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Economic Issues Under the Omnibus Trade and Competitiveness Act of 1988: An Overview

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I. INTRODUCTION

On August 23, 1988, the U.S. Congress passed the Omnibus Trade and Competitiveness Act of 1988 (the "Trade Act" or "Act").[1] This legislation was designed to address a wide range of problems pertaining to U.S. economic status in the world. At the core of the Trade Act was Congress' desire to remedy the growing trade deficit.

This article will focus on four sections of the Trade Act:[2] 1) exchange rates and economic policy, 2) international debt manage-

1. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, §§ 3001-3604, 102 Stat. 1372 (1988) (codified as amended in scattered sections of U.S.C. (1988)) [hereinafter Trade Act].

2. While each of the following sections are worthy of its own in-depth review, this article will limit itself to a broad overview of these sections.

ment, 3) subsidies and support of U.S. exports, and 4) foreign corrupt practices. This article analyzes the nature of the problem, the implementation strategy under the Act, prior law on the subject, the net change in the law, and the likely effect of the new rules. Wherever pertinent, alternative solutions that were not included in the Act will be discussed.

II. EXCHANGE RATES AND ECONOMIC POLICY

Title III, Subtitle A of the Trade Act is entitled "Exchange Rates and International Economic Policy Coordination Act of 1988."[3] In this portion of the Trade Act, Congress noted that the dramatic increase in the U.S. trade deficit in the 1980s was due to the rise in the relative value of the dollar.[4] Furthermore, Congress found that the shift in exchange rates was partially due to economic policy changes and to monetary policy manipulations on the part of some foreign nations.[5] The resulting artificial currency values produced an imbalance in trade and capital flows, and gave industries in the country which manipulated its currency a substantial competitive advantage over U.S. industries.[6]

In order to sustain a stable and consistent exchange rate and to achieve a balanced U.S. current account, Congress mandated "intervention by the United States in foreign exchange markets as part of a coordinated international strategic intervention effort."[7] The Trade Act recognizes that the key to an orderly adjustment of foreign exchange rates is coordination of macroeconomic policy.[8] To this end, the Congress increased the accountability of the President of the United States for the effects of exchange rates and economic policy on the trade deficit.[9] Furthermore, the Trade Act adopted the goals of the Plaza Agreement of September 1985.[10]

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3. 22 U.S.C. §§ 5301-5354 (1988).
4. *See id.* § 5302(3).
5. *See id.* § 5302(3)(b).
6. *See id.*
7. *See id.* § 5302(9). This intervention was seen as an appropriate response to volatile exchange markets.
8. *See id.* § 5302(1).
9. *See id.* § 5303(4).
10. *See id.* § 5303(1). The Plaza Agreement is a joint statement issued by the Group of 5 (France, Federal Republic of Germany, Japan, United Kingdom, and United States), which acknowledges the danger posed by the deficit current account of the United States and the surplus current accounts of Japan and West Germany. France-Republic of Germany-Japan-United Kingdom-United States: Communique on World Economy and Foreign Exchange Rates, Sept. 22, 1985, *reprinted in* 14 IMF SURVEY 296 (1985); 24 I.L.M. 1731-32

The Trade Act directs the President of the United States to negotiate with other nations to achieve both an integrated approach in macroeconomic policy, and exchange rates and trade levels that are compatible with balanced current accounts.[11] These multilateral negotiations will almost certainly involve intervention in currency markets.

Bilateral monetary negotiations under the Trade Act are assigned to the Secretary of the Treasury (the "Secretary").[12] It is the Secretary's responsibility to examine the exchange rate policies of other nations, in order to determine if any countries are manipulating their own currency to gain unfair trade advantages or to influence the balance of payments.[13] If the Secretary determines that a country is engaging in currency manipulation designed to influence the balance of payments, and if that country has both a material global current account surplus and a significant bilateral trade surplus with the United States, the Secretary must immediately initiate negotiations for the purpose of adjusting exchange rates to fair levels.[14] These negotiations may be direct and bilateral or through the International Monetary Fund (IMF).[15] If negotiations are not undertaken because of possible serious detrimental impact on national economic and security interests, that decision must be reported to the chairman and the ranking minority member of the Senate Committee on Banking, Housing and Urban Affairs and of the House Committee on Banking, Finance and Urban Affairs.[16]

The Trade Act requires the Secretary to make an annual report, with semi-annual updates, to the appropriate committees of the House and Senate.[17] The report must address the past year's developments in currency exchange rates and any intervention in currency markets, and analyze the factors and economic policies that determined the exchange rates.[18] More important, the report must contain the result of the multilateral and bilateral negotiations undertaken and recommendations for any changes necessary

(1985).

11. *See* 22 U.S.C. § 5304(a)(1)(A),(B) (1988).
12. *See id.* § 5304(b).
13. *See id.*
14. *See id.*
15. *See id.*
16. *See id.*
17. *See id.* § 5305(a).
18. *See id.* § 5305(b)(1),(2).

to reach a balance in the current account of the United States.[19] The report, and presumably the recommendations, are to be made after consultation with the Chairman of the Board of the Federal Reserve System.[20] The purpose of such a report is to place the responsibility on Congress to act to correct the effects of imbalanced exchange rates, in the event that multilateral and bilateral policy negotiations break down.

The exchange rate and economic policy provisions under the Trade Act parallel the objectives of the International Monetary Fund.[21] The enforcement means available under the Trade Act, however, are not limited to the enforcement measures the International Monetary Fund may adopt.[22] As a last resort against uncooperative nations, Congress may enact protective legislation such as quotas and import tariffs. Theoretically, any action taken could also involve cutbacks in military assistance or in other non-economic sanctions. As drastic as this may seem, the United States is fighting for its own economic survival. If the threat from another nation's economic policy is deemed serious enough, Congress may enact increasingly restrictive responses until the imbalance is corrected.

