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"I do not think foreign nationals have any business in our political campaigns. They cannot vote in our elections so why should we allow them to finance our elections? Their loyalties lie elsewhere; they lie with their own countries and their own governments."[1]

"The real scandal in Washington is not what is done illegally, but what is done legally."[2]

I. INTRODUCTION

Increasingly, foreign investors are doing business in the United States. Corporate firms locate in the United States to avoid protective tariffs, gain access to the rich U.S. market, acquire technology, and make a profit.[3] As of 1992, a preliminary survey estimated that foreign investment in the United States is over $692 billion and growing.[4] To maximize profits and protect these substantial

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[1] 120 CONG. REC. 8783 (1974). Senator Bentsen was referring to the investigation by the Senate Watergate Committee of contributions by foreign nationals. Senator Bentsen noted a ban for such contributions had recently been called for by President Nixon.

[2] PAT CHOATE, AGENTS OF INFLUENCE: HOW JAPAN MANIPULATES AMERICA'S POLITICAL AND ECONOMIC SYSTEM 1 (Touchstone 1991).

[3] MARTIN TOLCHIN & SUSAN TOLCHIN, BUYING INTO AMERICA 261 (Times Books 1988).

[4] EDWARD M. GRAHAM & PAUL R. KRUGMAN, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES 18 (Institute for International Economics, Washington, D.C. 1995). *But see*, TOLCHIN & TOLCHIN, *supra* note 3, at 6. See 1. Foreign Money, note 2: The Tolchins estimated in 1987 that foreign direct investment in the United States was

investments, foreign individuals, governments, and corporations have studied the U.S. government and electoral process and have expended significant resources to influence U.S. elections, government officials, and government agencies. Foreign corporate participation in U.S. politics has included foreign investors negotiating with state and local officials when making "siting" decisions for new manufacturing facilities, and foreign owned United States subsidiaries forming political action committees (PACs) which lobby and contribute, both directly and indirectly, to federal, state, and local elections.[5]

This participation of foreign corporations in the politics of the United States is a relatively new phenomenon that evolved in the 1980s along with the increase in foreign investment.[6] Traditionally, the United States had approached international trade policies from an "output" position[7] where U.S. corporations had been principally investing abroad rather than foreign corporations investing in the United States. This output position has been the standard trade policy position from which economic policy has been formulated by the industrial nations and the trade organizations of Organisation of Economic Development and GATT which represent them. It is the historical position of the United States in its international trade

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$1.5 trillion:The figure of $196 billion was calculated by the Commerce Department in 1974 and excluded foreign bank deposits abroad. By 1979, the Commerce Department's calculation had grown to $407 billion, and by 1983, $781.5 billion. Of that amount, foreign investments in government securities, stocks, and bonds had jumped from $153.9 billion to $646.1 billion. The figure of $1.5 trillion is the authors' estimate as of 1987, based on data collected for this study. Readers should bear in mind the inadequacy of existing data, presently collected by sixteen separate agencies, and significantly underreported in virtually all major categories.

[5] *See generally*, CHOATE, *supra* note 2; GRAHAM & KRUGMAN, *supra* note 4; TOLCHIN & TOLCHIN, *supra* note 3; THE POLITICS OF INDUSTRIAL RECRUITMENT, JAPANESE AUTOMOBILE INVESTMENT AND ECONOMIC DEVELOPMENT IN THE AMERICAN STATES (Ernest J. Yanarella et al. eds., Greenwood Press 1990); NORMAN J. GLICKMAN & DOUGLAS P. WOODWARD, THE NEW COMPETITORS, HOW FOREIGN INVESTORS ARE CHANGING THE U.S. ECONOMY (Basic Books 1989).

[6] RACHEL MCCULLOCH, NATIONAL BUREAU OF ECONOMIC RESEARCH, WORKING PAPER NO. 3672, INVESTMENT POLICIES IN THE GATT 6 (1991).

[7] *Id.*

dealings. Until the 1980s, the United States was principally concerned with U.S. foreign investment abroad.[8] Therefore, the primary U.S. concern, in the interests of investing U.S. companies, was the relaxation of trade restrictions by recipient countries. Accompanying this concern, not surprisingly, was U.S. support of the "national treatment" principle, or the notion that foreign firms should be treated as national firms in host countries.

The increased foreign investment in the United States in the 1980s should have forced the U.S. to reevaluate its stance on foreign investment abroad and at home.[9] After all, the U.S. itself has an interest in minimizing foreign influence in domestic affairs,[10] while maintaining its presence abroad. However, the United States has failed to acknowledge the need to exercise controls on foreign investment and its accompanying influence, something long advocated by international organizations such as the United Nations, its Commission on International Investment and Transnational Corporations, and many developing countries.[11] The international trade and investment goals of the United States should be in conflict because the United States wishes to secure the benefits of more free trade and integrated global markets for U.S. business investing abroad, while retaining complete national sovereignty of home markets with respect to foreign corporations becoming a larger part

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[8] *Id.*

[9] *Id.* at 4.

[10] *See generally*, MCCULLOCH, *supra* note 6.

[11] *See* David Lowry, *The National Level Roots of the Failure of State Industrial Policy, in* THE POLITICS OF INDUSTRIAL RECRUITMENT, JAPANESE AUTOMOBILE INVESTMENT AND ECONOMIC DEVELOPMENT IN THE AMERICAN STATES 198 (Ernest J. Yanarella et al. eds., Greenwood Press 1990). Lowry discusses the failure of the Reagan Administration to balance the international trade policy that "exerted pressure" on Japanese firms to locate in the United States, and macroeconomic policy adopted to reduce inflation, but resulted in high unemployment rates. Lowry states that these policies led to the desperation of state and local officials to attract foreign firms to their localities to reduce the high rates of unemployment. The federal government did nothing to respond to these pressures faced by state officials and the result was that foreign firms had the higher negotiating position when asking for state "incentive packages".

of the United States landscape.

Instead, the resulting United States national industrial policy has been a default policy[12] where the federal government has done little or nothing to regulate foreign investment. This void, coupled with the increase in foreign direct investment in the United States, has resulted in the formation of individual state industrial policies designed to lure foreign companies to individual states. These policies were and continue to be the standard property tax abatements, infrastructure funding, and state-sponsored training programs for workers at foreign investment sites.[13] States, in pursuit of their industrial policies, make large financial concessions to foreign investors who would likely locate in the United States regardless of state incentive packages.[14] The industrial policy formulated by the individual states is ineffective and costly.[15]

These new investors form political action committees from their U.S. subsidiaries which contribute to federal and state elections. This foreign political participation is in clear violation of U.S. laws proscribing political participation by foreign entities. However, the United States has failed to address the increasing political participation of foreign controlled subsidiaries. This political involvement by foreign corporations has strengthened the position of foreign investors in the United States, resulting in the continuing compromise of U.S. economic and political interests.[16]

The United States' inability to respond to the increasing involvement of foreign corporate participation in the U.S. political processes allows U.S. political and economic resources to dissipate while simultaneously leaving U.S. home markets susceptible to foreign control. This default policy by the United States is inconsistent with the historical United States policy abroad that has advocated national treatment standards in an effort to allow U.S. corporations to gain

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[12] *Id.* at 197.
[13] TOLCHIN & TOLCHIN, *supra* note 3, at 49.
[14] GLICKMAN & WOODWARD, *supra* note 5, at 229.
[15] *Id.*
[16] GRAHAM & KRUGMAN, *supra* note 4, at 85- 86.

access to global markets. To stabilize U.S. political and corporate interests, the United States needs to implement a cohesive national industrial policy that is not one of default, but a policy that balances the active attraction of foreign direct investment while safeguarding national political and economic resources.

This paper first evaluates the economic conflicts that illustrate the need for separate treatment of national and foreign corporations in the United States. Then, the traditional policy of "national treatment" advocated by the industrial nations and their representative trade organizations will be explored. Next, the need for a code of conduct and national controls on transnational corporations that has been put forth by the United Nations and the developing countries is explained. Additionally, the United States domestic regulation and its limitations are outlined. Finally, solutions advocating a cohesive federal industrial development policy are put forth.

II. THE ECONOMIC STAKES AND THE NEED TO DISTINGUISH FOREIGN CORPORATIONS FROM U.S. CORPORATIONS

While foreign corporate participation in government functions has accounted for only a small amount of overall corporate participation in the electoral and political functions of the U.S. government,[17] there are a number of reasons why it needs to be monitored and limited. These reasons include national economic and security interests[18] that have long been neglected by the default U.S. industrial policy.

First, strong and active foreign political influence can hinder

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[17] A *National Journal* survey in mid-1986 found that of the 92 PACs sponsored by corporations, in which a foreign investor held 10 per cent or more of the stock, they distributed relatively little money. Drexel Burnham Lambert Group Inc. (Belgian-controlled) and Shell Oil Co. (Dutch and British-owned), contributed more than $100,000 to congressional candidates during the study period. Only $796 was the average given to congressional candidates by foreign corporations. Bruce Stokes, *Foreign Owners*, NATIONAL JOURNAL, Sept. 19, 1987, at 2333, 2335.

[18] GRAHAM & KRUGMAN, *supra* note 4, at 85-86.

the government's responsiveness to American corporate concerns and participation. Successful manipulation by foreign corporations of the United States' domestic political process channels resources away from nationals toward foreigners.[19] In contrast, successful manipulation of the political process by domestic actors only redistributes income among nationals.[20] The resultant redistribution of wealth to foreign participants is contrary to national economic, security and political interests and therefore, should not be furthered by public policy.[21] This breach of national interest is why foreign influence in U.S. politics warrants greater concern than influence by domestic corporations.

