LEGAL TAKEOVERS OF NATIONS: THE VALUE AND RISKS OF FOREIGN DIRECT INVESTMENT IN A GLOBAL MARKETPLACE

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I. INTRODUCTION: THE REASON FOR FOREIGN DIRECT INVESTMENT

Although Foreign Direct Investment ("FDI") provides economic benefits to host nations, the findings in this Article indicate that government and private reports overstate the value of foreign investment and understate its costs and risks. This Article focuses on several specific adverse effects of FDI. First, promoted through free trade and bilateral agreements, foreign investment provides value to the U.S., but it may contribute to income gaps among individuals. Second, through inward and outward FDI, U.S. corporations avoid taxation through operating in tax haven nations, thereby contributing to inequities. Third, sovereign wealth funds and state operated enterprises are investors with political motivations that may harm U.S. interests. The United Nations 2013 World Investment Report found that state-owned corporations increased from 650 to 845 from 2010 to 2012.[2] Their FDI flows of $145 billion were almost 11% of global FDI.[3] Fourth, the Supreme Court's 2010 decision in *Citizens United* redistributed political influence and power from individuals to corporate and other business entities,

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[2] *Global Value Chains: Investment and Trade for Development*, WORLD INV. REPORT 2013 i, xiv (2013), http://unctad.org/en/PublicationsLibrary/wir2013_en.pdf.

[3] *Id.*

which are influenced by foreign nations and firms.[4]

FDI has an enormous influence on U.S. affairs because its financial value is significant. In 2013, the total of all FDI in the U.S. was $4.6 trillion, when measured by U.S. assets of foreign affiliates, and FDI inflows totaled $193 billion, according to the U.S. government.[5] In 2013, the World Bank concluded that the U.S. was the world's second largest recipient of FDI, with $295 billion, following China's $348 billion.[6] This Article describes how, with so much money at stake, certain problems have become more acute, such as tax avoidance, theft of trade secrets, bribery, and economic espionage. But, the problem that may surpass all the others is the newfound ability of foreign corporations to influence American elections through their U.S. subsidiaries. Ultimately, the benefits of FDI exceed the costs, but the U.S. will need to acquire much more information on foreign entities that invest in U.S. companies.

With exceptions concerning national security, the U.S. government's position toward foreign investment was one of neutrality, although in recent years, for the first time, the Bush and Obama Administrations sought vigorously to promote FDI.[7] Despite China's advances, the U.S. is considered by corporations to be the most attractive place for FDI and from 2006 to 2013 received the most total FDI.[8] In 1977, the Carter Administration neither favored nor disfavored inward or outward foreign investment.[9] Its policy was that "international investment will generally result in the most efficient allocation of economic resources if it is allowed to flow according to market forces; there is no basis for concluding that a general policy of actively promoting or discouraging international investment would further the U.S. national interest."[10] The Reagan Administration focused on preventing trade barriers and supporting private foreign investment in less developed countries, and the Clinton Administration supported the Multilateral Agreement on Investment draft, which would have created a more uniform

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[4] *See generally* Citizens United v. Federal Election Commission, 558 U.S. 310 (2010).

[5] *Winning Business Investment in the United States*, DEP'T OF COMMERCE 1, 8 (May 2014), http://www.whitehouse.gov/sites/default/files/docs/winning_business_investment_in_the_united_states.pdf.

[6] *Foreign direct investment, net inflows*, WORLD BANK, http://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD/countries?display=default (last visited Mar. 7, 2015).

[7] *See* Toluse Olorunnipa, *Obama Seeks Boost in Foreign Investment at SelectUSA Summit*, BLOOMBERG, http://www.bloomberg.com/politics/articles/2015-03-23/obama-seeking-to-boost-foreign-investment-at-selectusa-summit (last updated Mar. 23, 2015, 3:21 PM); Joanna Rubin Travalini, *Symposium on the Globalization of Private Equity: Changes in the International Market and the Impact on Private Equity Investment: Comment: Foreign Direct Investment in the United States: Achieving a Balance Between National Economy Benefits and National Security Interests*, 29 NW. J. INT'L L. & BUS. 779, 791 (2009).

[8] DEP'T OF COMMERCE, *supra* note 5, at 2–3.

[9] JAMES K. JACKSON, CONG. RESEARCH SERV., RL33984, FOREIGN DIRECT INVESTMENT: CURRENT ISSUES 3 (2010), http://fpc.state.gov/documents/organization/139257.pdf.

[10] *Id.* (citing *The Operations of Federal Agencies in Monitoring, Reporting on, and Analyzing Foreign Investments in the United States: Hearing Before the Subcomm. of the Comm. on Gov't Operations*, 96th Cong. 61 (1979)).

regulatory system of foreign investment in nations.[11]

Despite the threat of global terrorism during his Administration (2001–2009), President Bush concluded that, "[w]hile my Administration will continue to take every necessary step to protect national security, my Administration recognizes that our prosperity and security are founded on our country's openness."[12] In 2007, the International Trade Administration, within the Department of Commerce, announced Invest in America, a program designed to attract FDI.[13] In 2008, President Bush said:

> The Executive Order reaffirms our commitment to open economies and our policy of welcoming foreign investment and the important economic benefits that such investment brings. At the same time, the Executive Order sets forth procedures for protecting our national security, recognizing that our openness is vital to our prosperity and security.[14]

The Obama Administration has more vigorously encouraged foreign investment. The Administration has directed staff at foreign embassies to find private investors and cabinet secretaries to lobby foreign CEOs.[15] In 2011, it created SelectUSA, a program in the Commerce Department that helps foreign companies identify tax incentives, and established a $1 trillion investment initiative through the President's Council on Jobs and Competiveness.[16]

Despite its salutary economic effects, FDI is often accompanied by undesirable individual, corporate, and state crime, including tax evasion or avoidance, theft of trade secrets, economic espionage, and bribery. The U.S. Foreign Corrupt Practices Act ("FCPA") prohibits bribery of foreign officials and, as a means to detect and prosecute bribery, requires companies to keep certain books and records.[17] The FCPA has wide extraterritorial application, potentially applying "to any individual, firm, officer, director, employee, or

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[11] *Id.*

[12] *Id.* at 16 (citing Office of the Press Sec'y, *President Bush's Statement on Open Economies*, U.S. DEP'T OF STATE (May 10, 2007), http://2001-2009.state.gov/e/eeb/rls/prsrl/2007/84660.htm).

[13] *Commerce to Launch New Federal Initiative to Attract Foreign Investment*, INT'L TRADE ADMIN. (Mar. 7, 2007), http://www.trade.gov/press/press_releases/2007/investamerica_030707.asp.

[14] Mike Godfrey, *Bush and Paulson Comment on Foreign Investment in United States*, TAX-NEWS (Jan. 24, 2008), http://www.tax-news.com/news/Bush_And_Paulson_Comment_On_Foreign_Investment_In_United_States____29736.html.

[15] DEP'T OF COMMERCE, *supra* note 5, at 14.

[16] *Id.* at 12; *see also Recommendations from the President's Council on Jobs and Competitiveness*, WASHINGTON POST (Oct. 16, 2011), https://www.washingtonpost.com/business/capitalbusiness/recommendations-from-the-presidents-council-on-jobs-and-competitiveness/2011/10/14/gIQAJuAApL_story.html.

[17] 15 U.S.C. § 78dd-1 (2012); Stacey L. McGraw & Stacey E. Rufe, *The Foreign Corrupt Practices Act: An Overview of the Law and Coverage–Related Issues*, AM. BAR ASS'N (Mar. 21, 2014), http://apps.americanbar.org/litigation/committees/insurance/articles/janfeb2014-foreign-corrupt-practices-act.html.

agent of a firm and any stockholder acting on behalf of a firm[]"[18] anywhere in the world, so long as a firm or person is a securities issuer in the U.S., a domestic concern, or a foreign national or business.[19] As of 2014, eight of the ten largest U.S. settlements under the FCPA involved foreign companies from developed nations, and all of the settlements were with firms in nations that are members of the Organisation for Economic Co-operation and Development ("OECD").[20] In recent years (2006–2013), the U.S. Securities and Exchange Commission has brought from about eight to eighteen civil enforcement actions per year.[21] The settlements from just a five-year period total $3.82 billion.[22] The top U.S. settlements under the FCPA were:

1. Siemens (Germany): $800 million in 2008.
2. KBR / Halliburton (USA): $579 million in 2009.
3. BAE (UK): $400 million in 2010.
4. Total S.A. (France): $398 million in 2013.
5. Alcoa (U.S.): $384 million in 2014.
6. Snamprogetti Netherlands B.V. / ENI S.p.A (Holland/Italy): $365 million in 2010.
7. Technip S.A. (France): $338 million in 2010.
8. JGC Corporation (Japan): $218.8 million in 2011.
9. Daimler AG (Germany): $185 million in 2010.
10. Weatherford International (Switzerland): $152.6 million in 2013.[23]

One might conclude that such established firms (KBR/Halliburton, Siemens, BAE, Total S.A., Alcoa, and Daimler, for example) from these advanced

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[18] *Foreign Corrupt Practices Act: Antibribery Provisions*, U.S. DEP'T OF JUSTICE (July 22, 2004), http://acfcs.org/wp-content/uploads/2012/05/FCPA-DoJ-Laypersons-Guide.pdf.

[19] "Under the FCPA, U.S. jurisdiction over corrupt payments to foreign officials depends upon whether the violator is an 'issuer,' a 'domestic concern,' or a foreign national or business." *Id.* "An 'issuer' is a corporation that has issued securities that have been registered in the United States or who is required to file periodic reports with the SEC. *Id.* A "domestic concern," on the other hand, "is any individual who is a citizen, national, or resident of the United States, or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship." *Id.* A domestic concern "has its principal place of business in the United States, or which is organized under the laws of a State of the United States, or a territory, possession, or commonwealth of the United States." *Id.*

[20] Richard L. Cassin, *Alcoa Lands 5th on our Top Ten List*, THE FCPA BLOG (Jan. 10, 2014, 1:08 AM), http://www.fcpablog.com/blog/2014/1/10/alcoa-lands-5th-on-our-top-ten-list.html; *Largest Settlements Under the Foreign Corrupt Practices Act*, N.Y. TIMES (Sept. 3, 2012), http://www.nytimes.com/interactive/2012/09/03/business/largest-foreign-corrupt-practices-act-settlemments.html?ref=global; *List of OECD Member Countries – Ratification of the Convention on the OECD*, OECD, http://www/oecd.org/about/membersandpartners/list-oecd-member-countries.htm (last visited Mar. 27, 2015).

[21] *SEC Enforcement Actions: FCPA Cases*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml (last visited Mar. 27, 2015).

[22] Cassin, *supra* note 20.

[23] *Id.*

nations (United States, Germany, United Kingdom, Netherlands, Italy, France, Hungary, and Switzerland) would not be involved in bribery, unless the crime is a pervasive practice in foreign investment.[24]

Despite such recurring risks, the United States' experience with FDI has been profitable, albeit limited mainly to firms from ten developed nations (United Kingdom, Japan, Netherlands, Germany, Canada, Switzerland, France, Luxembourg, Belgium, and Australia).[25] By 2012, FDI was about 16% of the U.S. Gross Domestic Product ("GDP").[26] This is "the net book value of foreign direct investors' equity in, and outstanding loans to, their affiliates in the United States."[27] Still, with technology and the easy movement of firms across national borders, the mechanics of transnational crimes are far different now when compared with the clunky clandestine meetings of the past that were the gravamen of bribing and spying. The theft of trade secrets, another historic act of state and firms, can be accomplished from computers in Beijing or Moscow and through employees' collecting their firms' information on discs for the benefit of a foreign country or firm.

