There is always the further argument that the former U.S. owners would have the capital to start a competing company. Moreover, foreign governments would be careful about dominating a specific sector of U.S. economic life. The Arabs not only lack the managerial expertise to do so on a large scale, but all indications show that their interests lie in developing their own countries and not in managing foreign companies. In general, the Arabs are likely to prefer portfolio to direct investment and to look for safety of yield and diversification.

C. *Proposed Legislation*

The United States should reconsider current prohibitations on, and limitations to, foreign investment here. In this respect, many believe more data on ownership should be required. In this regard, some fourteen bills were introduced during the first session of the 94th Congress. I do not intend, for the purposes of this article, to discuss the provisions of those bills. I am, however, attaching as an appendix, a description of each bill. The reader may draw his own conclusions after studying these propositions. In my opinion, however, any U.S. regulations, or laws, affecting foreign investment here, should be considered in the light that other nations may well emulate U.S. regulations or laws and apply them to U.S. investment in their own country. Such a course of action by any foreign country would be a matter of considerable importance to U.S. foreign policy as well as for U.S. corporations invested abroad.

III. THE MULTINATIONAL CORPORATION

A. *Generally*

The multinational corporation is a major vehicle for the mobilization and dissemination of capital, technology, and managerial skills throughout the world. It improves the distribution of income and wealth among countries by moving capital and related factors of production from rich to poorer countries, and from areas of abundance to areas of scarcity. By itself this makes for a more equitable distribution of income among the countries of the world, and consequently, increases world welfare. By combining the material and human resources of a number of countries, the multinational corporation increases productivity and, consequently, world output. This, too, increases world welfare. The unprecedented vigor of the world economy since the end of World War II owes much to the multinational corporation. So far, no more effective instrument has been found for the mobilization and diffusion of capital and technology.

B. Criticisms

The views expressed so far comprise the conventional wisdom which, until recently, was widely accepted by virtually all professional economists and government officials. Today, it is under attack by certain economists, by U.S. trade union leaders, by parliamentary groups, and by important elements outside of the United States, especially in less developed countries.

The rapid growth of the multinational corporation and the recent development of data on the tremendous size of its operation have stimulated a wave of criticims about its contribution to a nation's political and economic strength. The criticisms come from a variety of sources and motivations. Some originate with those who oppose all private ownership of capital. Some are related to suspicions that the multinational corporation achieves its economic purposes by exploiting foreign resources and avoiding legitimate taxes. Others come from old-fashioned nationalism. Still others grow out of fear of a huge and still largely unknown force of great potential, and an amorphous feeling that the multinational corporation can and does use its power for undesirable, indeed, evil purposes. And, some criticisms come from carefully worked-out economic analyses of costs and benefits.

The range of opinion is wide. At one end of the spectrum are those who want to restrict the right of sovereign governments to nationalize properties within their jurisdiction without the approval of an international body. Close to the other end of the spectrum are the authors of the 1974 United Nations Report of Eminent Persons[8] who set out a populist, nationalistic view of large-scale business and recommend a great variety of restrictions on these corporations.

Those who would sharply limit the multinational corporation must consider whether alternative means of mobilizing and distributing capital and technology world-wide are as efficient and equitable as the imperfect existing system. As Thomas Enders, Assistant Secretary of State, points out, "[T]he danger is that uncoordinated or excessive national and international regulation—particularly if aimed at potential rather than actual abuses—runs the risk of killing the goose which lays the golden eggs."[9]

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8. United Nations Dept. of Economic and Social Affairs, *Report of the Group of Eminent Persons to Study the Role of Multinational Corporations on Development and on International Relations*, E/5500/Rev. 1-ST/ESA/6 (1974), *reproduced in* 13 INT'L LEG. MAT'LS 800 (1974).

9. Statement of Thomas O. Enders, Assistant Secretary of State, public hearing on the multinational corporation held jointly by members of Congress and the European Parliament, September 17, 1974.

C. *Proposed Solutions: The Need For International Cooperation*

Nevertheless, there are a number of actions which ought to be seriously considered. For example, tax havens might be eliminated. Tax subsidies to foreign investment and U.S. guarantees for foreign investment should be reassessed in light of current circumstances. International cooperation in obtaining "neutrality" in the tax field—to avoid artifical governmental inducements to, or restrictions on, the flow of capital—and to improve the effectiveness of antitrust action may be desirable. The need for international cooperation and a new code on the treatment of foreign investment is indicated by recent developments described in a provocative article by C. Fred Bergsten.[10] He points out that many, if not most, countries are developing policies to attract or restrict foreign investment on terms which the country finds attractive. The world is, Bergsten argues, entering a period where nations will use control over foreign investment to achieve their national goals in much the same way controls over foreign trade were used in the 1930's. As far as controls on investment are concerned, however, the United States, as the home country for the bulk of foreign investment, seems certain to be the prime loser. Whether the rest of the world gains or loses as a result is still an open question.

In 1974 the United Nations established a Commission on Transnational Corporations. It now has an information and research center and is planning to develop analyses on, and recommend policies toward, multinational enterprises. It is too early to know the direction and effectiveness of its work, but I believe that the subject will continue to be an important one for international consideration.