Second, national security is compromised by indiscriminate foreign participation in the U.S. political process. Substantial foreign ownership of domestic industries may alter the evaluation of economic policies from a national point of view.[22] Economically, this effects a wider-scale redistribution of wealth than foreign participation, as discussed above, because large scale politics and funding of election campaigns have the tendency to increase foreign direct investment, thereby shaping national policies by economic considerations.[23] Factoring foreign demands into the equation of national policy has a costly effect to the nation. For example, the review process for foreign investment in the United States is already ineffective. However, increasing political control and expansive economic investment by foreign investors relaxes the review process for the acquisition of key defense, chemical engineering and aeronautic industries in the United States. Policymakers, eager for continued and increasing foreign investment, are slow to review or prohibit acquisitions that may be a threat to national security.

Another national security conflict is due to the fact that disclosure of the identity of firm ownership and control is rarely

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19 GRAHAM & KRUGMAN, *supra* note 4, at 86.
20 *Id.*
21 *Id.*
22 *Id.* at 85.
23 *Id.* at 86.

mandated, and even then disclosure mandates are avoided. The majority of foreign political influence is rarely identified as what it is: foreign participation in U.S. politics, voicing foreign goals and loyalties. For example, the privatization of defense-related sectors is economically beneficial to both the government and the private sector because the industry becomes more efficient.[24] However, when foreign-controlled firms compete for the newly-privatized defense industry, U.S. national security interests are compromised.[25] This foreign presence is even more problematic when there is no disclosure of the identity of the acquiring corporation because deficient review processes are further weakened by insufficient information.

Finally, while the United States doles out its own economic, political and natural resources to foreigners who compete with U.S. corporations, there is little to no reciprocity in benefits or incentives for U.S. corporations that invest abroad.[26] This lack of reciprocity is costly to American corporations competing in a global market where foreign corporations are not only receiving their home country's economic and political concessions, but those of the United States, as well. As a result, American business cannot effectively compete. First, they are not as successful abroad due to tight foreign control on entry plans and lack of economic incentives to invest in foreign countries. Additionally, American business is not effective at home because they must "share" economic and political resources in their home market. The combined effect of lack of profitability abroad and loss of profitability in the United States results in investment loss, low profit margins and the inevitable "downsizing" of American industries.[27]

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[24] *Id.* at 86.

[25] *Id.* at 86. Graham & Krugman discuss this as a relevant issue in the Clinton administration.

[26] *See id.* at 156-158, Graham & Krugman acknowledge that lack of reciprocity does exist for U.S. corporations investing abroad. However, the authors caution that the U.S. should retaliate with a similar policy by limiting foreign investors own "equal treatment" with U.S. corporations in the U.S. Graham & Krugman urge that a more liberalized trade policy should be adopted worldwide.

[27] *See generally*, TOLCHIN & TOLCHIN, *supra* note 3.

III. NATIONAL SECURITY: NATIONAL ECONOMIC POLICY AND INTERNATIONAL LAW

A. The United States as the leading advocate of the national treatment principle

The United States has long been a stalwart proponent of the policy of national treatment.[28] The principle of national treatment mandates equal application of the laws of a host country to the foreign-controlled corporation operating within the host's jurisdiction. This treatment includes the elimination of tariff and non-tariff barriers worldwide so as to secure more globally integrated markets that assure access for U.S. corporations doing business abroad. The international trading community has traditionally been divided into two camps. Developing nations have consistently resisted efforts to apply a national treatment standard, arguing that they will lose autonomy in economic development decisions if they are not able to place restrictions and requirements on transnational corporations operating within their countries. In contrast, business interests and industrialized nations have repeatedly called for norms for provisions that would encourage fair, equitable and nondiscriminatory treatment of transnational corporations.[29]

Recently, Congressional testimony on the World Trade Organization before the United States House of Representatives Committee on Ways and Means Subcommittee on Trade stipulated that the two cornerstone rules of the World Trade Organization, the Most Favored Nation principle and National Treatment, are in fact

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[28] *See, e.g.*, Susan B. Hansen, *Industrial Policies in the American States: Historical and Comparative Perspectives*, *in* THE POLITICS OF INDUSTRIAL RECRUITMENT 3 (Ernest Yanarella et al. eds., 1990). Hansen explains that "even before the American Revolution the colonies were heavily involved in efforts to encourage investment and to promote business."

[29] KAWAMENA ACQUAAH, INTERNATIONAL REGULATION OF TRANSNATIONAL CORPORATIONS, THE NEW REALITY 117 (1986).

basic tenets of the American political and economic systems.[30] Political economist Joe Cobb stated, "National treatment is a principle that is very central to the American political and economic system, inasmuch as it is written into our Constitution. Article IV, Section 2, says: The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the Several States."[31] Cobb noted that "without the early adoption of free trade and national treatment among all of our states, this country could never have developed economically to become the wealthiest nation on earth."[32]

Mr. Cobb is not alone in advocating for the international adoption of "national treatment." President Clinton most recently stated his support for the principle of national treatment in a letter to the Senate on the Bilateral Investment Treaty with Uzbekistan. President Clinton confirmed, "The Treaty is fully consistent with U.S. policy toward international and domestic investment. A specific tenet of U.S. policy, reflected in this Treaty, is that U.S. investment abroad and foreign investment in the United States should receive national treatment."[33]

Congress has enunciated the United States' policy of the

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[30] *The World Trade Organization: Congressional Testimony Before the Comm. on Ways and Means Subcomm. on Trade*, 1996 WL 7136856 (1996) (statement of Joe Cobb, John M. Olin Senior Fellow in Political Economy).

[31] *Id.* at 6-7.

[32] *Id.* at 7. Mr. Cobb continued:

> Critics of the World Trade Organization and of trade agreements in general may well say that they do not want foreign business people and foreign products to be treated in the United States the same as products produced here or businesses owned by Americans, but the question then has to be, "Do we want Americans to be discriminated against by foreign governments when they try to do business or sell products to other countries?"
>
> The World Trade Organization provides a framework to go and try to get equal treatment for Americans. But the concept of playing fair and following equal rules naturally implies that Americans will also play by the same rules.

[33] *Letter from President Clinton to the Senate on Bilateral Investment Treaty with Uzbekistan*, U.S. Newswire, Feb. 28, 1996, *available in* 1996 WL 5619791 at 3.

freedom and promotion of foreign investment stating:

The principal negotiating objectives of the United States regarding foreign direct investment are--

> (A)(i) to reduce or to eliminate artificial or trade-distorting barriers to foreign direct investment, to expand the principle of national treatment, and to reduce unreasonable barriers to establishment; and
> (ii) to develop internationally agreed rules, including dispute settlement procedures, which--
> (I) will help ensure a free flow of foreign direct investment, and
> (II) will reduce or eliminate the trade distortive effects of certain trade-related investment measures.
> (B) In pursuing the negotiating objectives described in subparagraph (A), United States negotiators shall take into account legitimate United States domestic objectives including, but not limited to, the protection of legitimate health or safety, essential security, environmental, consumer or employment opportunity interests and the law and regulations related thereto.[34]

The United States continues to liberalize the meaning and application of national treatment. Most recently, on February 8, 1996, President Clinton signed the new telecommunications law into effect which "includes unrestricted market access and national treatment for foreign companies in the US 'local' telecommunications market."[35] The telecommunications law deregulates the U.S. telecommunications industry by eliminating internal barriers between local markets, cable

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[34] 19 U.S.C. § 2901(b)(11) (1988).

[35] *Jeffrey Lang, U.S. deputy trade representative, communiqué,* Feb. 26, 1996, *reprinted in US offers "unrestricted market access" to foreign telecom firms,* AGENCE FRANCE-PRESSE, Feb. 26, 1996, *available in* 1996 WL 3811558 at 1.

and telephone.[36] U.S. deputy trade representative, Jeffrey Lang, has presented the "offer" of "unrestricted national treatment" to the World Trade Organization (WTO), conditioned on the opening of competition rules in the markets of a "critical mass" of WTO members.[37] The term "national treatment" in the telecommunications law means that the U.S. will grant foreign telecommunications companies the same treatment as it gives to its own national companies. However, it has been determined that Lang's offer before the WTO is meant to be revoked if the "critical mass" of countries do not agree to provide market access and national treatment in the telecommunications sector.[38] The WTO members that have not opened their telecommunications markets to foreign companies include the European Union (EU), Japan and several other Asian countries, Australia, New Zealand, and such countries as Brazil and Argentina.[39] Lang urged the other countries "to make similar improvements to their offers, or for countries that have not tabled offers to do so now."[40]

The economic interests of the corporations of industrial countries, such as the United States, have been represented by the trade organizations these countries have built. These interests were first represented by the formation of the World Trade Organization (WTO) constructed after World War II. The General Agreement on Trade and Tariffs (GATT) is the successor to the WTO and has functioned as the main vehicle for the elimination of trade and tariff barriers world-wide. The promulgation of national treatment by such trade organizations has been an effective force in guaranteeing access to global markets for transnational corporations.[41]

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[36] *Id.*
[37] *Id.* at 2.
[38] *Id.* at 3 (referring to the interpretation by "an informed source in Geneva.").
[39] *Id.*
[40] *Id.*
[41] *See generally*, MCCULLOCH, *supra* note 6.

B. International Endorsements of the National Treatment Principle

1. Organisation for Economic Cooperation and Development

The Organisation for Economic Cooperation and Development (OECD) is one of the leading trade organizations encouraging implementation of the national treatment principle. The most recent project of the OECD has been the production of a strengthened 1993 National Treatment Instrument.[42] This National Treatment Instrument is one of four sections of the 1976 Declaration on International Investment and Multinational Enterprises. The National Treatment Section is the *Third Revised Decision on National Treatment*, adopted by the OECD Council in December 1991.[43] The OECD, in the foreword of the 1993 report states:

> OECD Member countries have declared that enterprises operating in their territory and controlled by nationals of another Member country should be treated no less favourably than domestic enterprises in like situations, that is they should be accorded "National Treatment". Member countries have gradually taken steps to extend their application of this principle by removing restrictions on foreign direct investment, thus contributing to a much improved investment climate.[44]

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[42] ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, NATIONAL TREATMENT FOR FOREIGN CONTROLLED ENTERPRISES (1993) [hereinafter OECD]. The Organisation for Economic Co-operation and Development has issued a 1993 report on national treatment. In the foreword, the OECD states the purpose: to provide Member governments and the general public with a comprehensive and accessible explanation of the principle of National Treatment and how it is applied among OECD countries. It is designed to improve implementation of the National Treatment principle through a better understanding of its nature and scope." *Id.* at 3.