China and Russia present unique challenges because they have vigorous programs through which they sanction and participate in stealing trade secrets and classified government information.[28] By one estimate, China steals intellectual property in the U.S. valued at between $50 and $100 billion a year, with a loss twice as large if the U.S. global economy is considered.[29] In gaining international influence, especially in the Pacific, China often provides nations with significant military hardware and technology.[30]

Aside from the risks presented by state-sponsored crime, FDI in the U.S. provides many benefits. Foreign firms necessarily employ U.S. workers. As noted below, through bilateral investment treaties ("BITs") between the U.S. and the foreign firms' home nations, the firms may take their disputes with the U.S. government to binding arbitration rather than to federal court,

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[24] *Id.*

[25] *Foreign Direct Investment in the United* States, DEP'T OF COMMERCE 1, 6 (Oct. 2013), https://www.whitehouse.gov/sites/default/files/2013fdi_report_-_final_for_web.pdf.

[26] *Foreign Direct Investment in the United States*, ORG. FOR INT'L INV. 1, 1 (2013), http://www.ofii.org/sites/default/files/FDIUS_2013_Report.pdf.

[27] JAMES K. JACKSON, CONG. RESEARCH SERV., RS21857, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES: AN ECONOMIC ANALYSIS 2 n.3 (2013), http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=2208&context=key_workplace.

[28] *Foreign Spies Stealing U.S. Economic Secrets in Cyberspace: Report to Congress on Foreign Economic Collection and Industrial Espionage, 2009–2011*, OFFICE OF NAT'L COUNTERINTELLIGENCE EXEC. 1, 5 (Oct. 2011), http://www.ncix.gov/publications/reports/fecie_all/Foreign_Economic_Collection_2011.pdf.

[29] C. Fred Bergsten, Peterson Inst. for Int'l Econ., The United States in the World Economy, Speech delivered at the Chautauqua Lecture Series, "The US Economy: Beyond a Quick Fix" (Aug. 12, 2011), http://www.iie.com/publications/papers/paper.cfm?ResearchID=1905.

[30] Jeryl Bier, *Pentagon: Military Losing Technological Superiority to China*, THE WEEKLY STANDARD (Nov. 6, 2014, 9:04 AM), http://www.weeklystandard.com/blogs/pentagon-military-losing-technological-superiority-china_818298.html#!.

where all U.S. firms must go. Sovereign wealth funds, as passive investors, may receive favorable tax treatment that is unavailable to U.S. firms.[31] FDI is valuable to the U.S., but the government should tread more lightly in extolling its virtues, especially because future FDI will bring new costs and risks.

II. THE BENEFITS AND COSTS, ILLUSIONS, AND FUTURE OF FDI

A. Benefits and Costs

Inward FDI means generally that firms operating in a host nation are controlled by firms rooted in another nation. Under the Code of Federal Regulations, "*Foreign direct investment in the United States* means the ownership or control, directly or indirectly, by one foreign person of 10 per centum or more of the voting securities of an incorporated U.S. business enterprise or an equivalent interest in an unincorporated U.S. business enterprise, including a branch."[32] In determining what companies must report to it, the U.S. Commerce Department characterizes foreign interests as:

> All U.S. business enterprises in which a foreign person (in the broad legal sense, including a company) owns directly and/ or indirectly a ten-percent-or-more voting interest (or the equivalent) are subject to these [government] reporting requirements. This includes foreign ownership of real estate, improved and unimproved, except residential real estate held exclusively for personal use and not for profit making purposes.[33]

FDI in the U.S. comprises foreign parent firms' equity contributions, reinvestments of earnings of the U.S. affiliates, and loans to the affiliates.[34] Equity contributions include the parent firms' establishment of new affiliates or the acquisition of additional interests in current affiliates; capital contributions to affiliates; and the use of stock to acquire existing businesses.[35]

Foreign investment creates jobs with wages that are 33% higher than those in other U.S. jobs because foreign companies invest in knowledge-based

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[31] Rufus V. Rhoades & Alexey Manasuev, *Practical Tax Considerations for Sovereign Wealth Fund Investments in the U.S.*, LEXISNEXIS LEGAL NEWSROOM TAX LAW (Jan. 2, 2012, 1:33 PM), http://www.lexisnexis.com/legalnewsroom/tax-law/b/stateandlocaltaxation/archive/2012/01/02/practical-tax-considerations-for-sovereign-wealth-fund-investments-in-the-u-s.aspx.

[32] 15 C.F.R. § 806.15(a)(1) (2013).

[33] *Current Reporting Requirements for BEA Surveys of Foreign Direct Investment in the United States*, U.S. BUREAU OF ECON. ANALYSIS 1, 1 (Nov. 2014), http://www.bea.gov/surveys/pdf/current_Reporting_Requirements.pdf.

[34] Marilyn Ibarra-Caton & Raymond J. Mataloni Jr., *Direct Investment Positions for 2013*, U.S. BUREAU OF ECON. ANALYSIS 1, 5 (July 2014), http://www.bea.gov/scb/pdf/2014/07%20July/0714_direct_investment_positions.pdf.

[35] *Id.* at 8.

and high-skilled industries.[36] The foreign-based jobs pay about $77,000 in yearly compensation per employee, where the average compensation for all workers is about $58,000.[37] The higher pay and greater performance of the U.S. affiliates of foreign firms is partly to be expected. With globalized marketplaces, today's worldwide FDI is out of all proportion to the past. For example, the larger average size of the factories of foreign firms in the U.S. are due to foreign investors focusing on larger and higher capital-intensity plants to minimize the risk of investing abroad, especially in automobile factories in the U.S.[38]

Globalized foreign investment on a large scale is new, and so are the foreign firms' factories, which provide greater productivity than older U.S.-based factories.[39] Large foreign firms are relatively likely to have proven technologies that they want to transport to the U.S. to engage the large consumer market. Moreover, foreign firms operating in the U.S. experience relatively high costs due to labor costs and government regulation. They are unlikely to start new plants in the U.S. unless they can do so in states that do not have a strong union presence and are willing to provide incentives to the companies, which included Alabama, Georgia, and Tennessee.[40]

B. *The Illusion of FDI*

Restraint should temper the exuberance over FDI, especially the investments of U.S. companies in other countries ("outward FDI"). For example, FDI, as now counted, may amount to U.S. firms' shuffling assets from one nation to another to avoid taxation. This is not usually illegal, but when the assets are transferred across borders they may count as foreign investment but provide little or no value to any company or country. In 2013, U.S. companies directed over 70% of outward FDI to eleven countries: Netherlands (15.5%); United Kingdom (12.3%); Luxembourg (8.9%); Canada (7.9%); Bermuda (6.2%); Ireland (5.1%); United Kingdom Islands in the Caribbean (5.0%); Australia (3.4%); Singapore (3.3%); and Switzerland (2.8%).[41] Behind these countries were generally much larger economically influential nations and would be expected to garner a much larger share of U.S. investment: Japan, Germany, Mexico, Brazil and France.[42] The outward U.S. FDI was about $4.66 trillion in 2013.[43]

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[36] DEP'T OF COMMERCE, *supra* note 5, at 3.

[37] *Id.* at 10.

[38] Daniel Gross, *Big Three, Meet the "Little Eight:" How Foreign Car Factories have Transformed the American South*, SLATE (Dec. 13, 2008, 6:51 PM), http://www.slate.com/articles/business/moneybox/2008/12/big_three_meet_the_little_eight.html.

[39] *Id.*

[40] *Id.*

[41] *Archive for the 'Direct Investment' Category*, U.S. BUREAU OF ECON. ANALYSIS BLOG (July 31, 2014), http://blog.bea.gov/category/direct-investment.

[42] *Id.*

[43] Ibarra-Caton & Mataloni Jr., *supra* note 34, at 1.

Seven of the top eleven nations (Netherlands, Luxembourg, Bermuda, Ireland, Islands in the Caribbean, Singapore, and Switzerland) are exceptionally small and have relatively few resources to trade. American companies' *investment* in these countries may be characterized as outward FDI, but it is really a transaction that produces little value. To illustrate, "[f]our-fifths of the position in the Netherlands was accounted for by holding companies that likely invested the funds in other countries . . . ."[44] In 2013, inward FDI was about $2.764 trillion.[45] The nations whose companies have the largest investments in the U.S. ("inward FDI") are: United Kingdom (18.8%); Japan (12.4%); Netherlands (9.9%); Canada (8.6%); France (8.2%); Switzerland (7.6%); Germany (7.6%); and Luxembourg (7.3%).[46] Similarly, such small countries as the Netherlands, Switzerland, and Luxembourg would not be expected to have such a large percentage of the inward FDI unless companies were transferring assets to avoid taxes. The money flowing to and from and through the Netherlands, Luxembourg, Bermuda, Ireland, UK Caribbean Islands, Singapore, and Switzerland is real, but the FDI represented by that money is an illusion. Firms are moving assets on paper to avoid taxation. The transfers have no economic value.

The eight nations satisfy the general definition of a "tax haven."[47] Tax havens are characterized by their imposition of no or only nominal taxes (the main criterion); a lack of transparency; laws or administrative practices that prevent nations from exchanging information on taxation; and an absence of a requirement of substantial activity before a firm can claim residence in the tax haven nation.[48] In 2009, the Treasury Department listed the Netherlands as a tax haven, but de-listed it after the Netherlands complained to the Obama Administration.[49] Nonetheless, investors surely consider the Netherlands a tax haven.

> First, although [Netherlands'] headline tax rate is 25.5% . . . it deliberately offers companies who would not otherwise seek to be resident within its territory the means to reduce their tax charges on interest, royalties, dividend and capital gains income from foreign subsidiaries. This is largely through an arrangement . . . that exempts dividends and capital gains from subsidiary companies abroad from

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[44] *Id.* at 4.

[45] *Id.* at 1.

[46] *Id.* at 9.

[47] JANE G. GRAVELLE, CONG. RESEARCH SERV., R40623, TAX HAVENS: INTERNATIONAL TAX AVOIDANCE AND EVASION 3 (2009), http://www.cob.calpoly.edu/wp-content/blogs.dir/1/files/2010/03/Congressional-Report-July-2009.pdf.

[48] *Progress in Identifying and Eliminating Harmful Tax Practices*, OECD 3, 10 (2000), http://www.oecd.org/tax/harmful/2090192.pdf.

[49] Dorian De Wind, *The Netherlands Surprised, "Miffed," by Obama's Tax Haven "Slur,"* THE MODERATE VOICE (May 5, 2009), http://themoderatevoice.com/31053/the-netherlands-surprised-miffed-by-obamas-tax-haven-slur/.

> corporate income tax in the Netherlands. A second reason is the unusually large Double Taxation Treaty (DTT) network [and the U.S. and the Netherlands have a tax treaty] that substantially reduces withholding taxes on dividend, interest and royalty payments between treaty countries and the Netherlands which in combination with the participation exemption means that investment income enjoys very low rates of tax in the Netherlands. A third reason is the advance tax ruling system that gives certainty to multinationals about how the income of their Dutch subsidiaries will be taxed.[50]

"Empirical evidence . . . provides little support for this [OECD] belief[]" that tax treaties, designed to avoid double taxation, promote FDI.[51] "Instead, the data suggest that treaties have either a zero or even a negative effect on FDI . . . [because] investment in mature subsidiaries may be independent of the withholding tax reductions treaties achieve[]" and, in a rich irony, treaties work to reduce tax evasion, which reduces FDI.[52]

Firms from the United States are booking profits in overseas tax havens to avoid taxation in the United States.[53] But they are not alone. Multinational corporations transfer about 33% of their FDI through tax havens.[54] Statistics from the Bank of International Settlement show that about 50% of international banking assets and liabilities have been routed through offshore financial centers since the early 1980s.[55]

> Because of a feature in our [U.S.] tax system known as deferral, U.S. multinationals can delay paying U.S. taxes on overseas profits indefinitely, whereas they must pay taxes on domestic profits in the year they are earned. Overseas profits are taxed only when and if they are returned to the United States—and often not even then.[56]

One study showed that the collective corporate tax rates in the Netherlands, Luxembourg, Ireland, Bermuda, Switzerland, and Singapore to be 4% or lower, which is why the U.S. multinational firms establish paper affiliates in

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[50] Richard Murphy, *The Netherlands is a Tax Haven*, TAX RESEARCH UK BLOG (Mar. 9, 2009), http://www.taxresearch.org.uk/Blog/2009/03/09/the-netherlands-is-a-tax-haven/; *Tax Convention with the Netherlands*, IRS (Jan. 1, 1994), https://www.irs.gov/pub/irs-trty/nether.pdf.

