Foreign Investors and Equal Protection

John R. Liebman
Beth Levine
POLITICAL IMPLICATIONS OF FOREIGN INVESTMENT IN THE UNITED STATES

By Senator Daniel K. Inouye*

In 1973, an unprecedented inflow of foreign investment into the United States caught American policy-makers and the general public totally unprepared for the experience. In that year alone, foreign direct investment (FDI) increased by $3.42 billion, more than a three-fold increase over the previous year, representing a 23 per cent rise in the aggregate foreign direct investment in the United States.¹

In addition to direct investment, portfolio equity investment amounted to $24.8 billion, for a total long-term equity investment in 1973 of $43 billion.² The total for 1974, the beginning of the recent global recession, showed similar growth. FDI for 1974 grew by $3.46 billion to a grand total of $21.7 billion, an annual rate of 19%.³

These government figures have been the subject of dispute. They do not include real estate investments, since these traditionally have been considered a local activity and any regulation thereof, such as title registration, has been at the local level.⁴ If rumors about large alien real estate purchases are confirmed, this omission must be considered of major significance.⁵ Furthermore, the information is gathered on a sampling process based on a benchmark study taken in 1959.⁶ Private estimates have been much higher than the official figures. Without accurate information gathering programs, policy-makers do not have some of the most basic information, such as aggregate long-term FDI in the United States.

In this discussion of the issue of foreign investment in the United States, it must be made clear that we are working with rough approximations, and new information conceivably could shift the focus of attention. The lack

---


² DEP'T OF COMMERCE, INTERIM REPORT TO CONGRESS: FOREIGN DIRECT INVESTMENT IN THE UNITED STATES 5 (October, 1975) [hereinafter cited as INTERIM FOREIGN DIRECT INVESTMENT REPORT].

³ TREASURY DEP'T, INTERIM REPORT TO THE CONGRESS ON FOREIGN PORTFOLIO INVESTMENT IN THE UNITED STATES 16 (October, 1975).

⁴ INTERIM FOREIGN DIRECT INVESTMENT REPORT, supra note 1 at 2.

⁵ COUNCIL ON INT'L ECONOMIC POLICY AND OFFICE MANAGEMENT AND BUDGET, UNITED STATES GOVERNMENT DATA COLLECTION ACTIVITIES WITH RESPECT TO FOREIGN INVESTMENT IN THE UNITED STATES 6 (1975). See also F. MORRISON AND K. KRAUSE, STATE AND FEDERAL LEGAL REGULATION OF ALIEN AND CORPORATION LAND OWNERSHIP AND FARM OPERATION IV-V (1975); DEP'T OF COMMERCE, 2 INTERIM FOREIGN DIRECT INVESTMENT REPORT XI-II (1975).


⁷ DEP'T OF COMMERCE, ASPECTS OF INTERNATIONAL INVESTMENT, reprinted from SURVEY OF CURRENT BUSINESS 42 (1975).

597
of adequate data is a serious one which will be analyzed later, but foreign investment in the United States appears to be significantly greater than initial government statistics indicate, and this fact must be taken into consideration as policy options for dealing with growing foreign investment are considered.

The issue of the volume of long-term foreign investment in the United States is of more than academic interest. Opponents of action against FDI have predicated some of their arguments on the relatively small size of such investment. If that investment is shown to be far larger than they had anticipated, their arguments may be weakened.

It would be facile to dismiss the concerns about FDI as being groundless. The lack of accurate data and absence of solid academic research on FDI in the United States only bolster the contention that American policymakers and the public lack a great deal of necessary and desirable information about foreign investment. It would be far wiser to adopt a position of economic agnosticism insofar as FDI is concerned and to suspend judgment about the aggregate domestic economic impact of FDI. Such a position does not in any way seek to contradict the pro-investment views by many economists, but rather acknowledges some of the potentially valid complaints about FDI, some of which may not be solely economic.

At least one authority has suggested that foreign multinational enterprises which invest in the United States may have motivations different from American firms which invest overseas. If this view is accurate, FDI in the United States should be treated as a special case to which analysis of outward American FDI may not be applicable.

This article will examine the political implications of FDI in the United States, with particular emphasis on the potential for Congressional action. The determination of whether FDI is "good" or "bad" is beyond the scope of this article, since no simple answer can possibly be definitive. Each situation differs, and one's attitudes towards FDI reflect value judgments, political and economic biases, and a multitude of subjective perceptions.