[43] *Id.* at 13.

[44] *Id.* at 3.

The National Treatment Instrument, originally meant to be a legally binding document, is now reinforced by new mandatory reporting measures and "increased peer pressure on Member countries to reduce the number and scope of their restrictions."[45] The Declaration defines national treatment and the meaning of liberalisation, lists acceptable exceptions to national treatment and discusses the principle of non-discrimination.[46]

2. GATT

The General Agreement on Trade and Tariffs, the leading world trade organization, has advocated "free trade" since the end of World War II.[47] Free trade necessitates the application of the "national treatment" principle for host countries where foreign corporations operate. National treatment insures that restrictions on the free flow of goods, services, and capital throughout the world are reduced.[48] In the Uruguay negotiations on "Trade Related Investment Measures" (TRIMs), the GATT specifically addressed the "national treatment" of foreign investors abroad.[49] TRIMs deemed unacceptable by the GATT included local-content requirements and minimum-export requirements which would force foreign investors to "source" a certain percentage of their manufacturing materials in the home country where they manufacture, and export a certain amount of their finished good, so as not to flood local markets.[50] The Uruguay round on TRIMs was a notable first in the GATT history because the GATT was designed to address issues of trade. In contrast, foreign investment is a capital investment and goods are being reduced from within the country, rather than being exported to

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45 *Id.* at 10.
46 *Id.* at 14-17.
47 TOLCHIN & TOLCHIN, *supra* note 3, at 4-5.
48 *Id.* at 4.
49 MCCULLOCH, *supra* note 6, at 1.
50 *Id.* at 1.

that country.[51] The Uruguay round viewed TRIMs as a trade policy problem that inhibits international free trade and should be phased out through "grandfather clauses" with newly imposed TRIMs prohibited.[52] The application of the national treatment principle would not allow for foreign corporations investing in host countries to be subject to such performance requirements as TRIMs. It is this result that the GATT hopes to achieve.

The United States and the several international trade organizations have continuously advocated world-wide acceptance of the principle of national treatment without including mention of how national treatment should function with regard to political participation in the host country. However, there has been international recognition that transnational corporations need to adhere to a policy of non-intervention in the affairs of another country where it operates. The international norms of non-intervention, as applied to states and transnational corporations are well established principles of customary international law.[53]

C. *International Norms of Non-Intervention*

International organizations and the developing nations they represent have long been opposed to the blind adoption of the national treatment principle. Acceptance of national treatment by developing nations has long been viewed as a relinquishment of national

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[51] *See id.* at 6. McCulloch argues that a separate GATT for foreign direct investment may be a better way to address the very different issue of foreign direct investment. McCulloch states that because of the differences between trade and investment, a more effective governing of investment issues would be a separate GATT for foreign direct investment that "would establish a set of rules and dispute-settlement procedures aimed at increasing the global benefits of international investment, just as GATT does-at least in principle--for national policies governing trade."

[52] *Id.* at 12.

[53] Professor Lori Fisler Damrosch examines various international instruments that articulate and support "the nonintervention norm as a textual principle." Lori Fisler Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence Over Domestic Affairs*, 83 AM. J. INT'L. L. 1, 6 (1989).

sovereignty and the ability to effectively evaluate and implement the most useful economic development program for such developing nations. These developing nations and their representative international organizations have called for limits on the forms and strengths of transnational influence in their countries' economic, political and security interests. These interests of developing nations can be supported by the international customary norm of non-intervention among foreign nations.

1. <u>The United Nations Charter</u>

The norm of non-intervention in the affairs of states is a well-established customary international norm. This international norm of non-intervention is exhibited in several international documents[54] and resolutions. The Charter of the United Nations refers to the "right to self determination" throughout.[55] The Charter states "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace."[56] The Charter also recognizes the right to political independence.[57] Moreover, the United Nations recognizes its own inability to intervene in the national affairs of Member States: "nothing contained in the present Charter

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[54] Documents not examined in this paper which recognized the principle of non-intervention include the *1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625 (XXV) (1970) and the *Declaration on the Establishment of a New International Economic Order*, G.A. Res. 2131 (XX) (1965). *See also The Declaration on the Admissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, GA Res. 2225 (XXI) (1966).

[55] U.N. CHARTER *passim*.

[56] *Id.* at art. 1, para. 2.

[57] U.N. CHARTER art.2, para. 4. "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." *Id.*

shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter."[58]

Subsequent documents also refer to the right to "self-determination". Both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights state "All people have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[59] Indeed, these instruments, and the right to political freedom that they embody constitute basic international human rights law.[60]

2. General Assembly Resolutions

General Assembly resolutions have reiterated the United Nations' commitment to non-intervention. The Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty (Declaration on Intervention)[61] was drafted and enacted due to the international alarm at "direct or indirect forms of interference threatening the sovereign personality and political independence of States."[62] The document declares that "no State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State."[63] The Declaration on Intervention recognizes the principle of

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[58] *Id.* art. 2, para. 7.

[59] UNITED NATIONS, INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, art. 1, U.N. Doc. A/6316 (1966); UNITED NATIONS, INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, art. 1, U.N. Doc. A/6316 (1966).

[60] *See generally* FRANK NEWMAN AND DAVID WEISBRODT, SELECTED INTERNATIONAL HUMAN RIGHTS INSTRUMENTS (1990).

[61] G.A. Res. 2131, *supra* note 54, at 11; *see also* G.A. Res. 2225, *supra* note 54, at 16.

[62] G.A. Res. 2131, *supra* note 54, at 11.

[63] *Id.* at 12.

non-intervention[64] and prohibits States from using or encouraging the "use of economic, political or any other type of measures to coerce another State"[65] to secure advantages of any kind.

The Charter of Economic Rights and Duties of States[66] reiterates the principle of non-intervention by stating that political relations among States are governed by the principle of "Sovereignty, territorial integrity and political independence of States."[67] This declaration prescribes the economic rights and duties of States. These duties include the freedom to "choose its political system without outside interference, coercion or threat."[68] Significantly, this Charter acknowledges the right of states to "regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies."[69] This Charter declares that "Transnational corporations shall not intervene in the internal affairs of a host State."[70]

The recognition that multinational enterprises "now play an important part in the economies"[71] of the governments of the world has led international organizations to draft communiqués regulating the behavior of transnational corporations. The Guidelines for Multinational Enterprises adopted by the OECD in 1976,[72] acknowledges that "the advances made by multinational enterprises in organising their operations beyond the national framework may lead to abuse of concentrations of economic power and to conflicts with

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[64] The Declaration on Intervention states that deprivation of national identity "constitutes a violation of the inalienable rights and of the principle of non-intervention". *Id.*

[65] *Id.*

[66] GA Res. 3281 (XXIX) at 50 (1974).

[67] *Id.* at 51.

[68] *Id.* at 52.

[69] *Id.*

[70] *Id.*

[71] O.E.C.D. Press Release (June 22, 1976), *reprinted in* 15 ILM 969.

[72] *Id.*

national policy objectives."[73] The guidelines propose vague standards by which corporations should abide. They provide that enterprises "should,... (8) unless legally permissible, not make contributions to candidates for public office or to political parties or other political organizations; (9) abstain from any improper involvement in local political activities." [74]

3. The United Nations Commission on International Investment and Transnational Corporations (Formerly the Commission on Transnational Corporations)

The most significant international body to focus specifically on the norms of conduct for transnational corporations is the United Nations Commission on International Investment and Transnational Corporations.[75] Work on the formulation of the United Nations Code of Conduct on Transnational Corporations[76] is conducted by the United Nations Centre on Transnational Corporations (UNCTC). The United Nations Commission on International Investment and

[73] *Id.*

[74] *Id.* at 972.

[75] The Commission recently changed its name from the United Nations Commission on Transnational Corporations to the United Nations Commission on International Investment and Transnational Corporations. *See* Robert J. Fowler, *International Environmental Standards for Transnational Corporation*, 25 ENVTL. L. 1, 30 n.139.

[76] UN Doc. E/C.10/1985/S/2, at 24-26. The text of the draft code is divided into six parts. The first part is reserved for the preamble and statement of objectives (yet to be agreed upon). Definitions and the scope of application of the code are in the second part. The third part is divided into four sections and will discuss activities of TNCs, first with general political implications, second with specific economic, financial, and social issues; and the third section will address disclosure of information by TNCs. The kind of treatment TNCs could expect from host governments is addressed by the fourth part. Intergovernmental cooperation for the application of the code is covered by the fifth part. Finally, the sixth part will concern modalities for implementation of the development at national and international levels. KWAMENA ACQUAAH, INTERNATIONAL REGULATION OF TRANSNATIONAL CORPORATIONS, THE NEW REALITY 114 (1986).