On the practical side, the inertia that is inherent in an institution like Congress inhibits immediate or decisive action. The committee process and lobbying of special interest groups serve to slow the reaction time of the House and Senate to the point where several years may have elapsed before action is taken. Also, the Group of Five Agreement and the inherent support for an open market global economy both work against protectionist legislation.[23] In the event that negotiations between the United States and a nation with unfair exchange rates fail to produce an adjustment in that nation's policies, any action that Congress may take is likely to be too little and too late.

The U.S. trade deficit, to a significant extent, is related to exchange rate policies of numerous countries. Under the Trade Act, however, the U.S. exchange rate policy, without additional Con-

19. *See id.* § 5305(b)(5),(6).

20. *See id.* § 5305(a).

21. *See* Second Amendment to the Articles of Agreement of the International Monetary Fund, Apr. 1, 1978, art. IV, 29 U.S.T. 2203, T.I.A.S. No. 8937.

22. For a history of the fund and the effects of conditionality, see Note, *International Monetary Fund Conditionality and Options for Aggrieved Fund Members*, 20 VAND. J. TRANSNAT'L L. 665 (1987).

23. *See* 22 U.S.C. § 5304(a) (1988).

gressional enactments, has no teeth. The President and the Secretary of the Treasury are commanded to negotiate with U.S. trading partners in order to eliminate the unfair competitive advantages created by those "partners."[24] Ironically, neither the President nor the Secretary is empowered to take any action against recalcitrant nations. Instead, the inability to reach an agreement is reported back the House of Representatives and the Senate, together with recommendations and information.[25] Implicit in the Trade Act is that, in order to implement the designs of Congress under the present law, new legislation must be proposed, carried through committees, and approved by the House and the Senate. Legislation that is to be enforced by subsequent legislation would appear to be a somewhat inefficient way to carry out trade policy.

The effectiveness of the Trade Act's exchange rate adjustment as a solution to trade imbalance has been disputed. A "White Paper" report from Japan, cites the U.S. growth rate, coupled with insufficient production capacity and short-sighted management, as the primary causes of the U.S. trade deficit, not any disparity in exchange rates.[26] The report points to the post-Plaza Agreement appreciation to support its proposition concerning the ineffectiveness of exchange rate adjustment where underlying economic conditions remain unchanged. The yen/U.S. dollar exchange rate, in the year following the Plaza Agreement, rose from 200 yen per U.S. dollar to 140 yen per U.S. dollar.[27] At the same time, the United States trade deficit rose from $124.4 billion to $147.7 billion.[28] In a speech on trade relations with Japan, U.S. Representative Glen S. Fukushima noted that the exchange rate adjustments did not produce any corresponding increase in the price of Japanese automobiles sold in the United States.[29] In the same speech, Mr. Fukushima said that non-price factors, such as perceptions of inferior quality and loyalty to domestically produced goods, may account for the failure of U.S. exports to Japan to increase over the

24. *Id.*

25. *Id.* § 5305(b)(6).

26. 4 Int'l Trade Rep. (BNA) 797 (June 17, 1987) [hereinafter Int'l Trade Rep.].

27. *Id.* at 798.

28. *Id.*

29. *Id.* at 802.

same period.[30] Thus, any increase in U.S. exports to Japan and a corresponding slowdown in U.S purchases of Japanese products is likely to happen independent of measured exchange rate adjustments.

Finally, the Trade Act leaves unresolved the question of how any negotiated exchange rate agreement would be carried out. In a floating exchange rate market, the proposed adjustments depend very heavily on currency market intervention by the central banks of the various nations. The Federal Reserve Bank of the United States has historically acted independently in formulating and carrying out economic policy. The Federal Reserve Board is appointed to extremely long terms by the President, but does not report to him.[31] Similarly, the Federal Reserve Bank is a creature of legislative design, but does not depend on Congress for appropriation of funds.[32] Congress undoubtedly has the power to pass legislation forcing the Federal Reserve's Open Market Committee to act in a particular manner to achieve desired economic results.[33]

The Trade Act correctly recognizes the economic impact of large and continuing trade deficits. However, the exchange rate and economic measures chosen to correct the situation may not be enough to be effective. Additionally, it may prove to be difficult to isolate the results of such measures, where so many other factors come to bear on trade deficits.

III. The International Debt Management Act

Title III, Subtitle B of the Act is referred to as the "International Debt Management Act of 1988" (IDMA).[34] Congress, through this section, recognized the interdependency of capital transfers between nations, service costs on external debt, imports and exports and the economic growth of a debtor country.[35] The legislation calls for U.S. policy to broach these problems with the primary goal of stabilizing U.S. banks and lending institutions

30. *Id.*

31. *See* 12 U.S.C. § 241 (1988) (President appoints the members of the Federal Reserve Board to 14 year terms); *but cf.* 12 U.S.C. § 242 (1988) (providing for staggered terms so that a vacancy occurs only once in every 2 years, in order to limit "stacking" by the President).

32. *Id.* § 243.