Increasingly, it has become clear that the issue is not whether to have FDI in a given country. Even some centrally planned economies welcome extensive activities by multinational enterprises. Rather the question ap-

pears to be how a host country can maximize the benefits it can obtain from FDI while minimizing any actual or potential drawbacks from such investment.

Direct investment traditionally has been defined as "one which gives the investor operating control of the business firm involved, as opposed to indirect or portfolio investment, which does not provide operational control." Control may be obtained by starting a new venture or by taking over an existing business entity.

Prior to the passage of the Foreign Investment Study Act of 1974, direct investment in a corporation was defined as control directly or indirectly of 25% or more of the voting shares. Anomalously, the definition of control for American investors overseas was 10% of the voting shares. As a result of the passage of that Act, this difference was reconciled, and a standard 10% definition was applied to both inward and outward investment.

The concept of "control," which distinguishes direct from portfolio investment, is crucial but elusive. Different conditions may dictate whether 10% or 25% ownership constitutes control, since 10% of the stock conceivably could be the dominant bloc of stock in a firm. The public controversy which erupted over foreign investment in the United States has focused exclusively on foreign direct investment in which "control" was, or is, a factor. By and large, foreign portfolio investment has escaped criticism while the public wrath has fallen on those companies in which management is considered to be foreign-controlled. Therefore, this article will deal only with foreign direct investment, since this is the form of foreign investment which has aroused public concern.

I. Policy Alternatives

Any scheme for the regulation or control of FDI would have to fall into one of three categories: multilateral, bilateral, or unilateral. Of the three, the most difficult to structure would be a multilateral regime, since it would involve several countries, presumably with different institutions, motivations, and objectives. The easiest to initiate would be a unilateral program, since any sufficiently motivated country could enact a program designed to thwart FDI.

A multilateral program by its nature suggests one of two things: a pattern of non-discrimination among the acceding parties, or, if the objective is to control investment, a carefully articulated program with explicit rules

11. FLANIGAN, U. S. POLICY ON FOREIGN INVESTMENT IN THE UNITED STATES 7 (Chamber of Commerce, 1974).
13. Hearings on Foreign Investments, supra note 7 at 18-19.
14. Id. at 13.
and exceptions. The Code of Liberalization of Capital Movements is an example of the former.

It has been suggested that a system like the General Agreement on Tariffs and Trade be established for investment, but in light of deep divisions between the rich and poor nations and controversies among the wealthier countries themselves, it is highly doubtful that such a code could be developed, much less adopted.

Work toward guidelines for international FDI has proceeded in existing multilateral forums. The Organization for Economic Cooperation and Development (OECD) is currently developing voluntary guidelines for multinational enterprises, while a number of U.N. agencies are working on various issues, such as technology transfer. The thrust of the efforts of the United Nations is in large part political in character; the emphasis is primarily on the achievement of certain political and economic goals rather than solely on the establishment of a regulatory regime for multinationals. The OECD Code has fallen into general disuse. The rapid changes in the global economy promise more turmoil and confrontation between the rich and poor, and the development of a consensus under such conditions is extremely unlikely.

One of the traditional modes of dealing with FDI has been through bilaterally negotiated treaties. Usually those treaties of "friendship, commerce, and navigation" with America's traditional trading partners guarantee full national treatment, conferring on foreign direct investment, once it is made, a status equivalent to a domestic investment. Bilateral treaties with other nations grant a variety of trading and investment privileges. There is little doubt that unilateral action by the United States would violate a number of these treaties if FDI were singled out for discriminatory limitations. There would be no legal impediment to doing so, however, since congressional action would supersede any existing treaty.

While the United States has sought to avoid bilateral FDI controls, it has also sought to use bilateral agreements to defuse the issue of foreign-government FDI. Informal agreement has been reached with Saudi Arabia and Iran for advance consultations before major governmental investment is undertaken.

20. Hearings on Foreign Investment Legislation, supra note 9 at 55.
Unilateral action is the easiest course to follow, since it does not require the acquiescence of foreign governments, and in lieu of an international regulatory regime, most countries have resorted to unilateral controls.\textsuperscript{21} Proposals in the United States have ranged from limitations on the acquisition of any stocks above a ceiling, to a "do-nothing" attitude.

The development, enactment, and implementation of coherent unilateral FDI regulation requires, above all, an evaluation of costs and benefits and a clear idea of the objectives of regulation. Neither of these elements has been adequately discussed in public debate on FDI.