Transnational Corporations was established in 1974.[77] The Commission is an inter-governmental subsidiary body of one of the major organs of the United Nations, the Economic and Social Council (ECOSOC).[78] The Commission elects sixteen expert advisers, or "Group of Eminent Persons" to assist the Commission in its deliberations. The main functions of the Commission are to "discuss and keep under review all issues related to Transnational Corporations (TNCs), to draft the UN Code of Conduct on Transnational Corporations and to advise ECOSOC in all matters relating to TNCs".[79] Furthermore, the Commission determines the priorities and the program work of the Centre on Transnational Corporations.[80] It is clear that the focus of the Commission has been to strengthen the bargaining power of third world countries in their negotiations with transnational corporations by providing them with information.[81]

The Commission has recognized the importance of international efforts to prohibit involvement of transnational corporations in host country politics.[82] It stated, "concern over the impact of transnational corporations in domestic and international affairs of States has been expressed in a variety of forums and texts and several efforts to prescribe the conduct of transnational corporations in other fields have been made in documents of various

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77 UNITED NATIONS CENTRE ON TRANSNATIONAL CORPORATIONS, UNITED NATIONS, UNCTC BIBLIOGRAPHY 1974-1987, at 1 (1988).

78 *Id.*

79 *Id.*

80 *Id.*

81 ACQUAAH, *supra* note 29, at 111.

82 The Commission has considered "Political Issues" to be one of the "most important substantive issues" in formulating a code of conduct. The Commission cited the Economic Declaration of the Fourth Conference of Heads of State or Governments of Non-Aligned Countries: "The Heads of State or Government denounce before the world public opinion the unacceptable practices of transnational companies which infringe the sovereignty of developing countries and violate the principles of non-interference and the right of peoples to self-determination which are basic pre-requisites for their political, economic and social progress." *See* CENTRE ON TRANSNATIONAL CORPORATIONS, TRANSNATIONAL CORPORATIONS: MATERIAL RELEVANT TO THE FORMULATION OF A CODE OF CONDUCT 21-22 (1976).

origins."[83]

However, meetings of the Commission have not yet resulted in any codification of regulations. A draft code of conduct for transnational corporations has been in preparation for many years.[84] One of the issues in continuing dispute is how the draft code should deal with corporate political activities, in view of widely diverse attitudes and practices in different parts of the world. The Commission stated "While the principle of prohibition of political intervention in domestic affairs of States is beyond dispute, the lines of admissible political involvement have not yet been generally drawn."[85]

Regarding political contributions by transnational corporations, the Group of Eminent Persons, in advising the Commission, stated, "The financial contributions of multinational corporations as well as of others to interest groups, should be regulated and disclosed."[86] The Commission reviewed the Group of Eminent Persons' recommendations:

> The Group felt that as a general principle the public activities of these corporations should be confined to those having a direct relationship to the objectives set out for the corporation upon its entry into the host country; for example representing their views to local authorities regarding policies that might affect their own companies. Thus, the Group implicitly acknowledged the conflict inherent in an affiliate of a transnational corporation to be at the same time a

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[83] *Id.*

[84] The Commission on International Investment and Transnational Corporations first met in New York in 1975. At the time international criticism for transnational corporate activities throughout the world was at its all time high. JOHN ROBINSON, MULTINATIONALS AND POLITICAL CONTROL 165 (1983).

[85] MATERIALS RELEVANT TO THE FORMULATION OF A CODE OF CONDUCT, *supra* note 82, at 21.

[86] *Id.* at 23.

> "good citizen" and a "discreet foreigner". As a "good citizen" it has the right to express views concerning governmental policies; as a "discreet foreigner" it should do it in a circumspect way. Then the onus falls on the Government to delineate permissible political activities. Publicity in this area was favoured.[87]

The Commission recognizes that political interference "can assume a variety of forms, some less obvious than others."[88] The Commission stated the need for a provision in the Code of Conduct that would require "transnational corporations to abstain from all interference in the internal affairs of the country in which they operate, or prohibiting improper political activities."[89] The Commission stated that this provision would cover the various forms of political pressure exerted by transnational corporations and would include "illegal contributions to political parties, political organizations or candidates for public office."[90]

Clearly there are problems with the acceptance of an international code of conduct for international investment and transnational corporations. Developing nations hope for a legally binding, enforceable document in the form of a multilateral treaty while transnational corporations urge that document by a voluntary code.[91] It is unclear when or if the commission will be able to formulate and implement a code that will meet the requirements of its many member states. However, the Commission has taken considerable steps in creating an international forum for the different concerns of the governments and corporations involved. However, the Commission has taken considerable steps in creating an international forum for the different concerns of the governments and corporations involved.

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87 *Id.*

88 CENTRE ON TRANSNATIONAL CORPORATIONS, *supra* note 82, at 22.

89 *Id.*

90 *Id.*

91 ACQUAAH, *supra* note 29, 115.

Recognition of the norm of nonintervention is not unique to developing nations and in fact, some of the most economically successful nations have developed and adopted some of the most restrictive laws regarding foreign corporate influence of their countries' national politics and economies.[92] These nations typically continue to invest abroad, gaining access to international markets while maintaining national controls over their home markets through effective legislation prohibiting undue foreign corporate influence and implementing cohesive national economic industrial policies.

IV. COMPARATIVE EXAMPLES OF OTHER NATIONS' POLICIES REGARDING THE POLITICAL INFLUENCE OF FOREIGN INVESTORS

Several nations exercise sovereign control over their countries' economic and political resources.[93] This control necessarily results in the limitation of access to these valuable assets. It is the recognition of the importance of these resources and the need to limit access to them that result in strong economic markets that attract foreign direct investment in the first place. Foreign investment and national exercise and control of sovereignty have been successfully balanced by several countries.[94]

Foreign legislation regarding foreign direct investment includes a variety of measures designed to limit the political participation of foreign investors in the host countries where they locate. Many of these laws screen foreign direct investment,[95] while implementing review, acceptance or rejection mechanisms ban foreign electoral involvement,[96] and articulate cohesive national policies of economic development.[97] Professor Lori Damrosch has written about the

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[92] *See generally* Damrosch, *supra* note 53.
[93] *Id.* at 25.
[94] *Id.* at 24.
[95] TOLCHIN & TOLCHIN, *supra* note 3, at 223.
[96] Damrosch, *supra* note 53, at 25.
[97] *See* GRAHAM & KRUGMAN, *supra* note 4, at 145; TOLCHIN & TOLCHIN, *supra* note 3, at 223; GLICKMAN & WOODWARD, *supra* note 5, at 251.

several types of treatment of foreign participation in national politics. There is a wide spectrum of prohibition and acceptance of foreign campaign contributions. While there appears to be no norm in the way countries prohibit foreign political participation, Professor Damrosch has concluded that the fact "that a variety of countries have recently adopted or strengthened measures against foreign funding is at least some evidence of a trend toward delegitimizing this activity."[98]

Countries restrict the influence of foreign investment for a number of reasons. As Professors Tolchin & Tolchin have stated: "in all cases restrictions on foreign investment reflect a country's insecurity; they protect a local industry from competition and, in a broader sense, allow that country to retain a sense of control over its economy."[99] For example, Canada, in 1985, issued new regulations restricting foreign investment. These regulations were enforced immediately, the first instance being the Prentice-Hall acquisition[100] by Gulf & Western. The effect of the new legislation was that Gulf & Western had to divest itself of the Canadian subsidiary within two years. The justification given for the decision to regulate the book-publishing industry was Canada's "fear of U.S. cultural dominance."[101]

Foreign legislation that bans electoral participation by foreign investors is widespread.[102] For example, in France, legislation prohibits candidates for election to Parliament from receiving "contributions or material assistance from a foreign state or from a natural or juridical person of foreign nationality."[103] Taiwan (Republic

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[98] Damrosch, *supra* note 53, at 28.

[99] TOLCHIN & TOLCHIN, *supra* note 3, at 226.

[100] At the time of the enacted legislation, $23 million in annual sales was reported by Prentice-Hall. TOLCHIN & TOLCHIN, *supra* note 3, at 226.

[101] *Id.*

[102] For a discussion of Canadian provincial laws prohibiting foreign campaign donations, *see* Khayyam Z. Paltiel, *Campaign Finance*, DEMOCRACY AT THE POLLS 161 (David Butler et al. eds. 1981).

[103] Loi organique no. 88-226 relative a la transparence financiere de la vie politique, Mar. 11, 1988, Journal Officiel de la Republique Francaise 3288, Art. 8 (Mar. 12, 1988), *cited in* Damrosch, *supra* note 53 , at 25, note 103. (This law added Art. L.O. 163-4 to the French electoral codes).

of China) prohibits foreign participation in elections by mandating that "Candidates shall not accept campaign contributions from the following sources: (1) Foreign groups, juridical persons or individuals."[104] Similarly, the Chilean Constitution states that political parties "may not have income of foreign origin."[105]

Other electoral codes are more exhaustive. For example, the Philippine Election Code of 1978 states:

> Intervention of foreigners
> It shall be unlawful for any foreigner, whether juridical or natural person, to aid any candidate or political party, group or aggrupation [sic] directly or indirectly, or to take part in or influence in any manner any election, or to contribute or make any expenditure in connection with any election campaign or partisan political activity.[106]

While these examples of electoral laws prohibiting foreign electoral participation are not meant to be complete, they do provide illustrations of the growing trend toward restrictive policies governing foreign electoral participants.

Countries also limit the political influence of foreign investors through cohesive national policies that significantly limit state and locality incentive programs. These programs are tied to performance

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[104] Public Officials Election and Recall Law, May 14, 1980, amended July 7, 1983, Art. 45-2(1). *See generally* HUMAN RIGHTS IN TAIWAN 1986-87: AN ASIA WATCH REPORT, at 197-239 (December 1987).

[105] CHILE CONST. Art. 19(15), *in* 4 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein et al. eds., 1991). *See* Ley organica constitutional de los partidos politicos, Law No, 18.603, Mar. 23, 1987, Art. 33.