33. See *id.* § 225a (1988) for establishment of economic goals by Congress.

34. Trade Act, *supra* note 1, § 3101 (codified as amended at 22 U.S.C. § 5321 (1988)).

35. 22 U.S.C. § 5322.

which hold the debts of these debtor nations.[36] The legislation recognizes that a country's debt payments absorb the majority of its foreign currency reserves, which in turn limits its potential purchases of U.S. goods and services.[37] Furthermore, to replenish its foreign currency reserves, a debtor nation is forced to devote a higher percentage of its productive capacity to goods for export, depressing the world market price for such commodities.[38] This has the effect of reducing the market for comparable U.S. goods, both in the United States and abroad.[39]

The IDMA attempts to deal with these problems in two ways. First, it directs the Secretary of the Treasury to investigate the feasibility of establishing the International Debt Management Authority (the "Authority"), to coordinate the purchase of Third World debt from banks and private creditors, and to work towards an acceptable restructuring of Third World debt.[40] Second, the IDMA requires U.S. lending institutions to remove any impediments to renegotiation of loan terms and to minimize the risk to the financial system that is posed by the threat of default.[41]

A. *The International Debt Management Authority*

The purpose of the Authority is to purchase sovereign debt of less developed countries from private creditors at a discount, to negotiate with debtor countries the restructuring of their debt, and to assist creditor banks in liquidating their portfolios of loans to these countries.[42] The Secretary of the Treasury must determine whether the creation of the Authority would have an adverse impact on: a) the discount rate at which sovereign debt is currently traded; b) the probability and severity of default of sovereign debt; and c) the possibility of a slow down or other disruption in the current debt service of these debtors.[43] If the Secretary finds that

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36. *Id.* § 5323(3). The now well-recognized debt crisis, especially in Latin America, has a profound impact on the U.S. trade deficit. The Latin American countries, as long as they are obliged to use up their foreign currency reserves in servicing their debt, cannot purchase U.S. products or services in the quantities necessary to have an impact on the U.S. trade deficit. *Id.*

37. *See id.* § 5322(5).

38. *See id.*

39. *See id.* § 5322(6).

40. *See id.* § 5331(a)(1),(3),(b).

41. *See id.* § 5331(a)(3).

42. *See id.*

43. *See id.* § 5331(a)(2).

such concerns are a real possibility, then he shall report the reasons for such a determination to Congress.[44] If not, he is then required to initiate the negotiations with other nations necessary to establish the Authority.[45]

The character of the Authority is determined by five specific proposals which the Secretary must include as part of the negotiations.[46] These proposals provide that:

1) any loan restructuring assistance provided by such an authority to any debtor nation should involve substantial commitments by the debtor to: a) economic policies designed to improve resource utilization and minimize capital flight, and b) preparation of an economic management plan calculated to provide sustained economic growth and to allow the debtor to meet its restructured debt obligations;[47]

2) support for such an authority should come from industrialized countries and greater support should be expected from countries with strong current account surpluses;[48]

3) such an authority should have a clearly defined close working relationship with the IMF, the International Bank for Reconstruction and Development (IBRD or World Bank), and the various regional development banks;[49]

4) such an authority should be designed to operate as a self-supporting entity, requiring no routine appropriation of resources from any member government, and to function subject to the prohibitions contained in the first sentence of Section 3112(a);[50] and

5) such an authority should have a defined termination date and a clear proposal for the restoration of credit worthiness to debtor countries before that date.[51]

The Secretary of the Treasury is also directed to investigate the assets available from the IMF and the IBRD to serve as collat-

44. *See id.*
45. *See id.*
46. *See id.* § 5331(b).
47. *See id.*
48. *See id.*
49. *See id.*
50. *See id.* § 5332(a). The Trade Act explicitly states that subsequent action on the part of Congress will be required before any funds, appropriations, guarantees or other financial support will be made available for the creation or operation of the Authority.
51. *Id.*

eral for loans to fund the activities of the IDMA.[52] The Secretary must report the results of the investigation, including a report on the progress of negotiations with the other industrialized nations, to Congress every six months beginning from the date of the IDMA's enactment.[53]

Under the IDMA, the IMF and the IBRD must report to Congress within one year from the enactment date of the Trade Act.[54] These reports must review and analyze the debt burden of the developing countries, and explore possible alternative methods of coping with the problem, including means such as discounting, debt conversion (debt-equity swaps), rescheduling, and new lending instruments.[55] The concept of the IDMA is also to be analyzed in the reports.[56]

At the conclusion of the studies and discussions with other nations, the Secretary of the Treasury must submit a report to Congress containing a detailed description of all that has transpired together with his recommendations for the legislation necessary to establish the Authority.[57] Congress has reserved itself the right to take the last steps necessary to create the Authority. Most important, the legislation would contain the appropriation of funds necessary to capitalize the United States share in the venture.[58]

Legal and economic experts consider the debt crisis as a threat to the financial stability of the United States, and a worthy subject of congressional attention. It remains to be seen, however, whether the Authority will ever come into existence or have any substantial impact on the problem. The total amounts at stake are almost too immense for any single nation to deal with, even the United States. At the end of 1987, the total external debt[59] for Latin America (excluding Suriname and Jamaica) was over US$414.5 billion.[60] This

52. *Id.* § 5332(a)(1),(2). The assets of the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (IBRD or World Bank) are primarily gold and uncommitted funds, respectively. The investigation is to be conducted through the United States Executive Director for each of the institutions.

53. *Id.* § 5331(c).

54. *Id.* § 5333(a),(b).

55. *Id.*

56. *Id.*

57. *See id.* § 5331(d).

58. *Id.* § 5332(a).

59. The term "total external debt," includes long-term debt and short-term debt for both the public and private sectors, as well as IMF repurchase obligations. INTER-AM. DEV. BANK, ECONOMIC AND SOCIAL PROGRESS IN LATIN AMERICA 578 (1988).