II. CURRENT UNITED STATES POLICY

Current American policy on foreign investment can be characterized as "liberal." With few exceptions, foreign investors are treated in a manner similar to domestic investors once an investment is made. Foreigners generally are not singled out for special discriminatory or preferential treatment. The exceptions to this policy are in those areas which have been deemed vital to national security.\textsuperscript{22} Such a policy raises interesting conceptual problems, however. Strong arguments could be made even under this policy to control or prohibit certain foreign investments in banking and finance, agriculture and food distribution, and defense industries, among others.

There seem to be no legal impediments to congressional enactment of selected additional restrictions, particularly if such prohibitions arguably could fit under the rubric of national defense, for which allowance is made

---

\textsuperscript{21} There are several extensive discussions of foreign government legal treatment of FDI. See 2 Interim Foreign Direct Investment Report, supra note 1, appendix X (October, 1975); Hearings on the Foreign Investment Study Act of 1974 Before the Subcomm. on Foreign Commerce and Tourism of the Senate Comm. on Commerce, 93rd Cong., 2nd Sess. at 84 (1974); M. Kennedy, The Climate for Investment Abroad (Office of International Investment, Dep't of State, 1974), reprinted in Hearings on Foreign Investments in the United States Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing, and Urban Affairs, 93rd Cong., 2nd Sess. at 86 (1974); Sanford and Costa, International Trends in the Regulation of Foreign Investment (Congressional Research Service, Library of Congress, Mar. 29, 1974) reprinted in Hearings on Foreign Investment in the United States Before the Subcomm. on Foreign Economic Policy of the House Comm. on Foreign Affairs, 93rd Cong., 2nd Sess. at 375 (1974). Chamber of Commerce, The Climate for Investment Abroad (Sept. 1974). Generally these studies show that the industrialized nations consider themselves to be liberal and non-discriminatory in their attitude towards foreign investment. Most of these countries do not have explicit policies embodied in foreign investment laws although there are variations from country-to-country. Canada and Japan in particular are more restrictive in that they formally screen new investment and have specific investment laws. France, among the Western European nations, regulates and screens most foreign direct investment. The others, according to the Kennedy study, maintain at least some form of reporting and monitoring mechanism of domestic investments. Many non-Western countries totally ban any FDI in their economies.

\textsuperscript{22} Hearings on Foreign Investments, supra note 7 at 9.
in bilateral treaties. Further restrictions on inward investment need not violate the letter of current U.S. policy, but the appearance and the psychological impact of a retreat from an open, even-handed policy apparently disturbs the Administration.\(^2\)

The United States, home of the largest international investors, has traditionally been a staunch advocate of free capital flows and is a strong supporter of the OECD Code. Administration spokesmen have incessantly stressed that the United States has the most to lose if the world were to embark on a wave of investment protectionism.\(^4\)

By and large, U.S. policy on foreign investment has been more liberal and open than the policies of our industrial allies,\(^5\) whose programs range from complicated prohibitions to extensive monitoring. Executive opposition to legislative proposals arises not from the belief that the proposals, if enacted, would result in an inequitable disparity in treatment of foreign investment (although this may happen in some cases), but rather from the fear that any reversal in traditional U.S. policy would be perceived as a weakening in the American commitment to free capital flows. This uneasiness is not necessarily misplaced, although it is hypothetical. Certainly the activities of some multinational enterprises have come under serious attack.\(^2\) Moreover, in some multilateral organizations such as the United Nations, efforts are underway to develop international codes or guidelines for the regulation of multinational enterprises. However, while the overseas reaction must be of vital interest to the United States, domestic American policy should not be predicated solely on the United States' international investment position if there are legitimate grounds for economic and security concerns.

Granted the major premises of traditional American policy towards FDI, that policy is still crude, since it makes little distinction between different types of investment. The thrust of that policy has been negative in the sense that politicians and bureaucrats have reacted rather than responded creatively to the growth of foreign investment to stimulate the economy, improve the balance of payments, or update antiquated regulations.

Investment can take place in several different forms and can have significantly different impacts. A totally new venture can create jobs, while the simple purchase of equity may simply add to the domestic capital stock. A direct investment also may introduce superior technology, bring in new

\(^{23.}\) Hearings on Foreign Investment Legislation, supra note 9 at 51, 81.