[106] Pres. Decree No. 1296, §36, cited in R. MARTIN, ADMINISTRATIVE LAW, LAW OF PUBLIC OFFICERS AND ELECTION LAW 382 (1983). Section 65 of the same decree provides: "No contribution shall be made directly or indirectly by any of the following:...(g) Foreigners and foreign corporations." *See* Damrosch, *supra* note 53, at 25.

requirements[107] reinforced with clawback provisions.[108] While performance requirements have been viewed as controversial by some scholars,[109] they have been viewed as an essential part of foreign direct investment policy by others.[110] Examples of extensive and successful uses of performance requirements are found through out the world. Professors Glickman and Woodward state:

> Overseas, the most common requirements are various domestic content provisions: an MNC (Multi National Corporation) must produce a specified level of its sales locally. Other requirements include manpower performance (job creation and limits on foreign employees), minimum export levels, maximum import limits, encouragement of investment in priority industries and development areas, limitations on acquisitions of domestic firms, technology transfer agreements, and restrictions on remittances of profit.

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[107] Performance requirements are frequently used by European countries. These requirements, tied to incentive packages offered to foreign investors, include contractual obligations that a certain number of jobs will be created, that a certain percentage of inputs will be bought locally, and may include other community building projects. Glickman & Woodward give the example that "a high-tech firm could be asked to help put together a science curriculum for the high schools or junior college." These performance requirements tied to incentive packages often create a more equal relationship between companies and the communities where they locate. GLICKMAN & WOODWARD, *supra* note 5, at 251-52.

[108] Clawback provisions come into effect when a company does not meet the performance requirements it agreed to in the original investment contract. These clawbacks work as penalties to acquire what the community lost in incentives when the company did not meet its obligations. *Id.* at 252.

[109] Tolchin & Tolchin state that performance standards, which include local content requirements, local worker requirements and the like, are considered to be a distortion of free trade and investment by U.S. policymakers. The professors state that "All performance standards lead to one goal: reducing competition for local manufacturers. They are regarded as an uneconomical use of resources and detrimental to everyone." TOLCHIN & TOLCHIN, *supra* note 3 , at 227.

[110] *See* GLICKMAN & WOODWARD, *supra* note 5, at 251; Graham & Krugman, *supra* note 4, at 145.

> Among developed nations, Canada has had the most active foreign investment policy for the simple reason that more of its economy is controlled by overseas MNCs than any other. In this respect, it is way ahead of the United States.[111]

Authors Graham and Krugman state that foreign governments differ significantly from the U.S. government in their "greater willingness to trade incentives for performance requirements."[112] This willingness reflects the fact that foreign governments have proven to be more amenable to targeted industrial policy in general.[113] Graham and Krugman state:

> the policies of the advanced nations do differ markedly in ...[the] provision of investment incentives and performance requirements. Incentives tied to performance requirements are in general offered more freely in other nations than in the United States. For example, the United Kingdom, which is among the most open nations with respect to FDI [foreign direct investment], has not been averse to combining investment incentives with performance requirements. A case in point is a large investment by Nissan Motor Company in the United Kingdom in the late 1980s, in which the quid pro quo for certain investment incentives, among them outright subsidies, included

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[111] The authors provide the following example of recent U.S. steps to enforce incentive agreements, "When Chicago gave Playskool a set of incentives, and the company promised to provide some jobs, Playskool closed without carrying out its end of the agreement; and Duluth, Minnesota took Triangle Industries to court on similar grounds." Glickman and Woodward state that these cases set important precedents in U.S. courts for the principle of seeking redress. Additionally, this is why clawback agreements should be stipulated to prior to costly court proceedings. GLICKMAN & WOODWARD, *supra* note 5, at 252-253.

[112] GRAHAM & KRUGMAN, *supra* note 4, at 146.

[113] *Id.*

> both a local-content target and a commitment to export to continental Europe. Incentives and performance requirements are used by other European nations as well.[114]

The performance requirements tied to limited incentive programs are viewed by most to be a way in which corporations and the communities where they build facilities can create a more equal relationship.[115]

Exercising sovereign control over political and economic interests does not necessarily exclude a country's ability to attract foreign investment and development. In fact, the appropriate symmetry is often beneficial to the national economies and the foreign investors in foreign direct investment. However, it is important that the need to protect certain resources are recognized while not dissuading foreign corporate investment.

V. U.S. LEGISLATION PROSCRIBING POLITICAL INTERVENTION IN U.S. ELECTIONS BY FOREIGN INTERESTS AND ITS INEFFECTIVENESS

The United States, like many other countries, has domestic legislation that is meant to prohibit certain foreign participation in state and federal political elections. Policies such as this are common, as demonstrated by the international practice of limiting foreign corporate political participation by transnational corporations. However, as demonstrated by the economic success[116] of these countries, foreign direct investment is not necessarily hampered by sovereign control mechanisms over political and economic resources.

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[114] *Id.* at 145-46.

[115] GLICKMAN & WOODWARD, *supra* note 4, at 252.

[116] Germany and Japan are two examples of countries with the most restrictive foreign investment policies. *See generally* TOLCHIN & TOLCHIN, *supra* note 3.

A. Federal Election Campaigns Disclosure of Federal Campaign Funds[117]

The Federal Election Campaign Disclosure of Federal Campaign Funds Act prohibits "contributions of money or other thing of value, or to promise expressly or impliedly to make any such contribution"[118] when it is done in connection with an election "to any political office or in connection with any primary election, convention or caucus held to select candidates for any political office; or for any person to solicit, accept, or receive any such contribution from a foreign national."[119] The Disclosure Act adopts the definition of "foreign principal", as set forth in the Foreign Agents Registration Act,[120] to mean "foreign national" within the scope of the Federal Election Campaign Act.[121] Therefore, a "foreign national" is:

> (1) a government of a foreign country and a foreign political party;
> (2) a person outside of the United States, *unless* it is established that *such person is not an individual and is organized under or created by the laws of the United States*, or that such person is not an individual and is organized under or *created by the laws of the United States or of any State* or other place subject to the jurisdiction of the United States and *has its principal place of business within the United States*; and

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[117] 2 U.S.C. § 441e, 11 C.F.R. §110.4(a).

[118] Federal Election Campaigns Disclosure of Federal Campaign Funds, 2 U.S.C. §441e(a).[hereinafter "the Disclosure Act"].

[119] *Id.*

[120] 22 U.S.C. §§611-621 Foreign Agents Registration Act of 1938, Pub. L. No. 75-583, 52 Stat. 631 (codified as amended at 22 U.S.C. §611)[hereinafter FARA] (1938).

[121] The term "foreign national" means "a foreign principal, as such term is defined by section 1(b) of the Foreign Agents Registration Act of 1938 (22 U.S.C. 611(b))". The Disclosure Act, *supra* note 20, at (b)(1).

> (3) a partnership, association, corporation, organization, or other combination of persons organized under the laws or having a principal place of business in a foreign country.[122]

The Federal Election Commission has interpreted "foreign principal", as set forth in section 2 of the FARA's definition. And "foreign national", as adopted by the Federal Election Campaign Act, as allowing wholly-foreign owned United States subsidiaries to form Political Action Committees (hereinafter "PACs") and participate in United States elections. The issues involved in allowing PACs of wholly foreign-owned U.S. subsidiaries are discussed in detail in the following section of this paper.

Additionally, according to the Federal Election Campaign Act, a foreign national shall not "direct, dictate, control, or directly or indirectly participate in the decision making process of any person, such as a corporation, labor organization, or political committee, with regard to such person's Federal or nonfederal election-related activities."[123] These decisions concern the making of contributions or expenditures in connection with elections for any local, state, or federal office or decisions concerning the administration of a political committee.[124]

The United States regulations on foreign participation in U.S. political processes is a necessary and important part of the economic policy of the United States. These sovereign controls, exercised in the national legislation, safeguard national economic and political interests within the United States. However, with the recent influx of foreign investment and subsequent foreign participation in the United States electoral process, the strength and efficacy of the U.S. regulations and restrictions on foreign political participation are challenged and strained. U.S. legislation prohibiting foreign influence in the United States has failed to meet the challenge of the political and economic

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[122] Foreign Agents Registration Act, 22 U.S.C. §611 (emphasis added).
[123] Federal Election Commission-Prohibited Contributions, 11 C.F.R. §110.4(a)(3).
[124] *Id.*

pressures that the 1980s increase in foreign direct investment in the United States has brought. Foreign corporations have profited from the inability of U.S. controls to safeguard economic and political resources, by enjoying widespread and powerful political representation and resulting economic benefits.

B. Federal Election Commission Advisory Opinions: Foreign-Controlled Corporate Political Action Committees (PACs) and campaign contributions

According to a line of Federal Election Committee Advisory Opinions,[125] foreign-owned United States subsidiary corporations are allowed to participate in federal, state and local elections through the formation of political action committees.[126] In several divided opinions the FEC has interpreted the federal laws to allow foreign owned companies to create and operate PACs, contributing to both the federal and state officials of the United States. Generally, the FEC advisory opinions have ruled that an American subsidiary corporation of a foreign corporation can establish and administer a PAC as long as: (1) the American subsidiary corporation has its principal place of business in the United States and (2) the PAC's fund-raising and decision-making processes are managed by U.S. citizens. However, the FEC has repeatedly asked Congress for clarification on this issue.[127]

The lead dissenter in the FEC cases involving foreign owned

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[125] *See* FEC Advisory Opinions: AO 1977-53; AO 1978-21; AO 1980-100; AO 1980-111; AO 1981-36; AO 1981-51; AO 1982-10; AO 1982-34; and AO 1983-19.

[126] Foreign controlled PACs operate in the same way the PACs of American corporations do. As long as only U.S. citizens donate to the committees and make their decisions, foreign-controlled companies may establish such organizations. All PACs are allowed to contribute $25,000 per election. Only American company employees make up foreign company-sponsored PACs, officially. However, company management, in reality, runs all corporate PACs, foreign and domestic. It has been widely believed that company managers do nothing but toe the company line. GLICKMAN & DOUGLAS, *supra* note 5, at 273.