60. *Id* at 580.

figure includes Brazil's US$121.2 billion debt, Mexico's US$105 billion debt, and Argentina's US$51.6 billion.[61] The total external debt of Latin America had increased by almost US$90 billion since the "crisis" was announced by Mexico's debt-service freeze of Mexico in 1982. The bulk of the increase in Latin America was caused by loans made for the purpose of meeting the scheduled payments on existing debt. The monetary commitment by nations joining the Authority to reduce the debt burden of Latin America needs to be generous to have any appreciable effect.

A stated objective of the legislation is that support for the IDMA should come from the industrialized countries and that such support should be tied to the surplus in current accounts.[62] In 1987, only three nations among the industrialized countries had a surplus current account balance: Japan, West Germany, and the Netherlands. Japan and West Germany had surpluses of US$86.96 billion and US$45.23 billion, respectively, while the Netherlands had a modest surplus of US$3.38 billion.[63] Obviously, these countries would be the first to be asked to finance the Authority.

It is difficult to conceive the reason why either Japan or West Germany should make any significant sacrifices in this regard. Neither country is dependent on Latin American countries as trading partners, nor are their banks threatened with insolvency if there is a default in the foreign debt of those countries. The flood of Organization of Petroleum Exporting Countries (OPEC) deposits and slow demand led lending institutions in the United States to look south for borrowers at that time, the U.S. lenders, spurred by the Eurodollar market, were directly responsible for the dramatic increase in lending to less developed countries.[64]

A contrasting view is that the United States, which had a current account deficit of over $153.9 billion in 1987,[65] and which can fairly be said to be the largest market for Japanese and German exports, must remain financially stable for Japan and Germany to enjoy long-term economic health. In order to induce Japan and

61. *Id.*

62. 22 U.S.C. § 5331(b)(2) (1988). This objective should be a central part of the Secretary of the Treasury's proposals to other industrialized nations.

63. *See International Financial Statistics*, 1988 Y.B. (Int'l Monetary Fund) 445, 371, 527.

64. For a comprehensive analysis of the factors giving rise to such lending practices, as well as an excellent overview of the situation, see Comment, *On Third World Debt*, 25 HARV. INT'L L.J. 83, 88-92 (1984).

65. *See International Financial Statistics, supra* note 63 at 721.

West Germany to contribute significant capital financing to the Authority, the U.S. representative at any negotiations will almost certainly have to commit to equal or greater U.S. contributions. Obviously, after the Latin American countries themselves, the United States stands to benefit most from the resolution of the Latin American debt crisis.[66]

The effectiveness of the Authority's primary strategy, to purchase sovereign debt at a discount from the stated value of the obligation,[67] will be determined by the amount raised for the Authority through initial capitalization and loans secured by IMF and World Bank pledges. The debt purchases should be directed at short-term credit which requires a higher debt-service payment by the debtor countries.[68] Any restructuring or extension on this short-term external debt would have a proportionately greater impact on that nation's required debt-service payments. Obviously, the greater the amount that the Authority has to work with, the greater the impact on the debtor nations' foreign currency outflows.

Another objective of the Authority is to assist creditor banks in reducing their exposure in Third World debt.[69] From the standpoint of the banks, the problem with the Third World debt is not merely the risk of default, but also the concentration of investment in risky loans. In order to alleviate this heavy concentration, the Authority should encourage a commercial market for those loans that it cannot purchase for itself.

One possibility is to convert the loans into bonds, with the same face value and interest rate, but in denominations of $1,000 or $10,000.[70] Banks could then sell these bonds at a discount to investors who are unwilling or unable to invest hundreds of millions of dollars in foreign loans, but are willing to invest smaller

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66. In 1985, U.S. banks' exposure for loans to less developed countries represented 8% of total assets and 124% of capital. *See* Amaral, *The Foreign Debt: From Liquidity Crisis to Growth Crisis*, 19 CASE WESTERN J. INT'L L. 17, 18 (1987).

67. 22 U.S.C. § 5331(a)(3)(A) (1988).

68. *See* INTER-AM. DEV. BANK, *supra* note 59, at 581-82. Although short-term debt does represent a much smaller percentage of total external debt, it generally requires much higher payments of principal.

69. 22 U.S.C. § 5331(a)(3)(C) (1988).

70. A debtor nation is likely to resist issuing bonds which are non-registered and freely traded, because it has an advantage if the indebtedness is held by large lending institutions. The threat of non-payment on identifiable loans has been used to coerce banks into lending more money to debtor countries. A widely dispersed and anonymous class of bondholders would eliminate this negotiating tool.

amounts in traded bonds. Investors would still be taking a risk, but the discounted purchase price would produce a much higher return on investment.[71]

The amount of the discount from face value, representing a loss to banks, would be a function of the effective rate of return to the investor who buys a bond. A key component of the effective rate is the tax rate on the income from the bond. Bonds subject to a much lower tax rate would not have to be discounted as much as a regular bond in order to produce an equivalent return on investment.[72] A variation of this arrangement might allow the debtor nation to share in the discounting process by exchanging bonds with a face value less than the amount of the loan, but with additional features to reduce the risk.[73]

The alternative which has received the greatest amount of publicity is the debt-equity swap.[74] The advantages for the debtor nation are a reduction in the debt service burden and increased investment in its economy. The debt holder either sells the debt to an investor who will exchange it for equity or keeps the equity investment for its own purposes. For example, American Pacific purchased the El Mochito mine in Honduras and required working capital for the mine's operation.[75] Under an agreement with the Honduran Government, American Pacific swapped debt with a face value of US$4.5 million, at the official exchange rate, for nine million *lempiras*.[76] However, American Pacific had purchased the

71. For example, if a bond was issued for $100,000 with annual interest payments at 10%, and maturity in 10 years, what rate could be produced if a subsequent buyer purchased the bond at a discount from its face value? If the investor desired an effective yield of 20%, present value calculations dictate that the price should be $58,120. The banks, in such a scenario, would have to recognize a loss of $41,880.