\(^{24.}\) Id. at 82.

\(^{25.}\) See sources cited supra at note 19. Appendix X in the INTERIM FOREIGN DIRECT INVESTMENT REPORT concentrated on the FDI of industrialized nations.

management, or invigorate an older firm. In short, certain types of investments, such as those which create jobs or employ superior technology, can bring clear, substantive benefits to an economy. Our current, even-handed policy is undiscriminating and unrefined, and Administration spokesmen are reluctant to take into account the costs and benefits of individual investments. While it may be difficult, if not impossible, to distinguish between different investments, there is no evidence that Executive policymakers have even considered the possibility of doing so.

Although FDI has existed in the United States for decades without known adverse impact, changes in the world economy dictate a constant re-evaluation of the nation's needs and objectives and the role of FDI relative to those objectives. Traditional policy should be the starting point of that review, not the end. The recent furor over FDI has served a constructive purpose in subjecting America's FDI policy to intense and critical public scrutiny and dissolving the complacency which enveloped business, labor, government, and the general public concerning this economic development.

A. Administration Position

The current Administration position on FDI reflects a comfortable consensus among the various departments and agencies with mild differences in nuance. Generally, there is broad agreement on the desirability of maintaining the current U.S. policy of minimal restrictions on the theory that the free market is the best means for achieving maximum efficiency in the allocation of capital resources. Current policy discounts the threat from the oil-exporting countries and hypothesizes that enactment of American restrictions would have a deleterious effect on American investments abroad.

Administration spokesmen have repeatedly reaffirmed their commitment to the free market and have warned that the imposition of restrictions would terminate the benefits flowing from foreign investment. Not only does the Administration oppose outright restrictions, but it has also opposed the establishment of a permanent monitoring mechanism as premature.

The Administration view clearly represents a national constituency which has an important stake in free, unfettered capital movements. Furthermore, inasmuch as the Administration's position endorses the status quo—that is, relatively minimal restrictions on incoming investment—it closely adheres to this nation's traditional policy.

While the Administration has strongly opposed enactment of additional controls, it has not been adverse to the need for more comprehensive infor-

28. Hearings on Foreign Investment Legislation, supra note 9 at 51-52.
information on foreign investment in the United States. Consequently Executive representatives endorsed S. 2840, which became the Foreign Investment Study Act of 1974. This Act authorized the first major study of foreign investment since 1959 and provided for more far-reaching and comprehensive information than the 1959 project. That the bill was introduced to meet an obvious deficiency in information was clear and should have been sufficient to induce Administration support. However, the fear that a more onerous and restrictive bill might be forthcoming also could have had a part in attracting Administration support.

Since the FDI issue first came to prominence, the Administration’s position has remained relatively consistent. However, the decision-making structure within the Executive has evolved considerably. In its early period, the Departments of the Treasury, Commerce, and State and the Council on International Economic Policy (CIEP) exerted the greatest influence in the development of an FDI policy. Each of these agencies represented a different constituency and had a slightly different orientation and concern. Treasury tended to be theoretical and was concerned about monetary affairs. State, on the other hand, was concerned about the international impact of efforts to curb foreign direct investment, while Commerce was heavily influenced by the business community. CIEP, probably the most balanced of the agencies in terms of its ideological orientation, was not as heavily influenced since it has no constituency per se as do the line agencies.

Although CIEP did much of the original research and work on this issue, it has gradually lost its influence on this and other international economic subjects. Since the resignation of its last permanent director, William Eberle, more than a year ago, CIEP has been headed by an acting director. The leading role has been assumed by the Treasury Department, a stronghold of the free-market, free-trade sentiment. This position was confirmed by the appointment of the Secretary of the Treasury as head of the interagency Committee on Foreign Investment, which consists of the Secretary of the Treasury, the Secretary of State, the Secretary of Defense, the Secretary of Commerce, the Assistant to the President for Economic Affairs, and the Executive Director of the Council on International Economic Policy. Such power appears to derive not from the particular expertise of the Secretary or the Department—although the Treasury does follow capital movements—but rather from the affinity of the President for the economic views of the Treasury Secretary. In view of the fact that it is foreign

FOREIGN INVESTMENT IN THE U.S.

direct investment—not foreign portfolio investment—which has been politically troublesome, it would have been more natural for the responsibility to have been lodged with the Secretary of Commerce, whose responsibilities include domestic corporate activities.