10. Bergsten, *Coming Investment Wars?*, 53 FOREIGN AFFAIRS 135 (1974).

APPENDIX

DESCRIPTION OF BILLS INTRODUCED IN FIRST SESSION, 94TH CONGRESS RELATING TO FOREIGN INVESTMENT IN THE UNITED STATES

S. 329 (Scott, Pa.) 1/23/75

Description: Directs the Secretary of Commerce to require reports from foreign investors in domestic businesses, and their agents, stating as a minimum; (1) the name of the investor; (2) the name of the agent; (3) the amount of the interest in a domestic business; and (4) the name of the domestic business.

S. 425 (Williams, N.J. et al.) 1/27/75

Description: Amends the Securities and Exchange Act of 1934 to require foreign investors and proxies of such investors to file a statement with the Securities and Exchange Commission notifying the Commission of their intention to acquire more than five percent of the equity securities of a United States company. Authorizes the President to prohibit any such purchase by investors. Requires issuers of securities to file with the Commission a list of the names and nationalities of the owners of their equity securities.

S. 1132 (Sparkman, Ala.) 3/11/75

Description: Amends the Interstate Land Sales Full Disclosure Act to prohibit any person from purchasing or leasing any interest in any natural resource land for any foreign purchaser without first filing a statement of full disclosure with the Secretary of Housing and Urban Development.

S. 1303 (Inouye, Hawaii, et al.) 3/21/75

Description: Establishes a Foreign Investment Administration, under the Secretary of Commerce. Requires the Secretary of Commerce, through the Administration, to require full disclosure of the nature and scope of Foreign Investment in the United States and to analyze such investments and make recommendations as to foreign investment policy.

H.R. 411 (Fish, N.Y.) 1/14/75

Description: Prohibits or restricts the ownership or control by foreign interests of certain issuers of securities, corporation, real estate, or natural resources deemed to be vital to the economic security and national defense of the United States. Establishes the National Foreign Investment Control Commission to supervise and regulate foreign investments in domestic interests.

H.R. 418 (Fish, N.Y.) 1/14/75

Description: Creates a Congressional Joint Committee on Foreign Investment Control in the United States to study the manner in which the

National Foreign Investment Control Commission, established by the "Foreign Investment Control Act of 1974," fulfills its functions.

H.R. 945 (Roe, N.Y.) 1/14/75

Description: Prohibits or restricts the ownership or control by foreign interests of certain issuers of securities, corporations, real estate, or natural resources deemed to be vital to the economic security and national defense of the United States. Establishes the National Foreign Investment Control Commission to supervise and regulate foreign investments in domestic interests.

H.R. 1573 (Ashbrook, Ohio) 1/17/75

Description: Prohibits any instrumentality of the United States government from providing assistance to finance or promote the export of any commodity, product, or service from the United States intended for energy research, development, or exploration in the Soviet Union.

H.R. 3424 (Gaydos, Pa.) 2/20/75

Description: Amends the Securities Exchange Act of 1934 (1) to prohibit persons who are not citizens of the United States from acquiring more than five percent of the voting securities, or thirty-five percent of the nonvoting securities, of any issuer whose securities are registered under the Act; (2) to prohibit any person not a citizen who now owns securities in greater percentages than stated above from acquiring any more of such securities; and (3) to direct the Securities and Exchange Commission to require the registration of persons not citizens before their acquisition of securities registered under the Securities Exchange Act of 1934.

H.R. 4492 (Burleson, Tex. et al.) 3/10/75

Description: Amends the Internal Revenue Code to repeal the December 31, 1975 termination of a provision of the code relating to interest income earned from certain domestic savings, insurance, and other institutions, which is treated as income from sources within the United States, except where such interest is paid to nonresident aliens or a foreign corporation.

H.R. 5491 (Solarz, N.Y.) 3/25/75

Description: Prohibits or restricts the ownership or control by foreign interests of certain issuers of securities, corporations, real estate, or natural resources deemed to be vital to the economic security and national defense of the United States. Establishes the National Foreign Investment Control Commission to supervise and regulate foreign investments in domestic interests.

H.R. 5888 (Roe, N.Y. et al.) 4/10/75

Description: Creates a Congressional Joint Committee on Foreign Investment Control in the United States to study the manner in which the National Foreign Investment Control Commission, established by the "Foreign Investment Control Act of 1975," fulfills its functions.

H.R. 6857 (Brodhead, Mich.) 5/9/75

Description: Amends the Securities and Exchange Act of 1934 to require investors and proxies of such investors to file a statement with the Securities and Exchange Commission notifying the Commission of their intention to acquire more than five percent of the equity securities of a United States company. Authorizes the President to prohibit any such purchase by investors. Requires issuers of securities to file with the Commission a list of the names and nationalities of the owners of their equity securities.

H.R. 6907 (Eshleman, Pa.) 5/13/75,

Description: Directs the Secretary of Commerce to require reports from foreign investors in domestic business, and their agents, stating as a minimum, (1) the name of the investor; (2) the name of the agent; (3) the amount of the interest in a domestic business; and (4) the name of the domestic business. Directs the Attorney General to take action to require foreign investors to relinquish ownership of a domestic business under certain conditions.