[127] *See* FEC Agenda Doc. No. 87-22, concerning 1987 legislative recommendations.

companies' PACs has been former Commissioner Thomas E. Harris. Harris argues that allowing PACs of foreign-controlled companies allows foreign participation in Federal Elections, frustrating the purpose of the 1974 Federal Elections Campaign Act:

> The PAC is always controlled by the top management of the corporation. By permitting foreign nationals to incorporate in the U.S. and thereby avoid the prohibitions of Section 441(e) [which bars foreign contributions to U.S. political campaigns], the commission does a great disservice to the congressional intention to keep foreign influence out of federal elections in the U.S. The notion that no decisions as to the activities of the proposed political committee will be dictated or directed by foreign nationals strikes me as extremely naive.[128]

Senator Bentsen agreed with Commissioner Harris, stating: "If you have a PAC from a subsidiary of a foreign company, it certainly seems to me that you open the door to foreign influence in our elections. My amendment closed that door. The foreign company will obviously dictate to the subsidiary on how its PAC will be used."[129]

One clear example of the foreign corporate influence on their PACs referred to by Commissioner Harris and Senator Bentsen is illustrated in the 1982 fundraiser held for Robin Beard, a Republican candidate campaigning for the seat of U.S. Senator Jim Sasser, a Democrat. The fundraiser was given by American executives of the Nissan Motor Company. It was apparent that the fundraiser was given in retaliation for Mr. Sasser's support of the domestic content bill. Mr. Beard supported the bill that would require a certain percentage of heavy industrial products sold in the United States to be

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[128] Federal Election Commission Advisory Opinion No. 1980-100, *reprinted in* 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 5548 (Oct. 14, 1980), *dissenting opinion* of Commissioner Thomas E. Harris.

[129] TOLCHIN & TOLCHIN, *supra* note 3, at 19.

manufactured in the United States.[130]

In 1989, the Federal Election Commission ruled that a political action committee, dependent on financial support from a Japanese corporation, could not contribute to state and local elections in Hawaii and remain in compliance with the Federal Election Campaign Act of 1971.[131] Kuilima, a subsidiary of Asahi USA, a wholly Japanese owned US subsidiary of Asahi Japan, proposed to establish a PAC to contribute to candidates in state and local elections in Hawaii. Although all of the directors and officers were Japanese nationals, Kuilima stated that the PAC would be run by three US citizen employees. Kuilima maintained that their decisions would not be dictated or directed by Kuilima, Asahi Japan, or any of their officers or directors.[132] Kuilima disclosed that while the PAC would not solicit or accept funds from persons who are foreign nationals, it would obtain most, if not all of its funding through corporate contributions from Kuilima. Kuilima, involved in developing commercial real estate projects that were not yet income-generating, received all its funding from loans and contributions to capital by Asahi USA, which obtained most of its funding from loans and contributions to capital by Asahi Japan. The FEC ruled that because all the directors and officers of Kuilima were foreign nationals it could not comply with previous FEC rulings that "no director or officer of the company or its parent who is a foreign national may participate in any way with the decision-making process with regard to making the proposed contributions."[133] The Commission further stated that "even if Kuilima were not funded predominantly by a foreign national corporation, it still would not be able to contribute to the proposed committee."[134]

The Commission subsequently allowed GEM of Hawaii, a wholly Japanese-owned U.S. subsidiary, and its GEM-PAC to make

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130 *Id.* at 20.

131 Federal Election Commission Advisory Opinion No. 1989-20, *reprinted in* WESTLAW, File 168485 (F.E.C.) Oct. 27, 1989.

132 *Id.* at 1.

133 *Id.* at 2. *See* FEC Advisory Commission Opinions 1985-3 and 1982-10.

134 *Id.* at 2.

contributions to candidates in federal, state and local elections because one of the company's three directors was an American, the other two being Japanese nationals.[135] In its request for the FEC Advisory Opinion, GEM stated that GEM derived all its revenues from merchandise sales and other related ventures in Hawaii, and that the GEM-PAC is controlled by US national administrators and managers. GEM stated "Neither the Japanese directors nor any other foreign national participates in decision-making as to where contributions should be directed or in the administration of the committee in any way."[136] The Commission distinguished the GEM case from the Kuilima opinion because GEM received all its revenues from the operations of its Stores in Hawaii, not from the subsidiary of a wholly foreign owned corporation, as in Kuilima,[137] and GEM is not controlled by foreign nationals, (presumably because one of the three directors was American[138]) whereas Kuilima's directors were all foreign nationals.[139]

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[135] FEC Advisory Commission Opinion 1989-29, *reprinted in* WESTLAW, File 225186.

[136] *Id.* at 1.

[137] *But see* dissenting opinion of Commissioner Scott E. Thomas. *Id.* at 5, n.5. Thomas explains: "The majority distinguishes Advisory Opinion 1989-20[kuilima] by saying that the domestic subsidiary there was 'predominantly funded by a foreign national parent.' Advisory Opinion 1989-29 at 3. Yet, that finding was not the sole basis for the Commission's conclusion in that [kuilima] opinion. As Advisory Opinion 1989-20 [Kuilima] points out, 'even if Kuilima were not funded predominantly by a foreign national corporation, it still would not be able to contribute to the proposed committee,' because of the foreign national presence on the board of directors."

[138] *Id.* at 3. Thomas, in comparing the Kuilima decision to the GEM case, states "There is one difference between these cases. In Kuilima, all of the directors of the subsidiary were foreign nationals. In GEM, all of the directors of the subsidiary are foreign nationals, save for one United States citizen who sits on the board of directors and is also a corporate officer. Advisory Opinion 1989-29 at 1. Apparently that makes all the difference to the majority in deciding whether foreign nationals exercise any influence on the political committee.

[139] FEC Advisory Opinion No. 1989-20, *reprinted in* WESTLAW, File 168485 (F.E.C.) 2.

Commissioner Scott E. Thomas, in dissenting to the GEM FEC advisory opinion rejected the treatment of a U.S. subsidiary as a separate entity from its foreign parent company. Thomas stated:

> Throughout the Act and Commission regulations, a parent corporation and its subsidiary corporations are viewed as one entity. We see no reason why the Commission should treat a parent corporation and its subsidiaries as one entity under the contribution limits and corporate solicitation provisions, but consider them as separate, distinct and presumably independent entities for purposes of the §441e foreign national provision.[140]

Commissioner Thomas specifically refers to two instances within the Act and Commission regulations where a parent corporation and its subsidiary are viewed as one entity: for purposes of single contribution limitations, and under the corporate solicitation rules. First Commissioner Thomas looks to "2 U.S.C. §441a(a)(5), which provides that 'the separate segregated funds established, financed, maintained or controlled by the same corporation including any parent, subsidiary, branch, division, department, or local unit of such corporation' are automatically considered to have been made by a single committee and subject to a single contribution limit. 2 U.S.C. §441a(a)(5); 11 C.F.R. §§ 100.5(g)(2) and 110.3(a)(1)(i)."[141] Then

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[140] *See* dissenting opinion of commissioner Scott E. Thomas, FEC Advisory Opinion 1989-29 at 1.

[141] *Id.* at 2. Dissenting opinion of Commissioner Scott E. Thomas. Thomas, citing FEC advisory opinion 1976-104, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5255, explains the legislative intent in creating the "anti-proliferation" provision, §441 a(a)(5): "to prevent evasion of the Act's [Federal Election Campaign Act of 1971] contribution limits by the existence of splinter political action committees (PACs) which were ostensibly separate entities, but were in fact set up, aided, directed or controlled in some manner by the parent organization." In fact, the broad intent of §441a(a)(5) was explained in the House Conference Report. House Administration Committee Chairman Hays stated: "Yet another major step to strengthen the

Commissioner Thomas reviewed other Commission opinions which "treat a parent corporation and its subsidiary as one entity under the corporate solicitation rules." While U.S.C. §441b(b)(4)(A)(i) "permits a corporation to solicit contributions for its separate segregated fund" only "from its stockholders, executive or administrative personnel and their families" the Commission goes even further in viewing the corporation and its subsidiary as one entity. Commissioner Thomas points out that "Commission regulations and rulings...specifically allow a corporation to solicit the executive or administrative personnel of the corporation's subsidiaries. 11 C.F.R. §114.5 (g)(1)"[142] Moreover, "the Commission has ruled that a wholly-owned subsidiary may solicit not only the permissible class of the parent corporation but also the permissible class of the other subsidiaries of the parent corporation and the permissible class of the subsidiaries of those fellow subsidiaries."[143]

Commissioner Thomas concluded that "If GEM's parent corporation were a domestic corporation, there is no doubt that the majority would view GEM and its parent as automatically affiliated. In so finding, the majority would view the parent corporation and its subsidiaries as one entity when applying the contribution limits and solicitation rules."[144] In a subsequent case allowing a wholly foreign owned US subsidiary to form a PAC for purposes of political

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contribution limitation provisions is the one that assures that closely connected entities cannot defeat the contribution limitations stated in the bill. To achieve this objective the complex and amorphous control criteria embodied in the 1974 Act are replaced by a far simpler formal relations test whose meaning is spelled out in detail in the conference report." 122 CONG. REC. H3778 (daily ed. May 3, 1976) (statement of Rep. Hays). *See also*, FEC v. Sailors' Union of the Pacific Political Fund, 828 F.2d 502, 505 (9th Cir. 1987), stating the Congressional intent of §441a(a)(5) to be preventing corporations and labor unions "from evading contribution limitations through a Hydia-like proliferation of segregated funds, each making separate contributions, but each being a part of the same beast."

[142] *See also* FEC Advisory Opinion 1989-29, *reprinted in* WESTLAW, File 225186 (F.E.C.) 2, Dec. 19, 1989, dissenting opinion of Commissioner Thomas.

[143] *Id.* at 2. See Advisory Opinion 1982-18, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5664, April 23, 1982.

