Foreign Investment in the United States

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I. Introduction

Rhetoric on foreign investment in the United States during 1997 did not exactly match reality. The year began with the national news media focusing like a laser beam on allegations of pernicious foreign influence and the U.S. political system. The Democratic National Committee, which had by all accounts failed to carefully screen "soft money" donations during the 1996 election cycle, announced that it would no longer accept contributions from U.S. subsidiaries of foreign-owned corporations. Notwithstanding that it should be a relief to corporate executives to be granted immunity from incessant entreaties to deliver up cash to politicians, there was legitimate complaint expressed about a rule that discriminates against foreign-owned U.S. companies, while allowing their domestic controlled competitors to curry favor with the governing political party.

While the news media and prosecutors focused their attention on "foreign influence," governors, mayors and county commissioners across the land were devoting significant time and effort and promising substantial fiscal benefits to entice foreign firms to locate new manufacturing plants and other facilities within their jurisdictions.[1] Although rhetoric in 1997 showed that foreign investment was viewed with suspicion by some within the United States, the actual data shows that the United States was both a welcoming environment and an attractive destination for foreign direct investment in 1997.

II. Trends for Foreign Investment in the United States

The most recent statistics of the U.S. Department of Commerce, which are based on data collected for 1996 and were released on June 30, 1997, show that foreign direct investment in the United States, valued at current cost, increased by $74.6 billion to a total of $729.1 billion. Measured by market value, total foreign direct investment in the United States stood at $1,253.6 billion in 1996, an increase of $221.7 billion over the previous year. The greater

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1. *See e.g.*, Greg Jaffe, *Southeast Tries to Attract Chip Makers*, WALL ST. J., Nov. 28, 1997, at A2.

rate of growth measured by market value reflected, in part, a substantial price appreciation in owner's equity.

The United Kingdom remained the leading source of foreign direct investment, with $126.17 billion invested on a historical cost basis. The next largest investors were: Japan with $107.93 billion; the Netherlands with $65.80 billion; Canada with $48.25 billion; and France and Switzerland, with $38.48 billion and $35.59 billion respectively.[2]

III. Regulation of "Political Activities" of Foreign Owned Entities

The year 1997 began with much attention on alleged foreign financial political contributions made to win friends and influence people in Washington. Although the allegations gaining the most headlines concerned the Clinton-Gore campaign, the Democratic National Committee was quick to point out similar problems in fund-raising by prominent Republican Party committees and candidates.

By year end there had been no resolution of the investigations of alleged improprieties and no end to the charges and countercharges. It was apparent, in any event, that at least some elected officials, business executives, and the general public were confused with respect to prohibitions of U.S. election law relevant to foreign nationals. In an effort to promote better understanding of the law in this area, the Committee on Foreign Investment in the United States made this issue the subject of a program at the American Bar Association's Annual Meeting in San Francisco. One of the program speakers, Lawrence Noble, General Counsel of the Federal Election Commission (FEC), summarized the relevant laws and regulations and decisions interpreting the prohibitions.[3]

The Federal Election Campaign Act of 1971[4] (FECA), prohibits a foreign national from making contributions or expenditures in connection with any U.S. election at either the federal, state, or local level, directly or through any other person, and also prohibits solicitation, acceptance, or receipt of such a contribution.

The FEC definition of a "foreign national" is borrowed from the definition of a "foreign principal" under the Foreign Agents Registration Act.[5] The term includes foreign governments, political parties, corporations, associations, and partnerships. An individual who is a citizen of a foreign country, not lawfully admitted to the United States, and in possession of a "green card" allowing permanent residence status is considered a "foreign national" for purposes of the FECA

Corporations, whether foreign or domestic, are not allowed to make direct contributions or expenditures in connection with federal elections. However, domestic corporations may contribute indirectly through political action committees (PAC's). The FEC's rules require a domestic U.S. subsidiary of a foreign corporation to exercise special care with respect to a PAC. PAC contributions will be deemed to have been by the foreign parent, through the domestic subsidiary, if either: (a) the foreign parent directly or indirectly finances the PAC's administration, establishment, or finance costs, or (b) there is foreign involvement in decision making for the PAC. For example, a foreign national may not: (i) serve as an officer of the

2. BUREAU OF ECONOMIC ANALYSIS, U.S. DEP'T OF COMMERCE, PUB. NO. BEA 97-20, U.S. Investment Position (1997).

3. Lawrence Noble, *Foreign National Prohibitions* of FECA, 1997 A.B.A. SEC. INT'L LAW.

4. 2 U.S.C. § 431, et. seq., *as amended*, at 2 U.S.C. § 441(e) (West Supp. 1998).

5. 22 U.S.C. § 611(b) (1994).

PAC; (ii) be involved in directing the operation of the PAC; (iii) participate in selecting people who operate the PAC; or, (iv) make decisions regarding contributions or expenditures. The FECA prohibitions on foreign parent oversight or decision making with respect to PAC contributions apply to contributions and expenditures at the state and local levels as well, irrespective of whether or not the state or local law permits a corporation to contribute to election campaigns.

During 1997, the FEC announced the completion of at least six compliance cases in which there were allegations of contributions by non-resident foreign nationals involving candidates in Hawaii, Georgia, Florida and California, as well as allegations concerning the 1984 Reagan-Bush campaign. It appears from FEC records that in all but one of these cases, there was no action taken based on the allegations.[6] However, in its request to Congress for supplemental appropriations for enforcement activity in 1997, the FEC's leadership identified investigation of allegations of foreign national contributions as an area for which additional resources would be required.

IV. Unilateral Sanctions as a Disincentive to Foreign Investment in the United States

During 1997, the threat of U.S. unilateral economic sanctions applied for foreign policy purposes was a development of major interest to foreign investors and their legal advisors. The possibility of sanctions under the Iran Libya Sanctions Act (ILSA) and provisions of the Helms-Burton Act attracted the ire of foreign investors and their home country governments, especially in Canada and the European Union.

The sale of a several hundred million dollar U.S. operating subsidiary by France's Total S.A. was believed by many to be motivated by fear of sanctions under ILSA for business activities of the parent firm in Iran. According to a study conducted by the European-American Business Council, 70 percent of European companies surveyed reported that they would be forced to cut their investments in the United States and reduce U.S. employment if threatened by the denial of visas to home country executives, a measure provided for in the Helms-Burton Act.[7] These U.S. laws imposing sanctions extraterritorially also became a factor complicating negotiation of a Multilateral Agreement on Investment.[8]

V. Other Developments

In what may ultimately be one of the most significant positive developments for foreign investment in the United States during 1997, the Federal Communications Commission (FCC) adopted rules in November that would open the U.S. telecommunications market as provided for in U.S. commitments made under the World Trade Organization's agreement on basic telecommunications. The FCC's rule is contingent upon implementation of the multilateral agreement, which was delayed at year's end.

6. *See* FEC News Releases <http://www.fec.gov>.

7. Bureau of National Affairs, *U.S. Sanctions Against Other Nations Have Hurt U.S. Companies*, 14 INT'L TRADE REP. 1710-11 (1997).

8. Bureau of National Affairs, *Canada Considers Helms-Burton Law to be a Deal Breaker in MAI Negotiations*, 14 INT'L TRADE REP. 1681 (1997).