[51] Ronald B. Davies, *Tax Treaties, Renegotiations, and Foreign Direct Investment*, UNIV. OF OREGON 1, 2 (June 2003), http://scholarsbank.uoregon.edu/jspui/bitstream/1794/116/1/2003-14.pdf.

[52] *Id.*

[53] David Kocieniewski, *G.E.'s Strategies Let It Avoid Taxes Altogether*, N.Y. TIMES (Mar. 24, 2011), http://www.nytimes.com/2011/03/25/business/economy/25tax.html?pagewanted=all.

[54] Ronen Palan, *History of Tax Havens*, HISTORY & POLICY (Oct. 1, 2009), http://www.historyandpolicy.org/policy-papers/papers/history-of-tax-havens.

[55] *Id.*

[56] Seth Hanlon, *Why We Need a Minimum Tax on U.S. Corporations' Foreign Profits*, CTR. FOR AM. PROGRESS (Feb. 10, 2012), https://www.americanprogress.org/issues/tax-reform/report/2012/02/10/11064/why-we-need-a-minimum-tax-on-u-s-corporations-foreign-profits.

and report a large portion of their profits as emanating from those nations.[57]

The U.S. firms avoid taxes through four methods.[58] One method is to move intangible property, such as patents and licenses, to their affiliates in tax haven nations, where royalties may not be taxed.[59] For instance, members of the Rolling Stones, from the UK, and U2, from Ireland, have moved their profits to the Netherlands, which does not tax royalties.[60] Second, the firms book profits in a tax haven nation through "transfer pricing."[61] The firm may develop and manage an asset in the U.S. (such as a patent) but assign the patent to a subsidiary firm in a tax haven nation, where the product is produced for $1, for example. The product is shipped to the U.S. and sold there for $2. The firm's profit of $1 is booked in the tax haven nation, although the U.S. firm produced, managed, and sold the product solely in the United States.[62]

Through "expense allocation," the third method, a firm will borrow money in the U.S. to support the product in the above example and receive an immediate deduction under U.S. tax law, saving the firm 35% of the interest on the loan.[63] The profits are booked to a tax haven nation, where they are taxed slightly or not at all.[64] Fourth, through "profit stripping," multinational firms will move profits from a higher-taxing nation to a tax haven.[65]

> These types of profit-stripping strategies do not directly reduce U.S. tax but they permit U.S. multinationals to shift income from relatively high-tax foreign countries to low-tax foreign countries. In so doing, they enhance the rewards for moving investment outside the United States in the first place, even to high-tax countries.[66]

Other than tax avoidance, there is almost no reason for U.S. firms to be sending and receiving money to and from small tax haven nations. "In 2008 the Government Accountability Office found that corporations pay a 16.1 percent effective tax rate on 'foreign-source' income (combining both U.S. and foreign taxes) and a 25.2 percent rate on U.S.-source income[,]" even as the tax rates in the tax havens continue to decline.[67]

The U.S. tax laws that encourage movement to tax havens result in

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[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] Lynnley Browning, *The Netherlands, the New Tax Shelter Hot Spot*, N.Y. TIMES (Feb. 4, 2007), http://www.nytimes.com/2007/02/04/business/yourmoney/04amster.html?pagewanted=print.
[61] Hanlon, *supra* note 56.
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.*

lost jobs in the United States. Multinational firms, which can operate abroad, have an advantage over the local firms that are taxed under U.S. rates; the process reduces competitiveness. Large firms with intangible assets, such as patents and copyrights, can more easily locate in tax haven nations than can firms with factories used for building infrastructure in the tax haven nations. This tax system deprives the United States of possibly $100 billion per year.[68]

Taxation avoidance, alone, contributes to inflated estimates of the value of FDI. But, also, FDI has significant direct and indirect costs, many of which are not fully considered in government or non-government reports. The success of FDI in the United States has to be qualified because *foreign* investment has a sizable domestic source in that all firms, domestic or foreign, can raise funds through borrowing from a parent, issuing stock to obtain equity capital, or reinvesting their earnings, which foreign firms do frequently within the United States.[69] From the years 1999–2006, only 8% of foreign investment in the U.S. arrived via a loan from a foreign parent to a U.S. affiliate.[70] "Equity capital raised in the U.S. capital markets accounted for 77% of the share of the funds foreign firms used to invest, with the rest, 15%, generated from the reinvested earnings of the foreign firms."[71] In contrast, foreign affiliates of U.S. firms derived 72% of their funds from reinvested earnings.[72] This means that 72% of the value of FDI into the U.S. was raised inside the United States, not from foreign markets or foreign firms.[73]

The government's overstatement of the benefits of FDI is illustrated in a 2011 Commerce Department estimate of the number of jobs in the U.S. associated with FDI.[74] In surveying FDI activity over the prior decade, the Commerce Department estimated that FDI provided 5 million jobs in the U.S.[75] This estimate might be accurate, but the impression it gives is that all the jobs were the result of inward FDI (jobs provided by foreign companies operating inside the U.S.). But, from 1998 to 2008, foreign firms' acquisitions of businesses in the U.S. accounted for "90% of the assets of the businesses that were either newly established or acquired by foreign investors, 95% of the increases in employment, 92 % [sic] of the sales, and 91% of the investment outlays."[76] In other words, foreign firms bought existing businesses, where U.S. workers had already been employed.

Most of the "5 million jobs" from foreign investment had been filled

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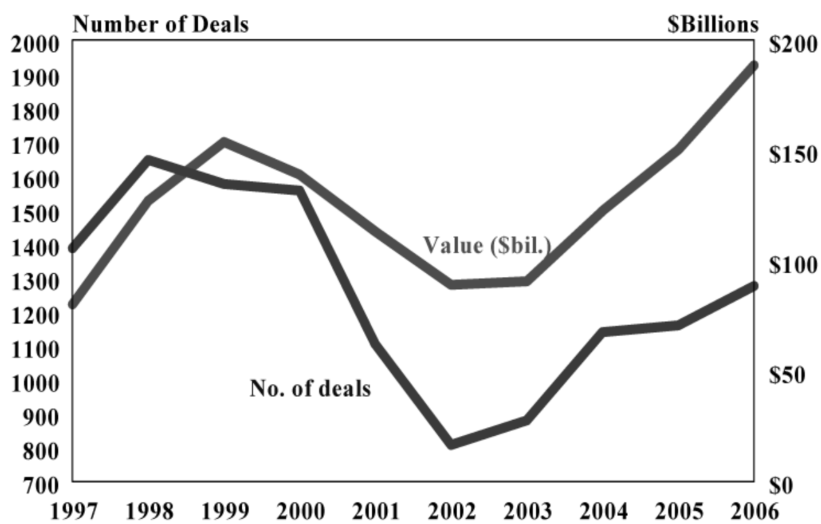
68 GRAVELLE, *supra* note 47, at 1.
69 JACKSON, *supra* note 9, at 17.
70 *Id.*
71 *Id.*
72 *Id.*
73 *Id.*
74 DEP'T OF COMMERCE, *supra* note 25, at 1.
75 *Id.*
76 JACKSON, *supra* note 9, at 18.

by U.S. workers prior to the foreign firms' acquisitions.[77] The Commerce Department's statement about jobs is literally true, but misleading. The statement reads: "During the last ten years, majority-owned U.S. affiliates of foreign companies have employed between 5-6 [sic] million workers."[78] Following an acquisition, foreign firms may add jobs, but also, "they may use an acquisition to consolidate or to streamline other operations, which may result in reducing their level of employment."[79]

In a recent ten-year period (1997–2006), foreign firms' acquisitions of U.S. firms and U.S. firms' acquisitions of foreign firms seem to have paralleled each other.[80] Under conventional theory, one would expect that a lack of or an increase in investment in the U.S. would result in an increased investment (when investment in the U.S. decreased) or a decreased investment (when investment in the U.S. increased), respectively, in other countries. However, the increases and decreases in investment in the U.S. and other nations paralleled each other. This is a figure of U.S. firms' acquisitions of foreign companies.[81]



[77] *New Commerce Department Report Shows Foreign Direct Investment Supports Millions of High-Paying Jobs*, DEP'T. OF COMMERCE (June 14, 2011, 1:00 PM), http://www.commerce.gov/news/press-releases/2011/06/14/new-commerce-department-report-shows-foreign-direct-investment-suppor ("Since 2000, FDI has supported more than five million jobs at 30 percent [sic] higher wages.").

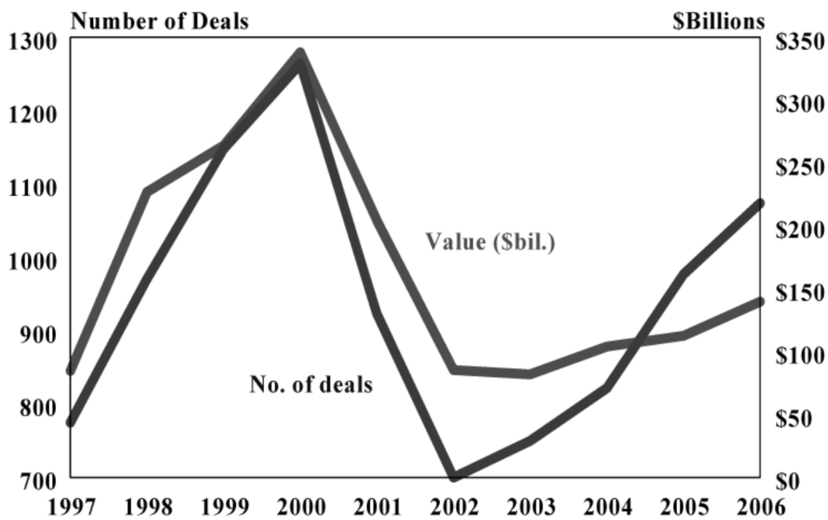
[78] David Payne & Fenwick Yu, *Foreign Direct Investment in the United States*, ECONS. & STATISTICS ADMIN. 1, 1 (June 2011), http://www.esa.doc.gov/sites/default/files/fdiesaissuebriefno2061411final_0.pd f.

[79] JACKSON, *supra* note 9, at 17.

[80] *Id.* at 18–20.

[81] *Id.* at 20.

This is a figure of foreign firm's acquisitions of U.S. companies.[82]



The parallelism of the "similarities in the acquisition activity of U.S. and foreign firms seem to be counter-intuitive in that those forces that draw U.S. firms to invest abroad should theoretically be separate from those factors that draw foreign firms to invest in the United States."[83] Perhaps FDI simply follows the economic conditions in the United States.

> [T]he stronger rate of economic growth in the United States enhances the profit position of U.S. firms which encourages them to increase their investments both at home and abroad as U.S. economic activity also boosts economic performance in Western Europe and among other developed economies that have become increasingly linked with the U.S. economy.[84]

Thus, inward and outward FDI is reflective of the domestic U.S economy. Perhaps the policies surrounding FDI are less important to foreign investment worldwide than the stability and prosperity of the U.S. economy. Domestic and international economies can be interconnected, but conclusions that FDI supports a certain number of jobs or a certain percentage of the economy are likely almost always overstated.