72. If an investor had desired, as in note 71 *supra*, a yield of 20%, then a tax rate of 30% would give him an effective yield of 14%, after-tax. However, if the same 10%, 10 year bond was tax-free, then he would pay a different discount price to achieve the same yield of 14%. The discounted price would be $79,160, and the bank would only have to write off $20,840. Of course, the United States would lose tax revenue as a result of this scheme.

73. An investor's desired return is a function of the perceived risk of the investment. If a government were to pledge assets to support the bonds, such as the U.S. Treasury bonds with zero coupon features that Mexico has proposed, the investor would accept a lower rate. This would save the banks from a second discount that is too great for their reserves to bear.

74. Sources on debt-equity swaps, along with many other aspects of the debt crisis, can be found in Kudej & Essien, *International Monetary Fund and Debt Crisis: A Selective Bibliography*, 17 N.Y.U. J. INT'L L. & POL. 751 (1985).

75. *See How One MNC Negotiated a Debt Swap in Honduras as Part of Acquisition Deal*, BUS. LATIN AM., July 11, 1988, at 218.

76. *Id.*

debt at a seventy percent discount and actually gained an additional US$3 million in *lempiras*.[77]

Individual debtor nations have structured their programs to fit their own economic needs. Any country whose natural resources have been exploited in the past is quick to ensure that the equity investments held by foreign investors are not in essential industries or do not relinquish too much control over the country's economy. Also, a nation must concern itself with the inflationary effect of issuing local currency to swap for the external debt. Argentina has set quotas for the years 1988 through 1992 which limit the total amount of currency issued to almost $2 billion.[78] Restrictions on projects, as well as dividends and capital repatriation, are also part of the Argentine program.[79] Likewise, Mexico, initially an aggressive participant in debt-equity swaps, still restricts access to some industries through such investment.[80]

The Authority has a cloudy future. Its creation will no doubt be the subject of heated negotiation, especially with Japan and West Germany. If the initial hurdle is cleared, then Congress must consider the reports and recommendations received and make a coherent allocation of funds for the Authority's initial capitalization. Once established, the Authority has to buy the debts of less developed countries while negotiating favorable terms for prospective investors. Similar to the "conditionality" of IMF's special drawing rights,[81] the Authority must condition a restructured loan to a country on the country's changes in internal economic policy.[82] Finally, the Authority is supposed to help the banks dispose of their unwanted loans in an orderly fashion.[83] Together, these may be impossible expectations, and the legislation which conceived it may

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77. *Id.* at 219.

78. See Paz & Tecson, *Argentina's Debt to Equity Conversion Program*, 22 J. WORLD TRADE 81, 82 (1988) for a discussion of the implementation of Resolution No. 992 (Oct. 15, 1987) of the Ministry of Economy.

79. *Id.* at 82-83. Foreign investors still must be approved, conversion funds cannot be used to purchase land or make financial investments, and the dividends in foreign currency may not be collected for four years. Repatriation of capital may not occur for 10 years.

80. *See* Note, *Debt-for-Equity Swaps in Mexico*, 23 TEX. INT'L L.J. 443, 451 (1988). Mexico also has suspended the program twice because of inflationary expectations. *Id.* at 452-56.

81. See INSTITUTE FOR INTERNATIONAL ECONOMICS, IMF CONDITIONALITY (J. Williamson ed. 1983) for a collection of criticisms and comments on conditionality. The policies advocated by the IMF are often highly resented by less developed countries.

82. 22 U.S.C. § 5331(b)(1) (1988).

83. *Id.*

prove to be a well-intended waste.

B. *Regulatory Provisions Affecting International Debt*

Given the catastrophic consequences of a complete default by Third World debtors, it is not surprising that Congress would look for ways to cushion U.S. and world economic vulnerability to the situation. Sections 3121(a) through (d) of the Trade Act, not incorporated into the United States Code, attempt to give the banks some latitude in dealing with the debt crisis.[84] Section 3121(e) amends Title 12 of the United States Code by adding a provision that requires federal agencies which regulate depository institutions to make annual reports to Congress on the status of both foreign lending practices and debt levels at specified U.S. banks.[85] Section 3122 requires that the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation make recommendations on regulatory obstacles which inhibit debt conversions, write-downs or restructurings.[86] Finally, Section 3123 requires the Secretary of the Treasury to investigate the possibilities of a one time allocation of Special Drawing Rights (SDRs) by the IMF to the poorest of the heavily indebted countries, targeted to pay off sovereign debt.[87]

Section 3121(a) states that regulations governing the international assets of the U.S. banks should allow banks as much latitude as possible when negotiating a reduction of principal and interest on Third World debts.[88] This requirement is mirrored by Section

84. *See* Trade Act, *supra* note 1, § 3121(a)-(d).

85. 12 U.S.C. § 3912 (1988). The initial report was to be made on March 31, 1989, and on April 30 of each subsequent year. The report is to be directed to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Banking, Finance and Urban Affairs of the House of Representatives.