[144] *Id.* at 2.

contributions, it cited the dissent for the same reason in GEM: that " a wholly owned domestic subsidiary and its foreign national parent corporation should be treated as one entity."[145]

When the FEC ruled that "a corporation that is a subsidiary of a Canadian corporation may make a contribution to a state campaign so long as foreign money is not involved."[146] Former Commissioner Harris reiterated that "the subsidiary of a foreign corporation may not make contributions, in connection with any elections in this country."[147]

While the debate over whether or not domestic subsidiaries of foreign owned parent corporations should or should not be allowed to form PACs and contribute to U.S. campaigns, FEC Advisory Opinions continue to allow domestic subsidiaries to do so. The FEC continues to make arbitrary and somewhat dubious distinctions on what constitutes "foreign control". In 1992 the FEC allowed Nansay Hawaii, a U.S. subsidiary of Nansay Japan, the foreign parent corporation, to form a PAC and contribute to U.S. campaigns. Nansay Hawaii received regular subsidies in the form of loans or contributions of capital from its foreign national parent, half the board

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[145] FEC Advisory Opinion 1992-16, *reprinted in* WESTLAW, File 157667 at 4, Sept. 14, 1992. Dissenting Opinion of Vice Chairman Scott E. Thomas and Commissioner Danny Lee McDonald. Vice Chairman Thomas stated:

> Just as a domestic corporation and its subsidiaries are seen as one entity (*See, e.g.*, 2 U.S.C. §441a(a)(5); 2 U.S.C. §441b(b)(4)(A)(i); 11 C.F.R. 114.5(g)(1).) to prevent a parent corporation from making excessive contributions through its subsidiaries' political committees, so too a foreign national parent corporation and its subsidiaries should be seen as one entity to prevent the corporation from making prohibited contributions through its subsidiaries. As the wholly owned subsidiary of a foreign national parent corporation, Nansay Hawaii should not be allowed to make contributions to candidates for political offices."

Id at 4.

[146] FEC Advisory Opinion 1985-3, *reprinted in* 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5809 Feb. 28, 1985.

[147] *Id.* (Harris dissenting).

members were Japanese nationals, and the PAC would be voted into existence by the board. However, the FEC allowed the PAC formation on the following conditions: (1) the foreign national members of the subsidiary's Board would abstain from voting on matters concerning the PAC and its activities, (2) the foreign nationals on the board also abstain from voting on the selection of individuals to operate the PAC, (3) only non-foreign nationals participate in the functions and operations of the committee.[148]

In the latest FEC Advisory Opinion involving a domestic subsidiary of a foreign parent corporation, Allison Engine, was allowed to maintain its PAC after a 100% acquisition by the United Kingdom corporation, Rolls-Royce. Allison PAC simply adopted by-laws stating the PAC would only be controlled by U.S. nationals. Furthermore, with certain recommended changes by the FEC to bring the PAC within time frame requirements, the Allison PAC was allowed to implement an "Employee Earmarking Program", or a "Payroll Deduction Plan" where the employees of Allison Engine could voluntarily elect to contribute to the Allison PAC in the form of payroll deduction or personal check.[149]

In addition to making direct campaign contributions through PACs of foreign-controlled U.S. subsidiaries, the influence of foreign corporations can be seen in a nonelectoral context at the state and local level. This foreign political participation takes the form of influence on state and local officials by foreign corporations offering to locate a U.S. subsidiary in the officials' districts, providing jobs and industrial growth, in exchange for incentive packages.

C. Foreign Corporate Influence in State and Local Politics

States have implemented rewarding incentive systems to recruit foreign investment. Most common state strategies, to maintain

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[148] FEC Advisory Opinion 1992-16, *reprinted in* WESTLAW File 157667 (FEC) at 3, June 26, 1992.

[149] FEC Advisory Opinion 1995-15, *reprinted in* WESTLAW, File 437680 (FEC) at 2, June 30, 1995.

a favorable business environment, include a combination of increased economic incentives, expanded overseas branch offices, and advantageous public policies regarding foreign investment.[150] This state recruitment effort for foreign direct investment first started under Ronald Reagan's "New Federalism". President Reagan's administration sharply reduced the federal government's role in domestic industrial policy.[151] Now, states and cities, in large part, bear the responsibility for their own economic development.

The major incentives states now offer foreign companies include: tax concessions, industrial development bonds (IDBs),[152] public-private sector agreements,[153] and infrastructure development and special services.[154] Specifically, these incentive programs include general tax rate reduction,[155] property-tax exemptions,[156] low interest financing,[157] and improved rail and highway connections, roads, sewers, and water facilities.[158] The competition for foreign direct investment has often times resulted in rigorous bidding wars where states often advertise relaxed environmental statutes, repealed taxes and low worker's compensation rates.[159]

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150 TOLCHIN & TOLCHIN, *supra* note 3, at 49.

151 GLICKMAN & WOODWARD, *supra* note 5, at 225.

152 State and local governments offer these municipal bonds to finance industrial projects at low interest rates. Typically, in an IDB, a state or municipality purchases or builds a facility, then leases it back to the investor. Through IDBs, a company has the advantage of having additional capital because it does not pay the substantial property tax it would if the company were responsible for the acquisition of the property. *See* TOLCHIN & TOLCHIN, *supra* note 3, at 59.

153 Public-private sector agreements occur where state sponsored cooperatives soliciting foreign banks investigate sections of the state, analyzing them for their investment potential. These banks than encourage corporations from their countries to invest in the sections the banks have found to have the most potential. *See* TOLCHIN & TOLCHIN, *supra* note 3, at 60.

154 *Id.* at 58-60.

155 *Id.* at 59.

156 *Id.*

157 *Id.*

158 *Id.*

159 *Id.* at 61.

While states and localities compete with each other to offer the best incentives to foreign investors, it is well documented that ultimately, incentive programs have very little to do with a company's decision of where to locate, and in fact are only considered in the very last stages of negotiation.[160] More important factors cited by foreign companies in making location decisions include the cost of labor, low level of union activity, the weather and healthy consumer markets.[161]

A foreign company makes their first important locational decision when the company decides to locate in the United States. This is the first major incentive, to avoid costly U.S. restrictive trade barriers.[162] The next stage in the decision of where to locate a foreign subsidiary is to locate the region which is most appropriate for their business. During this second stage the company looks for proximity to suppliers and markets, wages and unionization.[163] The third stage of the location decision is to find the best location within the region.[164] This locational decision evaluates good transportation to markets, prevailing wages of the city, worker skill and production levels, and the quality of life, important especially to industries that necessitate attracting engineers and scientists.[165]

While the above factors are the most important factors in deciding where a foreign subsidiary will locate, it has been shown that short-cited incentives do nothing to influence these factors. Most studies of location factors show that incentives are not important.[166]

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[160] *Id.* at 62.

[161] *Id.* at 62-63.

[162] For example, Ben C. Huang, manager of the import and traffic division of SAMPO, a Taiwan-based manufacturer of television sets discussed the firm's decision to locate a plant in Norcross, Georgia. Huang stated that the reason for the location was pure and simple, it was to avoid the imposition of protective tariff. *Id.* at 62.

[163] GLICKMAN & WOODWARD, *supra* note 5, at 228.

[164] *Id.*

[165] *Id.*

[166] *See generally*, ROGER W. SCHMENNER, MAKING LOCATION DECISIONS 51 (1982). *See also* MICHAEL KIESCHNICK, TAXES AND GROWTH: BUSINESS INCENTIVES AND ECONOMIC DEVELOPMENT (1981); on foreign companies, Jeffrey Arpan, *The Impact of State Incentives on Foreign Investors' Site Selections*, 66 ECONOMIC REVIEW, 36-

VI. SOLUTIONS[167]

Foreign investors have demonstrated their political negotiating savvy through their ability to utilize the political process of the United States. The success of these transnational corporations in manipulating the U.S. political system can be attributed to the divided front of the United States economic and political processes. By allowing the fifty states and millions of localities to develop their own industrial development policies without Federal oversight, the United States' national industrial development policy of default forfeits the economic advantages of its strong and attractive markets. The transnational investment in the United States will not cease with the adoption of a cohesive national industrial development policy which limits foreign access to political and economic resources. The

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42 (1981); and William Wheaton, *Interstate Differences in the Level of Business Taxation*, 36 NATIONAL TAX JOURNAL 5 (1983).

[167] These solutions are by no means meant to be an exhaustive list of remedies to the problems of foreign participation in the politics of the United States. Many other solutions have been proffered by several authors. Some such proposals include requiring full disclosure of foreign agents by eliminating the Foreign Agent Registration Act exemptions for: (1) Lobbyists who work for an American Affiliate of a foreign company, (2) Lawyers who perform legal chores on their clients' behalf, even when the same work might be considered lobbying when done by nonlawyers, and (3) Foundations funded by foreign companies and governments but incorporated in the United States should similarly be excluded. *See* Choate, *supra* note 2 , at 201-202. It has also been recommended that Ex-Officials' ability to become foreign agents or lobbyists should be limited by: (1) a permanent restriction on becoming a foreign agent for a foreign interest: including PAC participation, lobbying, and advising for the highest federal positions, (2) a longer time period before lower-level federal officials can lobby, counsel, or advise on trade matters. This is combined with an employment contract that prohibits the use of trade secrets in subsequent employment opportunities. (Currently a five year waiting period, or "cooling-off" period is one year by federal law, as of January 1991.), and (3) strengthening the federal programs by filling key policy positions and ambassadorships with professionals, not amateur politicians and by attracting quality talented people to public office by offering higher salaries and discouraging government bashing. Pat Choate states that by bashing government, public service becomes an object of contempt. *See* CHOATE, *supra* note 2, at 202.

adoption of such a policy only helps to balance the benefits of foreign investment with the economic and political disadvantages of foreign access to rich U.S. resources.