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[82] *Id.* at 21.
[83] *Id.* at 20.
[84] *Id.* at 21.

C. *The Future of FDI*

Nations have significant incentives to attract FDI even while casting a wary eye on it. In considering future foreign investment, at least three significant trends may emerge. First, Chinese contractors (that is, Chinese government) may be in demand because they have unique experience building infrastructure, such as 4000 miles of high speed rail lines, the Three Gorges Dam, and the Hangzhou Bay Bridge. Each of these Chinese projects is unmatched by any other country. Connected with this expertise is power. China's state owned banks can provide diplomatic and financial support so that Chinese companies can undertake similar projects in other countries.

Second, there will be a rush for natural resources, and, third, this rush will be supported by diversified global conglomerates.[85] There will be the traditional concerns of capital-exporting countries "that too much of their capital goes abroad, while capital-importing countries fear foreign control of domestic assets and the possible macroeconomic instability associated with rapid changes in foreign investment levels."[86] But these traditional concerns are not as relevant in regard to China because it severely restricts foreign companies operating in China while Chinese companies enjoy the benefits of all other nations' companies operating in the U.S. or other foreign countries. As the Obama Administration illustrated, the U.S. will be increasingly reliant on foreign investment because as the U.S. continues to borrow and increase its debt, now about $18 trillion,[87] it will lack the resources to finance domestic investment.[88]

The various states and the federal government, especially the executive branch, will continue to strongly encourage FDI. But despite public impressions that foreign investment is widespread in the U.S., the amount of investment varies greatly from year to year. In the years 1997, 2000, 2003, 2008, 2010, and 2013 inward FDI was approximately $101 billion, $328 billion, $64 billion, $328 billion again, $194 billion,[89] and $193 billion[90] respectively, a wide range. But from 1982 to 2013, total outward FDI increased from $208 billion to $4.66 trillion, and total inward FDI increased from $124.7 billion to $2.764 trillion.[91]

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[85] Sharad Verma et al., *Companies on the Move*, THE BOSTON CONSULTING GRP. 3, 16 (Jan. 2011), http://www.bcg.com/documents/file70055.pdf.

[86] Mihir A. Desai et al., *Foreign Direct Investment and the Domestic Capital Stock*, 95 THE AM. ECON. REV. 33, 33 (2005).

[87] *The Debt to the Penny and Who Holds It*, DEP'T OF THE TREASURY, http://www.treasurydirect.gov/NP/debt/current (last visited Mar. 27, 2015).

[88] EDWARD M. GRAHAM & DAVID M. MARCHICK, US NATIONAL SECURITY AND FOREIGN DIRECT INVESTMENT 75–76 (Inst. for Int'l Econ. ed., 2006).

[89] Mark Doms, *Foreign Direct Investment in the United States*, ECONS. & STATISTICS ADMIN. (June 14, 2011), http://www.esa.doc.gov/under-secretary-blog/esa-report-foreign-direct-investment-united-states.

[90] DEP'T OF COMMERCE, *supra* note 5, at 8.

[91] Ibarra-Caton & Mataloni Jr., *supra* note 34, at 1.

Congress has been apprehensive about inward FDI emanating from some countries. The government used the 1917 Trading with the Enemy Act[92] to expropriate chemical and broadcasting assets during World War I from German and non-German interests and from American Marconi, a radio group in the U.S. that was controlled by interests in Britain.[93] "In 1977, Congress passed the International Emergency Economic Powers Act (IEEPA), the successor to [the Trading with the Enemy Act] . . . . And in 1988, in response to concern about growing levels of Japanese investment in the United States, Congress passed the Exon-Florio amendment[,]" which provided the President with authority to prevent foreign firms from acquiring certain domestic and foreign firms in the United States[94] and to stop foreign acquisitions, mergers, or takeovers to preserve national security.[95] President Reagan delegated to the Committee on Foreign Investment in the United States ("CFIUS") the responsibility of investigating acquisitions by foreign firms and nations.[96] Since 1992, the Byrd Amendment,[97] an amendment to the National Defense Authorization Act, has required that the U.S. investigate every acquisition by a foreign government. The Byrd Amendment passed after a French firm, in which France possessed a 60% ownership interest and controlled 75% of the voting stock, attempted to take over an aerospace corporation that was a leader in missile technology.[98]

Following September 11, 2001, Congress passed the Patriot Act, which provides support for "critical industries," which are "systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters."[99] The Trade Act of 2002 provided the President the authority to negotiate trade deals, followed by an up or down vote of Congress on any agreement ("fast track"), and listed the objectives of U.S. trade policy.[100] That is, the U.S. should reduce trade barriers and ensure that foreign and U.S. investors enjoy comparable positions and rights. The Trade Act focuses on eight issues to promote trade:

> reducing or eliminating exceptions to the principle of national treatment; freeing the transfer of funds relating to

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[92] 12 U.S.C. § 95(a) (2012).
[93] David M. Marchick & Matthew J. Slaughter, *Global FDI Policy: Correcting a Protectionist Drift*, COUNCIL ON FOREIGN RELATIONS 1, 4 (June 2008), http://www.cfr.org/foreign-direct-investment/global-fdi-policy/p16503.
[94] *Id.*
[95] 50 U.S.C. § 2170(a) (1996).
[96] Exec. Order No. 12,661, 54 Fed. Reg. 779, 779–81 (Dec. 27, 1988).
[97] National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102–484, § 837, 106 Stat. 1620, 2463–65 (1992).
[98] GRAHAM & MARCHICK, *supra* note 88, at 145–46.
[99] USA Patriot Act, Pub. L. No. 107–56, § 1014, 115 Stat. 1, 399–400 (2001); 42 U.S.C. § 5195c(e) (2012).
[100] Trade Act of 2002, Pub. L. No. 107–210, § 342, 116 Stat. 811, 981 (2002); 19 U.S.C. § 3803 (2012).

> investments; reducing or eliminating performance requirements, forced technology transfers, and other unreasonable barriers to the establishment and operation of investments; establishing standards for expropriation and compensation for expropriation; establishing standards for fair and equitable treatment; providing meaningful procedures for resolving investment disputes; improving mechanisms used to resolve disputes between an investor and a government; and ensuring the fullest measure of transparency in the dispute settlement mechanism.[101]

In 2007, Congress passed the National Security Foreign Investment Reform and Strengthened Transparency Act, which provided more scrutiny of foreign firms that are owned or controlled by foreign governments, created an investigatory process through CFIUS to advise the President, and provided the President with additional authority to block takeovers by foreign firms.[102]

The United States has three methods by which to scrutinize foreign investment that might affect national security. First, the CFIUS process allows foreign firms to make informal inquiries about potential transactions in the United States, although the informal process is not detailed in statutes.[103] The informal process is based more on comity and consideration than on a statute or rule—it works to avoid embarrassment and the unnecessary expenditure of resources if a firm understands early that the President will reject its proposed acquisition.[104] The formal CFIUS process permits firms and requires governments to submit proposed transactions with national security implications to the Committee, which, through a review and investigation process, has a total of 75 days to provide a recommendation to the President.[105]

Second, the National Industrial Security Program coordinates to what extent private firms may access classified information, such as that within the defense industry.[106] Third, the Strategic Materials Protection Board, under the Department of Defense, determines "the need to provide a long term secure supply of materials designated as critical to national security to ensure that national defense needs are met . . . ."[107] This provision arose after a

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[101] JACKSON, *supra* note 9, at 6.

[102] Foreign Investment and National Security Act of 2007, H.R. 556, 110th Cong. (1st Sess. 2007).

[103] *CFIUS Process Overview*, U.S. DEP'T OF TREASURY, http://www.treasury.gov/resource-center/international/foreign-investment/Pages/cfius-overview.aspx (last updated Dec. 1, 2010, 8:08 AM).

[104] *Id.*

[105] *See generally* Mark E. Plotkin, David M. Marchick & David N. Fagan, *CFIUS and Network Security Agreements*, COVINGTON & BURLING LLP, http://www.cov.com/files/Publication/f23e0c74-e76d-4993-aeb5-901415b8483f/Presentation/PublicationAttachment/9138ee87-ecb3-44f7-80dc-99d6ccd0835d/oid45143.pdf (last visited Mar. 5, 2015).

[106] *National Industrial Security Program*, NAT'L ARCHIVES, http://www.archives.gov/isoo/oversight-groups/nisp/ (last visited Mar. 25, 2015).

[107] 10 U.S.C. § 187 (2012).

Chinese firm acquired Magnequench International, a U.S. firm that produced the minerals necessary to manufacture magnets used in munitions systems and computer data storage systems.[108] It appears that the two Chinese firms that took control of Magnequench were controlled by two sons-in-law of Deng Xiaoping, the former head of the Chinese communist party.[109] With the Environmental Protection Agency's closure of a mine in the United States, Magnequench, with operations almost solely abroad, was the United States' only source of rare-earth oxide necessary to make the specialized magnet.[110] The U.S. position is that it will block foreign firms' (like France, Germany, Japan, and Russia) acquisitions only to protect national security and "critical infrastructure," but not to preserve economic security, a criterion that China will use when considering whether to allow foreign investment.[111]

III. SOVEREIGN WEALTH FUNDS AND STATE-OWNED ENTERPRISES

The prosperity of China and the oil-producing countries is indicative of American limitations and challenges. Americans send dollars to China and the Middle Eastern countries for various goods and oil, although the U.S. importation of oil is decreasing, by almost 24% from 2008 to 2013.[112] Those nations have four kinds of investment entities: sovereign wealth funds, international reserves, public pension funds, and state-owned enterprises.[113] Through their sovereign wealth funds, those nations purchase American assets (including stock of corporations), lend to U.S. firms, and purchase U.S. government bonds.[114] Sovereign wealth funds are government funds, such as currency reserves, that governments use to invest in virtually any kind of asset.

Often, sovereign wealth funds derive their assets from commodity export revenues or foreign exchange reserves. In part, the exchange rate allows China to accumulate large dollar reserves, which it uses to replenish its sovereign wealth fund.[115] When China purchases an interest in Blackstone, which invests in other firms, China's influence on the other firms is limited. But concerns grow when China uses its sovereign wealth funds directly to purchase interests in American corporations, just as Abu Dhabi's sovereign

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[108] JACKSON, *supra* note 9, at 7.

[109] John J. Tkacik Jr., *Magnequench: CFIUS and China's Thirst for U.S. Defense Technology*, THE HERITAGE FOUND. (May 2, 2008), http://www.freerepublic.com/focus/f-news/2010985/posts.

[110] *Id.*

[111] Marchick & Slaughter, *supra* note 93, at 22.

[112] *U.S. Imports by Country of Origin*, U.S. ENERGY INFO. ADMIN. (Feb. 27, 2015), http://www.eia.gov/dnav/pet/pet_move_impcus_a2_nus_ep00_im0_mbbl_a.htm.

[113] Lee Hudson Teslik, *Sovereign Wealth Funds*, COUNCIL ON FOREIGN RELATIONS (Jan. 28, 2009), http://www.cfr.org/international-finance/sovereign-wealth-funds/p15251.

[114] *Economic and U.S. Income Tax Issues Raised by Sovereign Wealth Fund Investment in the United States*, JOINT COMM. ON TAXATION 1, 3 (June 17, 2008), http://www.jct.gov/x-49-08.pdf.