The report, which individually targets the nine largest banks under federal agency jurisdiction and the next 13 banks in the aggregate would include the following (in order of asset size): Citicorp, Chase Manhattan Bank, Bank America Corp., Chemical Bank (New York), Morgan Guaranty, Manufacturers Hanover, Security Pacific, Bankers Trust, First Interstate Bankcorp., First Chicago, Wells Fargo, Bank of Boston, Continental Illinois, PNC Financial Mellon Bank, Bank of New England, NCNB Corp., First Union Corp., Sun Trust Banks, First Bank System, Shawmut National, Fleet/Norstar Financial, Irving Bank, Barnett Bank, and NBD Bancorp. Harris, *What Top Banks Make*, BANKER'S MONTHLY, July, 1988, at 13-16.

86. *See* Trade Act, *supra* note 1, § 3122.

87. *Id.* § 3123.

88. *Id.* § 3121(a). The targeted institutions are the "depository institutions" described in § 19(b)(1)(A) of the Federal Reserve Act, clauses (i)-(vi). As defined at 12 U.S.C. § 461(b)(1)(A), the term includes insured bank, mutual savings bank, savings bank, insured

3121(b), which directs regulatory agencies to be as flexible as possible in allowing financial institutions to determine the value of the Third World loans and to account for the changes in such values.[89] As may be expected, a bank might resist reducing the value of a loan on its books if the effect is to reduce the value of the entire foreign loan portfolio. However, banks would be more willing to recognize the reduced value and to restructure the loans accordingly, if the loss could be spread out over a period of time.

Section 3121(c) and (d) deals with Congress' intent that banks with a substantial foreign loan exposure take steps to seek additional equity capital and to bring loan loss reserves up to a more responsible level.[90] These sections place federal agencies in a unique position to enforce their terms, because the sections directly and indirectly control a bank's ability to open new branches, acquire other banks or expand the area of service into fields such as insurance. Also, because a bank's legal lending limit is determined by the bank's capital,[91] any rulings on what is "capital" could limit a bank's ability to pursue the larger corporate loan business. How much pressure the federal regulators will place on the banks and whether the IDMA will be successful are open questions for the future. Obviously, factors like the stock market crash in October 1987 are outside of anyone's control, and the ability of the banks to issue new stock is subject to many different influences.

Section 3121(e) amends the International Lending Supervision Act of 1983[92] by adding a requirement that annual reports be made to Congress on the levels of "value-impaired," "substandard" or other types of troubled loans held by the largest banks.[93] Also required, wherever feasible, is a compilation of new bank loans made

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credit union member or other insured institution. *See* 12 U.S.C. § 461 (b)(1)(A) (1988).

89. *See* Trade Act, *supra* note 1, § 3121(b). Statement 15 of the Financial Accounting Standards Board (FASB) governs accounting by debtors and creditors for troubled debt restructurings. Paragraph 35 generally requires that losses from restructuring be recognized in the accounting period in which such restructuring occurred. FIN. ACCOUNTING STANDARDS BD., ACCOUNTING STANDARDS 1988/89 ED. 176 (1988).

90. *See* Trade Act, *supra* note 1, § 3121(c),(d). In late May and early June of 1987, other large banks followed the lead provided by Citicorp, and added large amounts to their loan loss reserve. Citicorp added $3 billion to its reserve because of foreign debt, resulting in the largest quarterly loss in U.S. history of $2.5 billion. Curiously, Citicorp stock price rose following the announcement of the special allocation.

91. See Glidden, *Capital-Based Limits on International Banking*, 11 N.C.J. INT'L & COMM. REG. 465 (1986) for a discussion on the regulation of bank lending limits under 12 U.S.C.

92. 12 U.S.C. § 3901 (1988).

93. *Id.* § 3912(d)(1).

to heavily indebted less developed countries and any loans to a sovereign power that were written off.[94] The relationship between banks and Third World nations, the progress made by both sides, and the actions by other international regulatory agencies around the globe are also to be reviewed by Congress.[95] The goal of this provision is to ensure that the problem area of international bank lending and the greatest participant banks are not left out of the bright light of congressional attention. Whether the report will generate any action on the part of the legislative branch remains to be seen.

The IDMA is a very generalized enactment requiring that studies or negotiations be undertaken and a report with recommendations be delivered to Congress. Mandatory action on the identified problems is almost universally absent from the legislation. Subsequent enactments are required before any resolution of the problems can be made. This feature makes the current legislation a mere statement, not a law which can be enforced.

IV. Subsidies and Support of United States Exports

Title III, Subtitles C through G, are aimed at conditions or practices which operate to exclude U.S. businesses from foreign markets. The purposes of the legislation include multinational development banks, nations whose export aid amounts to a subsidy, export trading companies owned by banks, primary dealers in government debt instruments, and the status of treatment accorded to U.S. financial institutions overseas. Title III adds to the United States Code, as well as amending existing sections. The most important sections, Subtitles C, D, and F are discussed here.[96]

A. *Multilateral Development Banks*

Subtitle C, entitled "Multilateral Development Banks Pro-

94. *Id.*
95. *Id.*
96. Subtitle E, the "Export Trading Company Act Amendments of 1988," amends the Bank Holding Act of 1956 by further defining an export trading company, leverage, and inventory. Trade Act, *supra* note 1, § 3401 (codified at 12 U.S.C. § 1841 (1988)). Subtitle G, entitled "Financial Reports," requires that Congress be given quadrennial reports on foreign countries' treatment of U.S. financial institutions which are attempting access to that nation's banking and securities markets. *Id.* § 3601 (codified at 22 U.S.C. § 5351 (1988)).

curement Act of 1988,"[97] requires that the Executive Director representing the United States take an active role in the procurement process of such organizations.[98] This includes investigating any complaints from a U.S. participant in the bidding process, and promoting the opportunities for U.S. businessmen in procurement contracts. Further, the Trade Act requires that the Department of Treasury designate an "officer of procurement" to ensure that cooperation and communication exists between the banks, the Treasury, and the Department of Commerce.[99] As the largest participant in the designated organizations, the United States is in a strong position to express its displeasure if it discovers that U.S. businesses are the object of economic discrimination.