U.S. foreign policy has been and continues to support and encourage U.S. business opportunities abroad. The hypocrisy is that, in the process, U.S. business interests are being undercut at home by foreign influence. The United States' inability to respond to the increasing involvement of foreign corporate participation in local, State, and Federal political processes allows U.S. political and economic resources to be squandered while at the same time leaving U.S. home markets susceptible to foreign control. This policy of default by the United States is inconsistent with the historical United States' policy abroad that has worked so hard to promulgate national treatment standards in an effort to allow U.S. corporations to gain access to global markets. The U.S. home markets and U.S. political resources need not suffer foreign influence to ensure U.S. access abroad. In fact, the U.S. corporations do not enjoy the same levels of access to foreign political and economic resources abroad. To balance the interests of U.S. corporations and U.S. political interests, the United States needs to implement a cohesive national industrial development policy that is not one of default, but a policy of balancing the active attraction of foreign direct investment and safeguarding national political and economic resources.

A. Prohibit Foreign Participation in American Elections

Political action committees of foreign owned subsidiaries influence political outcomes with financial resources in the same manner U.S. corporations do. While these PACs are legal, they are detrimental to the United States.[168] Despite repeated opportunities

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[168] According to Graham & Krugman, when foreign investors successfully influence the American political system, the investor often gets public policies enacted which will be largely beneficial to them, but of little importance or necessity to the general public. Moreover, the effective "playing of the game" by a foreign investor will redistribute income out of the country instead of redistributing it within the country.

Congress has refused to significantly amend the Federal Campaign Election Act of 1971 to prohibit the formation and use of foreign owned subsidiaries' PACs.[169] The FEC has, on various occasions, asked for clarification and made legislative recommendations to Congress to reexamine the section 441e prohibition on contributions by foreign nationals in connection with federal, state, and local elections.[170]

The Commission has frequently made similar legislative recommendations to Congress to examine section 441e[171] and to amend the Federal Election Campaign Act. Requested amendments would clarify the scope of foreign participation through the PACs of American subsidiary corporations. Such clarification is necessary because many problems have arisen concerning the FEC's administration and enforcement of this provision.

In 1987 one of the most significant proposed amendments[172] to section 441e was defeated. The legislation would have amended the provision prohibiting contributions in elections by foreign nationals by adding: "including any separate segregated fund or nonparty, mutlicandidate political committee of a foreign national."[173] Additionally, the definition of "foreign national" would have been broadened to include: "any partnership, association, corporation, or subsidiary corporation organized under or created by the laws of the United States, a State, or any other place subject to the jurisdiction of

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EDWARD M. GRAHAM & PAUL R. KRUGMAN, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES 89 (Institute for International Economics 1995).

169 *See generally*, THOMAS M. DURBIN, *Foreign Participation in Federal Elections: A Legal Analysis* 12 (Washington, D.C.: Congressional Research Service, Library of Congress, 28 April 1987).

170 *See* FEC Legislative Recommendations, FEC Press Release, March 4, 1987; *see also* FEC Record, V. 13, No. 4, pp. 6-7, April 1987; FEC Agenda Document No. 87-22, p.31, 2/24/87.

171 2 U.S.C. Code § 441e (1972).

172 *See* 133 CONG. REC. § 113 (daily ed. Jan. 6, 1987)(summary of the Boren-Byrd Senatorial Election Campaign Act).

173 *See* S. 2, 100TH CONG., 1ST SESS., §8(1) (1987), and S. 779, 100TH CONG., 1ST SESS., §10(2) (1987).

the United States if more than 50 per centum of such entity is owned or controlled by a foreign principal."[174]

These provisions would prohibit American subsidiaries of foreign parent corporations to establish political action committees, which can make election contributions that would otherwise be prohibited by section 319 of the Federal Election Campaign Act of 1971, as amended (2 U.S.C. §441e).

PACs of wholly foreign-owned United States subsidiaries have no place in the elections of the United States. For various reasons foreign participation has been prohibited from the national, state and local elections of the United States. These prohibitions are articulated in the Federal Election Campaign Act, Section 411e.

Moreover, new legislation does not have to be enacted to treat foreign owned subsidiaries and their foreign parent corporations as one entity, thereby precluding them from forming PACs and participating in the U.S. political process. The existing laws of 2 U.S.C. § 441 a(a)(5), cited to by the several reviewed dissenting FEC advisory opinions, requires subsidiaries and their parent corporations to be treated as one entity for the purposes of making campaign contributions. This statute read together in the context of § 411e, which prohibits contributions or expenditures by foreign nationals, would treat subsidiaries as a part of a foreign parent corporation and preclude them, as a foreign national, from making campaign contributions. Section 411e explicitly states that "a foreign national shall not direct, dictate, control, or directly participate in the decision making process of any person, such as a corporation, ...or political committee with regard to such person's Federal or nonfederal election-related activities...".[175] This law could be no clearer. It is now time to redefine "foreign national", to include foreign-owned subsidiary corporations both incorporated in the United States and having their principal place of business in the United States.

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[174] *See also* S. 2, 100TH CONG., 1ST SESS., §8(2) (1987), and S. 779, 100TH CONG., 1ST SESS., §10(2) (1987).

[175] 11 C.F.R. § 110.4 (a)(3).

B. Implement a Cohesive and Effective National Foreign Investment Program for the United States

Foreign investment in the United States can add to the economy.[176] However, a cohesive national policy on foreign direct investment needs to be formulated and aggressively used. While there is substantial debate over what kind of national policy should be adopted most scholars agree that a national policy would be most beneficial for the United States's economic, political, and national security interests. For example, Glickman and Woodward propose a sound investment policy that would include performance requirements, clawback provisions for enforcement of the performance requirements, and limited structured incentives, to recapture the paid incentives in a reasonable time all coordinated into a coherent strategy for economic development.[177] However, Graham and Krugman are proponents of a national policy that would broaden the scope of national treatment to new multilateral agreements that would cover foreign direct investment.[178] The Professors, Susan and Martin Tolchin argue that the fifty separate countries that the states act as to attract foreign investment does not create a level playing field for states to negotiate because the resources of the foreign corporations far outweigh the states.[179]

While all scholars do not agree on what exact policy should be accepted, there is a consensus that the federal government of the United States needs to address the problem of foreign influence on the state and local politics of the United States. By evaluating the need for a cohesive national industrial development policy, the federal government will be forced to reexamine the conflicting goals of pursuing national treatment abroad, for U.S. corporations investing in host countries and the goal of maintaining national sovereignty in the United States, by limiting foreign participation in the U.S. political

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[176] GLICKMAN & WOODWARD, *supra* note 5, at 254.
[177] *Id.* at 251-254.
[178] GRAHAM & KRUGMAN, *supra* note 4, at 169.
[179] TOLCHIN & TOLCHIN, *supra* note 3, at 271.

process. Of course, by exerting control on a federal level, the states powers to offer incentives to foreign investors will necessaryily be limited.

C. Ban State and Local Incentives to Attract Foreign Corporations

An integrated United States policy regarding industrial development would address the problem of the currently splintered and competing state policies seeking to attract foreign investment. In 1986 states spent over $40 million to attract foreign corporations' direct investment.[180] The use of state and local incentives to attract foreign corporations "dissipates any national gain from the spillovers, transferring them to the foreign firm instead."[181] Additionally, states and localities do not implement a uniform economic investment policy. States have long been criticized for disregarding the long term effects of using incentive packages to attract foreign investment. For example, lax environmental controls in return for foreign investment may trade short-term jobs for pollution, but does not analyze the long term effect of such environmental concessions.[182]

Moreover, states are simply not in a position to bargain effectively with foreign firms making "siting" decisions. The incentives states have to offer are limited. The revocation of state incentive packages would serve to avoid unnecessary windfalls for the foreign corporations while gaining the benefit of foreign investment in

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[180] *See* Marianne K. Clarke, *Revitalizing State Economies: A Review of State Economic Development Policies and Programs* (Washington, D.C.: National Governors Association, 1986).

[181] According to Graham & Krugman, this dissipation of gains is a direct result of the fact that the foreign firm has already decided to build a facility in the United States and the firm regards a number of U.S. locations as equally suitable for the site. It is when the candidate states and localities compete to attract the firm that tax breaks, provisions of infrastructure, and subsidies are offered to the firm. In exchange, the firm chooses that state or locality. This wastes U.S. resources because one place in the U.S. would have received the benefits of the foreign facility regardless of whether or not the incentives were given. GRAHAM & KRUGMAN, *supra* note 4 , at 89.

[182] GLICKMAN & WOODWARD, *supra* note 5, at 251.

the United States economy.

Legislative reconsideration of the existing statutes is necessary for the government agencies to effectively monitor and control the forces of foreign direct investment and the extent of, if at all, their participation in the political processes of the United States. The successful elimination of foreign leverage in bargaining with state and local officials would eliminate the micro-economic competition between states for foreign companies' operations. The clarification and enforcement of existing legislation would force states to comply with a cohesive economic policy that is beneficial to the United States.

VII. CONCLUSION

The United States needs to acknowledge the modern changes in the dynamic environment of world trade and investment. Such economic forces are rarely stagnant, and a country's ability to successfully evaluate and respond to the forces which operate within international economics frequently determine that country's role and status within the economic market place.

The United States has to evaluate the goals of its own economic success abroad, through its access to foreign markets and a globally integrated market place, and its goal of national sovereignty and its political and economic security within the United States. To address only one of the goals compromises the other. Both interests are fundamental to the economic and political strength of the United States. Efforts to remedy the current situation should encourage foreign direct investment in the United States, while safeguarding limited political and economic resources.

Finally, the United States legislation does have safeguards in place to protect against undue foreign influence in the U.S. political process. However, these precautions have failed and the pertinent legislation has not been applied effectively. This legislation need only be enforced to comply with the letter and spirit of the provisions.