[115] *Id.* at 61.

wealth fund did with Citigroup in 2007.[116] Middle Eastern nations and China also operate state-owned enterprises, which complement sovereign wealth funds. Like private parent firms in any country, state-owned enterprises, such as the China National Offshore Oil Corporation ("CNOOC") and Dubai Customs and Free Zone Corporation ("Dubai Ports World"), operate businesses and purchase and operate firms in other nations.[117]

Although declining, the high U.S. current account deficit—$440.4 billion or 2.7% of GDP in 2013[118]—means that countries with a surplus, such as Japan, China, Russia, and Saudi Arabia have the ability to acquire U.S. assets and companies with their dollars.[119] Compared with private investors, sovereign wealth funds may also deprive the U.S. of taxable income because U.S. tax law favors foreign governments. "To the extent that a foreign government recognizes income that is not exempt from U.S. income tax under the exception for passive income received by foreign sovereigns, the foreign government is treated as a corporate resident of its own country."[120] The important point is that America's purchases of goods from other nations allow those nations to diversify by using dollars to acquire interests (through sovereign wealth funds) in U.S. firms and purchase other firms (through state-owned enterprises), making those creditor/exporter countries stronger.

Even where finding that the U.S. has been lax in regulating China's acquisitions, one finds support for FDI.[121] For example, the Chinese firm that acquired Magnequench was controlled by two son-in-laws of Deng Xiaoping, heads of the Communist Party.[122] Moreover, state-owned enterprises create market distortions because they are supported by the treasury and influence foreign states. Through "dumping" (selling goods in a foreign market for less than they are sold at home)[123] and other means, they have the ability to squeeze out U.S. firms and other foreign firms, and they can more easily corner a market or become a monopoly.

American trepidation over state-owned enterprises increased based on three transactions that occurred from 2004 to 2006. In 2004, Lenovo, a

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[116] Eric Dash & Andrew Ross Sorkin, *Citigroup Sells Abu Dhabi Fund $7.5 Billion Stake*, N.Y. TIMES (Nov. 27, 2007), http://www.nytimes.com/2007/11/27/business/27citi.html?pagewanted=all.

[117] Matthew R. Byrne, Note, *Protecting National Security and Promoting Foreign Investment: Maintaining the Exon-Florio Balance*, 67 OHIO ST. L. J. 849, 850–51 (2006).

[118] James Politi, *US Current Account Deficit Falls Again*, FIN. TIMES (Mar. 19, 2014, 6:11 PM), http://www.ft.com/intl/cms/s/0/f39383b2-af85-11e3-a006-00144feab7de.html#axzz3UnL6BSBj.

[119] Marchick & Slaughter, *supra* note 93, at 24.

[120] JOINT COMM. ON TAXATION, *supra* note 114, at 1–2.

[121] Tkacik Jr., *supra* note 109.

[122] *Id.*

[123] *An Introduction to U.S. Trade Remedies*, INT'L TRADE ADMIN., http://enforcement.trade.gov/intro (last visited Mar. 25, 2015) ("Dumping occurs when a foreign producer sells a product in the United States at a price that is below that producer's sales price in the country of origin ('home market'), or at a price that is lower than the cost of production. The difference between the price (or cost) in the foreign market and the price in the U.S. market is called the dumping margin. Unless the conduct falls within the legal definition of dumping as specified in U.S. law, a foreign producer selling imports at prices below those of American products is not necessarily dumping.").

large Chinese computer firm announced it would purchase IBM's personal computer business.[124] Academics at the Chinese Academy of Science, a government supported institution, started Lenovo in 1984.[125] After an investigation by CFIUS, the government approved the purchase.[126] In 2005, after significant public criticism of the pending purchase of Unocal, a U.S. oil company, by CNOOC, a company controlled by the Chinese government, CNOOC withdrew its offer.[127] In 2006, Dubai Ports World, a company controlled by the United Arab Emirates, purchased the Peninsular and Oriental Steam Navigation Company (P & O), a UK company.[128] The purchase included contracts to operate six major ports in the United States.[129] After a review by CFIUS, the government approved the purchase.[130] But, after significant criticism from Congress and the public, Dubai Ports World sold P & O to American International Group.[131]

Sovereign wealth funds have significant reach. One estimate is that in 2013 they held about $5.4 trillion in assets.[132] China has more than 5,000 investment entities in 10,000 overseas enterprises throughout 172 countries or economies.[133] In foreign markets, China focuses more on merging with and acquiring existing firms compared to "green field" investment, in which a foreign firm starts an affiliate.[134] In *Citizens United*, the Supreme Court held that corporations have a constitutional right to contribute an unlimited amount of money to independent political groups.[135] It would be unwise to believe that American corporate officers and managers, who might be U.S. citizens, will not contribute to these political funds—and, in effect, to political candidates—according to the wishes of their largest shareholders, who will often be foreign companies and nations.

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[124] *IBM Sells PC Business to China's Lenovo*, NBC NEWS, http://www.nbcnews.com/id/6666170/ns/technology_and_science-tech_and_gadgets/t/ibm-sells-pc-business-chinas-lenovo/#.VqQBHrSvXGk (last updated Dec. 8, 2004, 2:52 PM).

[125] *Id.*

[126] *Id.*

[127] GRAHAM & MARCHICK, *supra* note 88, at 128–36; *China's CNOOC Drops Bid for Unocal*, NBC NEWS, http://www.msnbc.msn.com/id/8795682/ns/business-oil_and_energy/t/chinas-cnooc-drops-bid-unocal (last updated Aug. 2, 2005, 4:51 PM).

[128] GRAHAM & MARCHICK, *supra* note 88, at 136–41.

[129] Randall Beisecker, *DP World and U.S. Port Security*, NUCLEAR THREAT INITIATIVE (Mar.1, 2006), http://www.nti.org/analysis/articles/dp-world-and-us-port-security.

[130] *Id.*

[131] *AIG Unit to Buy Dubai Company's U.S. Ports*, USA TODAY, http://usatoday30.usatoday.com/money/industries/2006-12-11-dubai-ports_x.htm (last updated Dec. 12, 2006, 12:53 AM).

[132] Press Release, Preqin, Sovereign Wealth Fund Assets Surpass $5tn (Oct. 10, 2013), https://www.preqin.com/docs/press/Sovereign_Wealth_13.pdf.

[133] KARL P. SAUVANT ET AL., FOREIGN DIRECT INVESTMENTS FROM EMERGING MARKETS: THE CHALLENGES AHEAD 319 (Karl Sauvant et al. eds., 2010).

[134] *Green Field Investment*, INVESTOPEDIA, http://www.investopedia.com/terms/g/greenfield.asp#axzz1mOHVEffx (last visited Mar. 27, 2015). A greenfield investment is "[a] form of foreign direct investment where a parent company starts a new venture in a foreign country by constructing new operational facilities from the ground up. In addition to building new facilities, most parent companies also create new long-term jobs in the foreign country by hiring new employees." *Id.*

[135] Citizens United v. FEC, 558 U.S. 310, 318 (2010).

IV. NATIONAL SECURITY AND THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES

FDI creates risks to national security because it places the employees of nations and their firms in sensitive and non-sensitive positions within U.S. affiliates that provide products or services in support of national security. In control of the affiliates, the nations or foreign firms have access to high-tech information or materials that are used commercially and also in support of national security. One report, generally supporting Chinese FDI, found four concerns where nations, as opposed to their private firms, are investing: "[C]ontrol over strategic assets (ports, pipelines); control over the production of critical defense inputs (such as military semiconductors); the transfer of sensitive technology or know-how to a foreign power with hostile intent; and espionage, sabotage, or other disruptive action."[136] Through acquisitions of Lenovo and Magnequench, for example, a Chinese state-owned enterprise and another firm controlled by the Chinese government, respectively, took control of IBM's personal computing business and the only source in the U.S. of minerals (neodymium-iron-boron) used to make high-tech magnets for military munitions.[137]

The crimes implicated in FDI are often theft of trade secrets, economic espionage, and bribery, all of which can be precursors to greater harm. The U.S. government believes that five areas in particular need more careful scrutiny.[138] They are: (1) China and Russia; (2) information and communications technology; (3) business information relating to scarce natural resources; (4) technologies with fast growth (energy, health care, pharmaceuticals); and (5) military technologies (marine systems, unmanned aerial vehicles, aero technologies).[139] The saliency of these five concerns is illustrated by the Chinese takeover of Magnequench, through which China gained control of a rare mineral.

The Chinese takeover was approved by President George W. Bush after a CFIUS review.[140] It appears that CFIUS and the Pentagon had little concern over the acquisition.[141] A small Indiana newspaper described all the problematic elements where a foreign nation controls an important asset.[142]

> The neodymium-iron-boron magnets made by Magnequench are a crucial component in the guidance system of cruise

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[136] Daniel H. Rosen & Thilo Hanemann, *An American Open Door? Maximizing the Benefits of Chinese Foreign Direct Investment*, ASIA SOC'Y 1, 48 (May 2011), http://asiasociety.org/files/pdf/AnAmericanOpenDoor_FINAL.pdf.

[137] *Id.* at 45–64.

[138] OFFICE OF NAT'L COUNTERINTELLIGENCE EXEC., *supra* note 28, at 2.

[139] *Id.*

[140] Jeffrey St. Clair, *The Saga of Magnequench*, THE BLOOMINGTON ALT. (Apr. 23, 2006), http://www.bloomingtonalternative.com/node/7950.

[141] *Id.*

[142] *See generally id.*

missiles . . . . Magnequench enjoys a near monopoly on this market niche, supplying 85 percent of the rare-earth magnets that are used in the servo motors of these guided missiles and bombs.

. . . On September 15, 2004 Magnequench shuttered [sic] its last plant in Indiana, fired its 450 workers and began shipping its machine tools to a new plant in China. . . .

In 1995, Magnequench was purchased from GM by Sextant Group, an investment company headed by Archibald Cox, Jr- the son [sic] of the Watergate prosecutor. After the takeover, Cox was named CEO. What few knew at the time was that Sextant was largely a front for two Chinese companies, San Huan New Material and the China National Non-Ferrous Metals Import and Export Corporation. . . . [T]he heads of both companies were [son] in-laws of the late Chinese premier Deng Xiaopeng.

Three years later Cox shut down the Anderson plant and shipped its assembly line to China. . . .

. . . [O]nly months prior to the takeover of Magnequench San Huan New Materials was cited by US International Trade Commission for patent infringement and business espionage. The company was fined $1.5 million. . . .

One of Magnequench's subsidiaries is a company called GA Powders, which manufactures the fine granules used in making the mini-magnets. GA Powders was originally a Department of Energy project created by scientists at the Idaho National Engineering and Environmental Lab. It was spun off to Magnequench in 1998, after Lockheed Martin took over the operations at INEEL.

In June 2000, Magnequench uprooted the production facilities for GA Powders from Idaho Falls to a newly constructed plant in Tianjin, China. This move followed the transfer to China of high-tech computer equipment from Magnequench's shuttered [sic] Anderson plant. . . .

. . . .

Dr. Peter Leitner is an advisor to the Pentagon on matters involving trade in strategic materials. He says that the Chinese targeted Magnequench in order to advance their development of long-range Cruise missiles. China now holds a monopoly on the rare-earth minerals used in the

> manufacturing of the missile magnets. The only operating rare-earth mine is located in Batou, China.
>
> . . . .
>
> . . . [The Pentagon admitted] that Magnequench was the only domestic supplier of the smart bomb magnets (Hitachi holds the other contract), but that it had no idea that company was owned by the Chinese or that it was packing up for Tianjin.[143]

One commentator characterized China's Magnequench acquisition as an "unfortunate business necessity."[144] Magnequench stopped producing magnets to focus on "more profitable and less-commoditized activity of innovation and design of rare earth powders used in such magnets[]"[145] and, therefore, according to "these real world conditions, Magnequench's exit from the neodymium magnet production business and their closure of the Valparaiso facility is not only rational but an unfortunate business necessity."[146] But, that kind of business necessity, used in corporate law to exculpate officers and directors from liability, should create some hesitation because such principles like business necessity and the drive for economic gain provide little consideration of national security interests.