B. Export-Import Bank and Tied Aid Credit Amendments

Subtitle D, the Export-Import Bank and Tied Aid Credit Amendments of 1988, addresses the practice of tied aid credits, and the need for continued effort on the part of the Export-Import Bank (Eximbank or "Bank") in this regard.[100] The Eximbank was previously authorized to make grants in order to supplement the financing of U.S. exports.[101] Even though an international agreement exists to regulate unfair tied aid credit programs, Congress felt that the Eximbank should continue its efforts to neutralize and discourage these predatory practices.[102] The Eximbank's authority, which was to end in 1988, was extended to 1989.[103] However, no mention of any change in appropriation was made in the Trade Act legislation.[104] The President of the Eximbank is required to report to Congress on the tied credit program as well as on progress made by the Bank in this area and its recommendations for the future.[105]

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97. *Id.* § 3201 (codified at 22 U.S.C. § 262a (1988)).

98. *Id.* Multilateral Development Banks are defined in the Multilateral Development Banks Procurement Act of 1988, 22 U.S.C. § 262a (1988), as the IBRD, the International Development Association, the International Finance Corporation, the Inter-American Development Bank, the Inter-American Investment Corporation, the Asian Development Bank, the African Development Bank, and the African Development Fund.

99. 22 U.S.C. § 262a(b) (1988).

100. Trade Act, *supra* note 1, § 3301 (codified at 12 U.S.C. § 635 (1988)).

101. 12 U.S.C. § 635i-3(b)(1) (1988).

102. *Id.* § 635i-3(a).

103. *Id.* § 635i-3(b).

104. *Id.*

105. *Id.* § 635i-3(c).

Section 3304 of the Trade Act amends part of the Export-Import Bank Act of 1945 (the "1945 Act").[106] The general rule in the 1945 Act is that the Bank may not extend credit of financial guarantees to the other countries if such assistance causes injury to U.S. producers of the same, similar or competing commodity.[107] The Trade Act amendments clarify the definition of "substantial injury." If the Bank's assistance establishes or increases the foreign country's capacity for production by an amount equal to one percent of U.S. production, it will be deemed a substantial injury for purposes of the 1945 Act.[108]

The amendments further clarify the exception to the general rule.[109] The exception permits the Eximbank to grant direct credit or financial guarantees to foreign countries if the Bank determines that the short- and long-term benefits to U.S. industry and employment outweigh the injury to U.S. producers and employment of the same, similar or competing commodity.[110] The Trade Act amendments specify that the Eximbank may examine both the short-term and long-term injury to U.S. industry and employment.[111] Thus, the Bank will probably grant assistance where the short-term injury to the equivalent U.S. industry is outweighed by the long-term benefits to all U.S. industries and employment.

C. *The Primary Dealers Act*

Subtitle F, the "Primary Dealers Act of 1988," is directed at nations which prohibit U.S. financial firms from doing business overseas.[112] The restrictions employed by the Japanese are singled out.[113]

The Primary Dealers Act responds to unequal treatment by limiting who may be designated as a primary dealer in government debt instruments.[114] The Federal Reserve Board of Governors and the Federal Reserve Bank of New York[115] are prohibited from

106. *Id.* § 635(e).
107. *Id.* § 635(e)(1).
108. *Id.* § 635(e)(3).
109. *Id.* § 635(e)(2).
110. *Id.*
111. *Id.*
112. Trade Act, *supra* note 1, § 3501 (codified at 22 U.S.C. § 5352 (1988)).
113. *Id.* § 5342(a)(3),(4).
114. *Id.* § 5352(b).
115. As depository agents for the Treasury, the Federal Reserve system and the Federal Reserve Banks are the conduits through which government obligations are sold. 15 U.S.C. §

granting or continuing such designations[116] for any foreign person[117] whose country imposes competitive barriers to U.S. financial companies.[118] However, there are exceptions to this rule. If the designation was given prior to July 31, 1987, and control of the company was acquired prior to July 31, 1987 by a foreign person, then the prohibition against a continued designation does not apply.[119] Another exception is granted where a person is a resident of a country that, prior to July 31, 1987, entered into a bilateral agreement with the United States for a free trade area. Similarly an exception is granted if as of July 31, 1987[120] that country was in the process of negotiating a bilateral agreement with the United States pursuant to Title 19 of the United States Code Section 2112(b)(4)(A).[121] Other than these exceptions, the mandate is a step in the right direction: a clear statement of the United States intent to level the playing field.

V. Foreign Corrupt Practices and Review of Acquisitions

For the ease and clarity of conditions under which U.S. businesses operate, Congress passed the Foreign Corrupt Practices Act Amendments of 1988 (the "FCPAA").[122] The FCPAA's purpose, in part, was to eliminate uncertainty over certain possible violations under the existing provisions, which could discourage businesses from entering the export trade.[123] These regulations apply to issuers of securities under Section 12 of the Securities Exchange Act of 1934 (the "Securities Act").[124]

Section 13(b) of the Securities Act is expanded and softened

780-5(f) preserves the authority of the Federal Reserve System within this sphere of influence, while subjecting other dealers to SEC authority. 15 U.S.C. § 780-5(f) (1988).