Most of the convictions arising from the Economic Espionage Act of 1996 resulted after employees of U.S. firms stole trade secrets to benefit China.[147] While the Espionage Act of 1917 prohibits the misappropriation of classified government information,[148] the Economic Espionage Act of 1996 prohibits the misappropriation of commercial information, such as trade secrets, for the benefit of a foreign nation.[149] Some representative cases include the following, with the firm/victim in parentheses:

> 2014: Defendants Wang Dong, Sun Kailiang, Wen Xinyu, Huang Zhenyu, Gu Chunhui (Westinghouse and other U.S. companies)—cyber-espionage including theft of trade secrets—to benefit a Chinese state owned enterprise (charges pending).[150]
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> 2013: Defendant Hanjuan Jin (Motorola)—theft of trade secrets for a mobile communications system for the benefit

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[143] *Id.*; *see also* Tkacik Jr., *supra* note 109; Charles W. Freeman III, *Remember the Magnequench: An Object Lesson in Globalization*, THE WASH. QUARTERLY 61, 62 (Jan. 2009), http://csis.org/files/publication/twq09januaryfreeman.pdf.

[144] Freeman III, *supra* note 143, at 68.

[145] *Id.* at 67.

[146] *Id.* at 68.

[147] Economic Espionage Act of 1996, Pub. L. No. 104–294, § 1832, 110 Stat. 3009, 3489 (1996).

[148] H.R. 291, 65th Cong. (1st Sess. 1917).

[149] Economic Espionage Act § 1832.

[150] *United States of America v. Wang Dong, Sun Kailiang, Wen Xinyu, Huang Zhenyu, Gu Chunhui*, TRADE SECRETS INST. (May 1, 2014), http://tsi.brooklaw.edu/cases/united-states-america-v-wang-dong-sun-kailiang-wen-xinyu-huang-zhenyu-gu-chunhui.

of China (conviction affirmed on appeal).[151]

2013: Defendants Clark Alan Roberts and Sean Edward Howley (Goodyear)—theft of trade secrets for tire building for the benefit of a company with a contract with China (convictions upheld).[152]

2012: Defendant Yuan Li (Sanofi Aventis)—economic espionage—to benefit the Chinese chemical producer, Xiamon KAK Science & Technology (chemical compounds) (convicted).[153]

2011: Defendant Kexue Huang (Dow)—economic espionage—to benefit Chinese universities (organic insecticides) (convicted).[154]

2011: Defendant Xiang Dong Yu (Ford)—product engineer at Ford stole engine-transmission and electric power supply systems for the Chinese automaker Beijing Automotive Industry Corp. (convicted).[155]

2010: Defendant David Yen Lee (Valspar)—formerly a technical director at Valspar Corp., stole secret formulas for paints and coatings from Valspar's offices for a competitor in China (convicted).[156]

2008: Defendant Xiaodong Sheldon MengMeng (Quantum 3D)—economic espionage by misappropriating a trade secret, known as "Mantis 1.5.5," from his former employer, Quantum3D, with the intent to benefit China's Navy Research Center in Beijing (convicted).[157]

2006: Defendants Fei Ye and Ming Zhong (Sun Microsystems and Transmeta)—convicted of economic espionage for stealing trade secrets for the benefit of the city

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[151] United States v. Hanjuan Jin, 733 F.3d 718, 719 (7th Cir. 2013).

[152] United States v. Howley, 707 F.3d 575, 577–83 (6th Cir. 2013).

[153] Press Release, The United States Attorney's Office District of New Jersey, Former Research Chemist at Global Pharmaceutical Company Sentenced to 18 Months in Prison for Theft of Trade Secrets (May 7, 2012), http://www.justice.gov/archive/usao/nj/Press/files/Li,%20Yuan%20Sentencing%20News%20Release.html.

[154] Karen Gullo, *Ex-Dow Scientist Who Stole Secrets Gets 7 Years, 3 Months Prison*, BLOOMBERG BUS. (Dec. 22, 2011, 12:01 AM), http://www.bloomberg.com/news/articles/2011-12-21/ex-dow-scientist-gets-more-than-seven-years-in-prison-for-stealing-secrets.

[155] *Ex-Ford Engineer Sentenced for Trade Secrets Theft*, REUTERS (Apr. 13, 2011), http://www.reuters.com/article/2011/04/13/us-djc-ford-tradesecrets-idUSTRE73C3FG20110413.

[156] Press Release, U.S. Attorney's Office, Former Paint Manufacturing Chemist Sentenced to 15 Months in Prison for Stealing Trade Secrets Valued up to $20 Million (Dec. 8, 2010), http://www.fbi.gov/chicago/press-releases/2010/cg120810-1.htm.

[157] Press Release, U.S. Department of Justice, Chinese National Sentenced for Economic Espionage (June 18, 2008), http://www.justice.gov/opa/pr/2008/June/08-nsd-545.html.

of Hangzhou and the Province of Zhejiang, China (convicted).[158]

China and its firms and agents are not alone in their misbehavior. But the theft of trade secrets for the benefit of China and the bribery of foreign officials for the benefit of foreign firms should not be overstated or understated. Theft and bribery have occurred throughout history, although, with new technology, those crimes can now cause greater harm. Foreign trade, from which the crimes originate, benefits the United States. A large distinction today is that more dangerous weapons are available to more dangerous people in more nations. Even a small component can have great significance. The theft of trade secrets is a tactical loss that could be very dangerous if it leads to military assets falling into an adversary's hands or prevents the U.S. from obtaining necessary materiel. Bribery of foreign officials destabilizes political processes and nations and can lead to regional conflict.

The Committee on Foreign Investment in the U.S. was designed to ameliorate the national security risks of inward FDI.[159] Created by President Ford's Executive Order in 1975, CFIUS is charged with recommending to the President whether he should block a proposed acquisition of a U.S. firm by a foreign firm or government.[160] The Committee chair is the Treasury Department and its other members include the Departments of Justice, Homeland Security, Commerce, Defense, State, and Energy, and the Offices of the U.S. Trade Representative for Science & Technology Policy.[161] The Director of National Intelligence and the Secretary of Labor are non-voting, *ex-officio* members.[162] Observers and participants include the Office of Management & Budget, the Council of Economic Advisors, the National Security Council, the National Economic Council, and the Homeland Security Council.[163]

While it would be difficult to improve on its structure, with its cross-section of agencies, the Committee's composition may create conflicts of interest. As noted, since the Carter Administration adopted a neutral policy on FDI, subsequent presidents have been proponents of inward foreign investment. Typically, when any firm, foreign or domestic, employs

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[158] Michael Barkoviak, *Two Silicon Valley Engineers Receive One Year Prison Sentences*, DAILY TECH (Nov. 24, 2008, 4:22 AM), http://www.dailytech.com/Two+Silicon+Valley+Engineers+Receive+One+Year+Prison+Sentences/article13503c.htm.
[159] *The Committee on Foreign Investment in the United States (CFIUS)*, U.S. DEP'T OF TREASURY, http://www.treasury.gov/resource-center/international/Pages/Committee-on-Foreign-Investment-in-US.aspx (last updated Dec. 20, 2012, 1:37 PM).
[160] Exec. Order No. 11,858, 3 C.F.R. 990 (1971–1975), *reprinted as amended* in 3 C.F.R. 13456 (2008).
[161] *Composition of CFIUS*, U.S. DEP'T OF TREASURY, http://www.treasury.gov/resource-center/international/foreign-investment/Pages/cfius-members.aspx (last updated Dec. 1, 2010, 8:08 AM).
[162] *Id.*
[163] Exec. Order No. 11,858, 3 C.F.R. 990 (1971–1975), *reprinted as amended* in 3 C.F.R. 13456 (2008).

American workers, presidents are pleased. The heads of all the agencies within CFIUS are political appointees who depend on the President's favor and his re-election (if applicable) for their jobs. The approval of a foreign firm that promises jobs, which will at least indirectly benefit the members of CFIUS, might be incompatible with a truly independent review of the foreign firm's application to conduct business in the United States.

Still, a better composition of CFIUS would be difficult to obtain. Members of Congress and their staff members do not have the interests or expertise of executive agencies. Even assuming that Congress would provide new scrutiny, conflicts of interest exist because members of Congress will usually want to encourage investments within their districts and states. Usually unaware of the national security implications of an acquisition of a local company by a foreign firm, the constituents of the member of Congress will almost always lean one way: toward job retention or creation and the approval of foreign investment. Private consultants might be helpful in the CFIUS process, but the government could not provide them with all the classified information necessary to make an informed recommendation to the President. Using consultants would be expensive and time-consuming.

Still, American institutions and people should more thoroughly scrutinize not only the foreign firm or nation wanting to acquire the factory next door, but also the foreign government officials who are considering the acquisition. For example, despite reviewing the acquisition of Magnequench, CFIUS was apparently unaware that the Chinese government or Communist Party controlled the purchasing firm.[164] Indeed, pressures on CFIUS should be recognized. During a recent five-year period, 2008 to 2012, CFIUS received 538 proposed investment transactions.[165] Companies withdrew some of their proposals, but 87% of the 538 transactions were completed.[166]

The foreign firm must provide CFIUS a "summary setting forth the essentials of the transaction, including a statement of the purpose of the transaction, and its scope, both within and outside of the United States;"[167] "[a] good faith approximation of the net value of the interest acquired in the U.S. business[;]"[168] the "name of any and all financial institutions involved in the transaction, including as advisors, underwriters, or a source of financing for the transaction;"[169] and with "respect to a transaction structured as an acquisition of assets of a U.S. business, a detailed description of the assets of the U.S. business being acquired, including the approximate value of those

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[164] St. Clair, *supra* note 140; *see* Tkacik Jr., *supra* note 109; *see also* Freeman III, *supra* note 143, at 62.

[165] JAMES K. JACKSON, CONG. RESEARCH SERV., RL33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 22 (2014), http://fas.org/sgp/crs/natsec/RL33388.pdf.

[166] *Id.*

[167] 31 C.F.R. § 800.402(c)(1)(i) (1996).

[168] 31 C.F.R. § 800.402(c)(1)(viii) (1996).