116. Primary dealer means a "government securities dealer," within the meaning of 15 U.S.C. § 78c(a)(44) (1988), that is monitored by, reports to, and is recognized as a primary dealer by the Federal Reserve Bank of New York. *See* S. Rep. No. 99-426, 99th Cong., 1st Sess. (1985).

117. 22 U.S.C. § 5342(d) (1988) defines foreign person.

118. *Id.* § 5342(b)(1).

119. *Id.* § 5342(b)(2).

120. *Id.* § 5342(c).

121. 19 U.S.C. § 2112(b)(4)(A) (1982) (authorizing the President of the United States to enter into agreements, including the elimination of a duty imposed by the United States, with other nations for the purpose of harmonizing or eliminating barriers to international trade).

122. Trade Act, *supra* note 1, § 5001 (codified at 15 U.S.C. § 78a (1988)).

123. *Id.* § 78b.

124. 15 U.S.C. § 12 (1988).

by the amendments.[125] No criminal penalty attaches to a failure to comply with the internal control and record-keeping provisions with Section 13(b)[126] unless a person acts "knowingly" in any circumvention, falsification or omission.[127] This amendment no doubt relieved the fears of corporate officers, who may have believed that criminal penalties could result from an honest error. The inclusion of "knowingly" brings the law into alignment with traditional requirements of *mens rea*[128] in criminal law.

The holders of less than fifty percent of the voting power of another business concern, if they are issuers of securities under Section 12 of the Securities Act,[129] are obligated to use good faith in an attempt to influence that concern to comply with the record keeping requirements of Section 13(b).[130]

Section 5003 of the FCPAA makes a number of changes in the existing law.[131] Minor changes include a prohibition against inducing a foreign official to "omit to do any act in violation of the lawful duty."[132] More important, the Trade Act clarifies some actions which are not covered by the general prohibitions. A payment which expedites or secures a "routine governmental action" is not in violation of the amended law.[133] A common example might be tipping a customs officer for the prompt processing of baggage or goods.

The FCPAA creates two affirmative defenses for potential defendants: 1) that the challenged action does not violate the written laws and regulations of that other nation;[134] or 2) that the action is a reasonable expense incurred by a foreign official in connection with the promotion of products and services, or the execution of governmental contracts.[135] Again, this is a case of the law recognizing the realities of business.

The U.S. Attorney General is required to issue guidelines and

125. *Id.* § 79.
126. *Id.* § 78m(b)(4).
127. *Id.* § 78m(b)(5).
128. *Mens rea* is a guilty mind, a guilty or wrongful purpose or criminal intent. BLACK'S LAW DICTIONARY 889 (5th ed. 1979).
129. 15 U.S.C. § 78c(8) (1988).
130. *Id.* § 78m(b)(2).
131. *See id.* § 78dd-1.
132. *Id.* § 78dd-1(a)(1)(A).
133. *Id.* § 78dd-1(b).
134. *Id.* § 78dd-1(c)(1).
135. *Id.* § 78dd-1(c)(2).

precautionary procedures that further serve the needs of the U.S. business community with regard to the rules for doing business across the borders.[136] Furthermore, the Attorney General is obligated to respond to inquiries from the public concerning their conformance with the law.[137] The Attorney General's response shall not be made public, despite federal disclosure requirements, unless the requesting party so authorizes.[138]

A. *Authority to Review Mergers, Acquisitions, and Takeovers*

Section 5021 of the FCPAA, entitled "Authority To Review Certain Mergers, Acquisitions and Takeovers," grants to the President the power, under the guise of the "Defense Production Act of 1950,"[139] to suspend any merger or acquisition of industry the President judges to be a threat to national security.[140] This authority may be exercised, after an investigation, only if the President has found credible evidence that a foreign interest exercising control may act adversely to U.S. national security,[141] *and* if no other provisions of law are an adequate source of Presidential authority.[142] These findings must be reported, in writing, to both the Senate and the House of Representatives.[143] The national security interest must be evaluated from three perspectives: 1) domestic production needed for national defense; 2) capability and capacity of domestic industry to meet these requirements; and 3) the control over domestic activities and commerce by foreign citizens.[144] The President may direct the U.S. Attorney General to seek relief in the federal district courts, including an order for divestment.[145] However, divestment is an extreme measure, and not likely to be used. Its value may lie in the fact that mere presidential scrutiny may discourage certain takeovers of U.S. businesses by foreign cor-

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136. *Id.* § 78dd-1(d)(2).

137. *Id.* § 78dd-1(e)(1).

138. *Id.* § 78dd-1(e)(2). Specifically exempted is the requirement that an agency make available to the public its statements of policy and interpretations adopted by the agency, as set out in 5 U.S.C. § 552(a)(2)(B).

139. 50 U.S.C. app. § 2158 (1988).

140. *Id.* § 2170(a).

141. *Id.* § 2170(d)(1).

142. *Id.* § 2170(d)(2).

143. *Id.* § 2170(f).

144. *Id.* § 2170(e).

145. *Id.* § 2170(c).

porations if a domestic concern can call enough attention to the proposed takeover.

VI. Conclusion

The Omnibus Trade and Competitiveness Act of 1988 cannot be expected to be remembered among the great pieces of U.S. legislation. It will likely prove to be ineffective because its provisions concerning exchange rates and international debt are largely unenforceable. The congressional mandate contained in the Trade Act is a directive to go forth and negotiate. If the negotiations are not satisfactory, a report is to be made back to Congress, which will then contemplate appropriate action on the problem. As previously stated, any law that requires a subsequent law to enforce its provisions is itself an unenforceable law. Unfortunately, this relegates the Act to being a piece of largely ineffective legislation.

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