[169] 31 C.F.R. § 800.402(c)(1)(ix) (1996).

assets . . . ."[170] The Committee may not release the firm's confidential information to the public so as not to disclose trade secrets or harm the firm's market position, although the Committee may release relevant information for judicial or administrative proceedings.[171] During the review, the Director of National Intelligence must evaluate the transaction for "any threats to national security posed by the transaction."[172] If, upon completion of the review, any CFIUS member finds a threat to national security, CFIUS will conduct an investigation and issue a recommendation to the President.[173]

Under the federal regulations, the "Committee will continue its practice of focusing narrowly on genuine national security concerns alone, not broader economic or other national interests."[174] But the Committee and the President may consider factors related to national security, which are many and broadly stated.[175] They include: domestic production for national defense; capability and capacity of domestic industries to meet defense requirements; control of domestic industries and commercial activity by foreign firms; potential effects of the transaction on the sale of military goods, equipment, or technology to a country that supports terrorism or proliferates missile technology or chemical and biological weapons; potential effects on U.S. technological leadership related to national security; security-related impact on critical infrastructure; potential effects on critical infrastructure; effects on critical technologies; foreign government-controlled transaction; review (of foreign country-controlled transaction) of the country's nonproliferation control regimes, cooperation with counter-terrorism efforts, and potential for diversion of technologies with military applications; projection of U.S. energy needs; and other factors as the President or the Committee deem appropriate.[176] CFIUS is limited to reviewing "covered transactions," in which a foreign firm wants to take control of a U.S. firm, with "control" often defined as more than a 10% ownership stake or the ability to steer the U.S. firm through control of management or the board of directors.[177] Review of "critical infrastructure" includes "systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on [national] security[] . . . ."[178] Where there was concern about an acquisition, in 2006, a French company, Alcatel, was permitted to acquire Lucent Technologies by promising to limit its access to Bell Labs, which is important

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[170] 31 C.F.R. § 800.402(c)(1)(ix)(2) (1996).
[171] 31 C.F.R. § 800.702 (1996); *see generally* JACKSON, *supra* note 165, at 19.
[172] JACKSON, *supra* note 165, at 16.
[173] *Id.* at 25.
[174] *Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons*, FED. REGISTER (Nov. 21, 2008), https://www.federalregister.gov/articles/2008/11/21/E8-27525/regulations-pertaining-to-mergers-acquisitions-and-takeovers-by-foreign-persons#h-7.
[175] JACKSON, *supra* note 165, at 21.
[176] 50 U.S.C. § 2170 (1996); *see also* JACKSON, *supra* note 165, at 21.
[177] JACKSON, *supra* note 165, at 13.
[178] 42 U.S.C. § 5195c(e) (2012).

to U.S. communications systems.[179] In contrast, in 2008 Bain Capital and Huawei Technologies withdrew their offer to acquire the network and software firm, 3Com, for $2.2 billion, due to an inability to successfully negotiate a mitigation agreement with members of CFIUS.[180] The 2015 report issued by CFIUS, covering the year 2013, indicated closer inspection of transactions involving Chinese investors.[181] "In 2013, for the second year in a row, Chinese investment in the United States accounted for the largest number of covered transactions reviewed by CFIUS," according to an analysis by the Cadwalader law firm.[182] Indeed, in a proposed $2.9 billion transaction in 2016, CFIUS blocked Chinese investors, GO Scale Capital and GSR Ventures, from purchasing a controlling interest in a unit of Phillips, a Netherlands company, because the unit produced gallium nitride, which can be used to produce microchips in weapons systems.[183]

V. BILATERAL INVESTMENT TREATIES

As a base, the 2012 Model U.S. BIT provides *most-favored-nation treatment* to investors of a Party (nation).[184] That is, the U.S. must provide the same rights to all firms of nations that enjoy the most beneficial trading status ("most favored").[185] Under the Model BIT Treaty, the U.S. "shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory."[186] Most-favored-nation status often applies to the standards a foreign firm confronts when entering a nation, such as tariffs, while *national treatment*, also provided under the Model BIT, provides equal treatment, in comparison with U.S. firms, once a foreign firm enters the United States.[187] Thus, under the Model BIT, the U.S. "shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors."[188]

While global trade is governed through nations' membership in the World Trade Organization ("WTO") (and, before the WTO, the General

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[179] JACKSON, *supra* note 165, at 7.
[180] *Id.* at 23.
[181] Michael Liu et al., *Investing in the United States: CFIUS Concerns for Chinese Investors*, CADWALADER (July 9, 2015), http://www.cadwalader.com/resources/clients-friends-memos/investing-in-the-united-states-cfius-concerns-for-chinese-investors.
[182] *Id.*
[183] Paul Mozur & Jane Perlez, *Concern Grows in U.S. Over China's Drive to Make Chips*, N.Y. TIMES (Feb. 4, 2016), http://www.nytimes.com/2016/02/05/technology/concern-grows-in-us-over-chinas-drive-to-make-chips.html.
[184] *2012 U.S. Model Bilateral Investment Treaty*, UNITED STATES TRADE COMM'N 1, 7 (2012), https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf.
[185] *Id.*
[186] *Id.*
[187] *Id.*
[188] *Id.*

Agreement on Tariffs and Trade), global FDI does not operate under a comparable international monitoring or dispute-resolution system.[189] BITs provide foreign firms in host nations with protections and a resolution mechanism in the event they have a dispute with the host nation, which includes any federal, state, or local governmental unit.[190] BITs originated in the late 1950s to supplement the slender customary law protections that firms possessed in foreign nations.[191]

The number of treaties increased significantly after 1974, when the United Nations General Assembly adopted the Charter of Economic Rights and Duties of States, which held that a nation's domestic law determines whether compensation for expropriation would be provided.[192] BITs would provide some protection against expropriation, and they proliferated. The United Nations estimated that at the end of 2007 there were about 2,608 BITs,[193] entered into by 177 countries.[194]

Developed countries do not generally enter into BITS with each other, in large part because they are members of the OECD,[195] which coordinates dispute resolution, such as that regarding the resolution of tax disputes.[196] Under BITs, if there is a dispute between a foreign firm and a host nation, it will be resolved through binding arbitration, often under the World Bank's International Centre for the Settlement of Investment Disputes ("ICSID").[197] The 2012 Model U.S. BIT contains a security exception, which provides that the treaty shall not "preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests."[198] The 2012 U.S. Model BIT, compared with the 2004 Model, does provide additional environmental and labor protections, mainly that Parties may not waive their domestic

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[189] *See generally Bilateral Investment Treaties, 1959-1999*, UNITED NATIONS (2000), http://www.unctad.org/en/docs/poiteiiad2.en.pdf ("UNCTAD [United Nations Conference on Trade and Development] serves as the focal point within the United Nations Secretariat for all matters related to foreign direct investment and transnational corporations.").

[190] Luke Eric Peterson, *Human Rights and Bilateral Investment Treaties*, RIGHTS & DEMOCRACY 1, 9 (2009), http://publications.gc.ca/collections/collection_2012/dd-rd/E84-36-2009-eng.pdf.

[191] *Id.* at 12.

[192] STEPHEN M. SCHWEBEL, JUSTICE IN INTERNATIONAL LAW 1, 152 (Cambridge University Press 2011).

[193] *Recent Developments in International Investment Agreements (2007–June 2008)*, UNITED NATIONS 1, 2 (2008), http://unctad.org/en/Docs/webdiaeia20081_en.pdf.

[194] Jennifer L. Tobin & Marc L. Busch, *A Bit Is Better Than A Lot: Bilateral Investment Treaties and Preferential Trade Agreements*, 62 WORLD POLITICS 1, 4 (2010), http://faculty.georgetown.edu/mlb66/BITs%20and%20PTAs.pdf.

[195] UNITED NATIONS, *supra* note 189, at 4.

[196] *Dispute Resolution*, OECD, http://www.oecd.org/ctp/dispute/ (last visited Mar. 27, 2015).

[197] UNITED STATES TRADE COMM'N, *supra* note 184, at 26; *see also Cases*, INT'L CTR. FOR THE SETTLEMENT OF INV. DISPUTES, http://icsid.worldbank.org/ICSID/Index.jsp (last visited Mar. 27, 2015); *see also ICSID Convention, Regulations and Rules*, INT'L CTR. FOR THE SETTLEMENT OF INV. DISPUTES (Apr. 10, 2006), http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/main-eng.htm.

[198] UNITED STATES TRADE COMM'N, *supra* note 184, at 21.

environmental and labor laws as a means to encourage investment.[199]

The 2012 Model BIT provides that foreign investors in a host nation shall be provided at least the minimum protections afforded under customary international law.[200] When there is an "investor-state dispute," at the option of either the firm or the U.S., the dispute must be submitted to binding arbitration.[201] In practice, it has been and probably only will be foreign firms that will select arbitration because the U.S. is comfortable with disputes being resolved through its court system. Courts are also more predictable than arbitrators in that court decisions are based on federal and state law, which is relatively well-established in comparison to customary international law. Under the U.S. bilateral treaties, a panel of three arbitrators will decide an investor-state dispute without considering national law and by relying on only their interpretation of customary international law, which is by nature amorphous, usually unwritten, and relatively undeveloped.[202] In a sense, the BIT elevates the foreign firm to an unusually high status in that, like a nation, it can compel the U.S. government to submit to arbitration. Despite controversy over the binding-arbitration process in BITs and FTAs, the U.S. has prevailed in every final arbitration decision (nine) in which a foreign firm has taken the U.S. to arbitration under Chapter 11 of the North American Free Trade Agreement ("NAFTA").[203] Under Chapter 11 of NAFTA, Canada and Mexico have paid investors $269.6 million in ten different cases.[204]

The most prominent case involving the U.S. as a respondent was *Glamis Gold*, which arose in 2009.[205] Glamis was a Canadian firm with an affiliate in the U.S. that complained that a California mining law resulted in the expropriation of Glamis' property.[206] California passed a law that required backfilling and restoration of open pit mines near sacred sites of Native Americans.[207] Rather than pursue various state and federal permits, Glamis demanded arbitration under NAFTA's Chapter 11, which provided that an "investor of a Party may submit to arbitration under . . . a claim that another Party has breached . . . and that the investor has incurred loss or damage by reason of, or arising out of, that breach."[208] In 2009, the arbitration panel

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[199] *Model Bilateral Investment Treaty*, U.S. DEP'T OF STATE (Apr. 20, 2012), http://www.state.gov/r/pa/prs/ps/2012/04/188199.htm.

[200] UNITED STATES TRADE COMM'N, *supra* note 184, at 7.

[201] *Id.* at 26.

[202] SCHWEBEL, *supra* note 192, at 152.

[203] *Table of Foreign Investor-State Cases and Claims under NAFTA and Other U.S. "Trade" Deals*, PUBLIC CITIZEN 1, 2–10 (Feb. 2014), http://www.citizen.org/documents/investor-state-chart1.pdf.

[204] *Id.* at 10–30.

[205] Elizabeth Whitsitt & Damon Vis-Dunbar, *Glamis Gold Ltd. v. United States of America: Tribunal Sets a High Bar for Establishing Breach of "Fair and Equitable Treatment" under NAFTA*, INV. TREATY NEWS (July 15, 2009), http://www.iisd.org/itn/2009/07/14/glamis-gold-ltd-v-united-states-of-america-tribunal-sets-a-high-bar-for-establishing-breach-of-fair-and-equitable-treatment-under-nafta.

[206] *Id.*

[207] PUBLIC CITIZEN, *supra* note 203, at 6.

[208] North American Free Trade Agreement, art. 1116(1)(a)–(b) (1994).

dismissed the complaint, concluding that, while the regulations were costly to Glamis, the cost did not constitute an expropriation.[209]

Corporations or investors have brought 22 arbitration cases against the U.S. under NAFTA.[210] But significant U.S. liability is a theoretical possibility. For example, Loewen, a Canadian funeral home company, sought $725 million from the U.S. because it lost a damage award in a Mississippi state court.[211] It demanded investor-state arbitration in 1998.[212] The case was dismissed on procedural grounds, but the arbitration tribunal found that private contract disputes resolved in state courts are subject to NAFTA's jurisdiction.[213]

Methanex was a Canadian corporation that challenged California's prohibition on methyl tert-butyl ether ("MTBE"), which pollutes groundwater.[214] In 1999, Methanex demanded $970 million, alleging that the prohibition on MTBE harmed its ability to sell methanol, a chemical in MTBE.[215] The arbitration tribunal found that the connection between the MTBE ban and methanol was not sufficient as a basis for liability.[216] In the cases brought against the U.S., corporations or investors have demanded nearly $50 billion.[217]

Although U.S. BITs and FTAs are increasing—the U.S. has FTAs in effect with 20 countries[218] and 48 BITs[219]—cases like *Glamis Gold* raise fundamental issues about the nature and value of U.S. foreign policy and the agreements that emanate from it. On the most basic political level, the binding arbitration agreements upset constitutional federalism. Certainly, no business entity other than a foreign firm acting in reliance on an arbitration clause in a BIT or FTA could ever take the U.S. government to only one forum (three arbitrators) that would, once and for all, decide the disputed issue. The only constitutional exception to this rule is the original jurisdiction provision in Article III of the Constitution:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have

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209 PUBLIC CITIZEN, *supra* note 203, at 6.
210 *Id.* at 2–10.
211 *Id.* at 2.
212 *Id.*
213 *Id.*
214 *Id.* at 3.
215 *Id.*
216 *Id.*
217 *Id.* at 2–10.
218 *Trade Agreements*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, http://www.ustr.gov/trade-agreements (last visited Mar. 27, 2015).
219 *United States Bilateral Investment Treaties*, U.S. DEP'T OF STATE, http://www.state.gov/e/eb/ifd/bit/117402.htm (last visited Mar. 27, 2015).

> appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.[220]

Through the President's authority to conduct foreign affairs and the Senate's authority to ratify treaties, the U.S. has afforded foreign commercial firms the kind of expedited resolution process that the Constitution's founders reserved for states and high foreign officials as a method to deter significant conflict.

The exceptional right that foreign commercial firms operating inside the United States possess to take their cases first (and finally) to binding arbitration reflects more on the allure of international commerce and inward and outward foreign investment, as well as on the power of corporate interests, than on the U.S. government's fidelity to federalism. After all, depriving all federal and state agencies and courts, as well as all state governors and legislatures, of the power to regulate aspects of commercial matters places a big, round dent in the armor of separation of powers. To some degree, this raises the specter of the substantive non-regulation of economic matters that was popular during the *Lochner* era.[221] Indeed, some have argued that this modern U.S. approach will presage a decline in health, environmental, and labor standards:

> These firms have access under the deals to an 'investor-state' enforcement system, which allows them to skirt national court systems and privately enforce their extraordinary new investor privileges by directly challenging national governments before extrajudicial tribunals. These investor-state cases are litigated outside any domestic legal system in special international arbitration bodies of the World Bank and the United Nations. A three-person panel composed of private attorneys listens to arguments in the case, with the power to award an unlimited amount of taxpayer dollars to corporations. Because the mechanism elevates private firms and investors to the same status as sovereign governments, it amounts to a privatization of the justice system.[222]

Under NAFTA and at the instance of the trucking industry, the Obama Administration agreed to a pilot program to permit Mexican trucks into the United States, although the Mexican trucks have poorer safety records than U.S. trucks.[223]

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[220] U.S. CONST. art III, § 2.
[221] *See generally* Lochner v. New York, 198 U.S. 45 (1905).
[222] PUBLIC CITIZEN, *supra* note 203, at 1.
[223] Vicki Needham, *Rockefeller Wants Assurances Mexican Trucks Adhere to Safety Standards*, THE HILL (Oct. 31, 2011, 7:15 PM), http://thehill.com/policy/finance/190797-rockefeller-wants-assurances-mexican-trucks-adere-to-safety-standards.

Under FTAs and BITs, if foreign firms have economic procedural and substantive due process in the United States, then U.S. multinational firms will have similar substantive and procedural protections in the nations that are parties to the agreements and treaties. Arbitration might be the only realistic dispute resolution process that is accessible to U.S. firms in developing nations. In contrast, given the stable U.S. legal system, foreign investors have much less need for arbitration for their operations in the United States.

In providing this protection, the U.S. may have undercut federalism and weakened the ability of all governmental entities to regulate in the health, environmental, and labor areas. Opponents of binding arbitration may fear that an unpredictable and unfavorable arbitration decision in regard to expropriation will result in U.S. taxpayers having to compensate a foreign firm under a customary international law standard that would never apply under U.S. law. In considering health, environmental, and labor standards, governmental entities in the U.S. would find it politically impossible to place more stringent regulations on U.S. firms than they are allowed to place on foreign firms under BITs. As a result, if they fear having to pay compensation for expropriation, they may lessen health, environmental, and labor regulations for everyone.

The benefits of the FTAs may not be uniform. By the end of 2013, the U.S. trade deficit with FTA partner countries was more than five times higher than before the FTAs went into effect. According to Public Citizen:

> The aggregate U.S. trade deficit with FTA partners has increased by more than $147 billion (inflation-adjusted) since the FTAs were implemented. In contrast, the aggregate deficit with all non-FTA countries has decreased by more than $130 billion since 2006 (the median entry date of existing FTAs). Two reasons: a sharp increase in imports from FTA partners and significantly lower export growth to FTA partners than to non-FTA nations over the last decade. Using the Obama administration's net exports-to-jobs ratio, the FTA trade deficit surge implies the loss of about 800,000 U.S. jobs. [224]

Perhaps at the expense of U.S. workers, the U.S. government has used FTAs and BITs to promote foreign policy. In 2011, the U.S. ratified trade agreements with Korea, Colombia, and Panama.[225] According to former Secretary of State Hillary Clinton, the agreements are important not only for

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[224] *U.S. Trade Deficits Have Grown More Than 440% with FTA Countries, but Declined 16% with Non-FTA Countries*, PUBLIC CITIZEN (Mar. 28, 2014), http://citizen.typepad.com/eyesontrade/2014/03/us-trade-deficits-have-grown-more-than-440-with-fta-countries-but-declined-16-with-non-fta-countries.html.

[225] Hilary Rodham Clinton, *South Korea, Colombia, Panama Free Trade Agreements*, U.S. DEP'T OF STATE (Oct. 12, 2011), http://www.state.gov/secretary/20092013clinton/rm/2011/10/175348.htm.

their economic benefits but also because the "three important partners [are] in strategically vital regions."[226]

But the FTAs have been criticized for their practical implications.[227] North Korea and China may produce goods labeled "Korean" and export them to the United States through South Korea, in effect increasing the U.S. trade imbalance with China and skirting U.S. sanctions against North Korea. The U.S. trade agreement with Colombia does not provide for protections of Colombia's workers, although Colombia has a high rate of death for trade unionists, where fifty-one labor leaders were killed in 2010.[228] With a relatively small economy, Panama is beneficial to investors mainly as the world's second best tax haven, but not very beneficial economically to anyone else.[229]

VI. CONCLUSION: FDI WITH EYES WIDE OPEN

Almost all reports indicate that FDI provides economic benefits to host nations, including the U.S. The findings in this Article confirm that view but indicate that the value of FDI has been overstated and that the costs and risks associated with foreign investment have been understated. When foreign firms establish or purchase affiliates in the U.S., the firms bring essential competition and new ideas to the marketplace, through which they make American products and workers better. Still, absent foreign firms, U.S. employers would have employed many of the workers who now count as beneficiaries of FDI, albeit in a less competitive environment.

Moreover, a large majority of these jobs existed when the foreign firm acquired the U.S. affiliate. "In addition, while foreign direct investment does have positive net benefits for the economy as a whole, empirical research has not established that such benefits remain unambiguously positive when tax and financial incentives are offered as inducements."[230] With jobs in manufacturing, which has higher-than-normal wages, the employees of foreign firms are often managers, professionals, and scientists. The government conclusion, about 5 million jobs with foreign firms providing 30% more in average compensation, is incomplete or misleading.[231] The compensation of U.S. workers employed through FDI is naturally higher than the average compensation in the U.S. because the jobs are in higher-paying sectors.

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[226] *Id.*
[227] Lynne Dodson & Kathleen Ridihalgh, *Congress Should Reject Proposed Trade Agreements and Insist on Better Policies*, THE SEATTLE TIMES, http://seattletimes.nwsource.com/html/opinion/2015736117_guest27dodson.html (last updated July 26, 2011, 6:01 PM).
[228] *Id.*
[229] *Id.*
[230] JACKSON, *supra* note 9, at 22.
[231] *Id.* at 10.

Some undesirable individual, corporate, and national behaviors are associated with FDI, including tax evasion or avoidance, theft of trade secrets, economic espionage, and bribery of officials of developing nations. Despite their diminutive nature in world commerce, the Netherlands and Luxembourg, for example, are among the top nations sending foreign investment into the United States. It is likely that individuals and firms transferred their assets to and from the Netherlands and Luxembourg simply to avoid taxation, with no net economic benefit to the United States.

Foreign firms with affiliates in the U.S. must comply with the Foreign Corrupt Practices Act. In just a six-year period (2008–2014), after lodging criminal and civil bribery accusations against some of the world's most prominent corporations (Siemens, KBR/Halliburton, BAE, Total, Alcoa, Snamprogetti, Technip, JGC Corporation, Daimler, and Weatherford), the U.S. reached settlements worth $3.82 billion.[232] Despite such recurring risks, the United States' experience with FDI has been seemingly profitable, although the FDI has been mainly with firms in ten developed nations (United Kingdom, Japan, Netherlands, Germany, Canada, Switzerland, France, Luxembourg, Belgium, and Australia).[233] By 2012, FDI was about 16% of the U.S. GDP,[234] and in 2013, foreign firms' direct investment into the U.S. increased to $272.6 billion,[235] to a total of $2.8 trillion.[236]

To enhance FDI, the U.S. relies on FTAs and BITs, mainly with developing nations. BITs with developed nations are unnecessary because multilateral treaties bind the nations already, and all the developed nations are members of the OECD, which may coordinate dispute resolution. Moreover, developed nations have legal systems that provide stability. A main reason that the U.S. enters into BITs is to ensure that U.S. firms operating abroad will not be expropriated by a foreign nation without compensation. The affiliates of foreign firms operating inside the U.S. have constitutional and statutory protection against the government's taking of their property. But if a foreign firm has a dispute with the U.S. government, under a BIT the firm may take the dispute to binding arbitration rather than to federal court. Binding arbitration is useful, but the U.S. should re-consider whether it should be available in all cases involving health, labor, and environmental regulations.

Various costs and risks regarding national security and law enforcement have not been adequately evaluated. Foreign firms that question whether the U.S. government will try to block their mergers with or

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[232] Cassin, *supra* note 20.
[233] DEP'T OF COMMERCE, *supra* note 5, at 6.
[234] ORG. FOR INT'L INV., *supra* note 26, at 1.
[235] Ibarra-Caton & Mataloni Jr., *supra* note 34, at 6.
[236] *Id.* at 1.

acquisitions of U.S. firms on national security grounds may ask CFIUS to provide an informal or formal opinion. Where a foreign government is seeking to acquire a U.S. firm and national security is implicated, CFIUS, comprised of government agencies and led by the Treasury Department, must conduct a formal investigation and make a recommendation to the President, who will approve or disapprove the acquisition. Through CFIUS, the U.S. has adequate means to prevent nations and dubious foreign firms from acquiring critical companies or assets so long as economic interests are subordinated to national security.

The U.S. should continue to promote FDI but better understand its costs and risks. First, tax laws should be changed to prevent paper transfers of assets solely to avoid taxation. Through inward and outward FDI, U.S. corporations avoid reasonable taxation through operating in tax haven nations. Second, the U.S. should monitor foreign sovereign wealth funds and state-owned enterprises more closely. In considering their political and social interests, the foreign funds and enterprises are more than amoral corporate entities focused on profit. Their national interests are different from, and in many instances contrary to, the interests of the United States. Thus, third, the U.S. should ensure that enterprising nations and foreign firms are prevented from acquiring national-security-important U.S. firms.

Fourth, the United States must ensure that foreign firms and nations are excluded from de facto participation in state and federal elections. Under *Citizens United*, U.S. affiliates, even when controlled by foreign firms or nations, may contribute unlimited sums of money to independent U.S. political organizations. Those organizations are never truly *independent* from political candidates. Under *Citizens United*, the U.S. corporate affiliates of foreign firms have the right to financially support political groups with unlimited payments, but the government has the right to make them disclose their expenditures and to identify the members of the groups and their supporters. In sum, the U.S. needs additional information and disclosure about the value of FDI and its risks, especially where foreign firms may influence the U.S. political process or its national security.