The creation of a high level unit to review foreign investment was one facet of the Administration's four-point program. In addition to the appointment of the interagency committee, the Administration did the following:

—established an Office of Foreign Investment in the United States within the Department of Commerce to gather and analyze information and to support the interagency committee;

—initiated a program to improve information operations, principally through the Office of Foreign Investment in the United States; and

—obtained agreements from some—though not all—surplus OPEC states for advance consultations with the United States government before significant governmental investments are made in this country.32

Before the Congress, the Executive has continued to oppose enactment of any further limitations, although in principal it supports the concept of additional disclosure from all investors, both domestic and foreign.33 The Administration has expressed the desire also to wait for the issuance of the final reports on foreign direct and portfolio investment before proceeding with further disclosure or monitoring programs.34

Pursuant to the Foreign Investment Study Act of 1974, four reports on FDI were issued by the Executive agencies in 1975: the interim reports on portfolio and direct investment by the Departments of the Treasury and Commerce respectively and two reports on information gathering released under CIEP auspices.35 As a major part of its program to cope with pressures for restrictions, the Administration is relying heavily on the assumption that the data collected will show no reason for alarm. Since it defends

32. Hearings on the Foreign Investment Act of 1975, supra note 19 at 22.
33. Id. at 26. Ray Garrett, then Chairman of the Securities and Exchange Commission, supported those provisions in S. 425 relating to further disclosure of equity ownership although he also contended that the Commission had sufficient rule-making authority. Id. at 98.
34. Hearings on Foreign Investment Legislation, supra note 9 at 51-52.
35. INTERIM FOREIGN DIRECT INVESTMENT REPORT, supra note 1; INTERIM REPORT TO THE CONGRESS ON FOREIGN PORTFOLIO INVESTMENT IN THE UNITED STATES, supra note 2; COUNCIL ON INT'L ECONOMIC POLICY, REPORT ON FEDERAL GOVERNMENT AGENCY SOURCES OF DATA ON FOREIGN INVESTMENT IN THE UNITED STATES (Oct. 1975), reprinted as Appendix XIII; 2 INTERIM FOREIGN DIRECT INVESTMENT REPORT; COUNCIL ON ECONOMIC POLICY AND OFFICE OF MANAGEMENT AND BUDGET, FEDERAL GOVERNMENT AGENCY DATA COLLECTION ACTIVITIES REGARDING FOREIGN INVESTMENT IN THE UNITED STATES (March, 1975).
the status quo, the Administration appears to be in a stronger position vis-

a-vis critics of FDI.

B. Congressional Response

In contrast to the Administration’s relatively homogenous, consistent position, the Congress responded to the growth of foreign investment in a hesitant fashion. Legislation in the 93rd and 94th Congresses ranges on a broad continuum from the highly restrictive to straightforward data collection.36

Congress is often criticized for being remote from and unresponsive to the public, but the truth is quite different. Members of Congress have been much more sensitive to local and state constituency pressures on this issue than the Administration has been, and this fact has been reflected in the attempt of Congress to deal with a novel issue. Foreign direct investment is a regional phenomenon, with demands for action varying from area to area. Moreover, FDI is actively sought by many state development officials,37 and a Member’s willingness to introduce legislation or his interest in legislation will be influenced by the experience of his district with FDI as well as by his national perspective.

It is misleading to speak of a “congressional response” as though Congress were a monolithic and cohesive body. Under our system of government, the only legally valid congressional response is a public law, even if, as a strategic matter, one must pay attention to statements by Members and subsequent media coverage. Therefore, it is noteworthy that the congressional response as expressed in public law has been moderate and reasonable. Of the plethora of bills introduced in the 93rd Congress, only two proposals were enacted into law. The most significant was the Foreign Investment Study Act of 1974, which authorized a complete survey of

36. The principal bills introduced in the 93rd Congress included: H.R. 8951 (Dent-Gaydos); H.R. 12040 (Moss); H.R. 13897 (Roe); H.R. 16848 (Wyman); H.R. 16932 (Gunter); S. 2840 (Inouye) (now P.L. 93-479, 88 Stat. 1450 (1974), 15 U.S.C.A. §78b note (Supp. 1976)), S. 3955 (Metzenbaum). Bills and resolutions introduced in the 94th Congress are as follows: H.R. Res. 249 (Regula); H.R. Res. 755 (Dent); H.R. 411 (Fish); H.R. 418 (Fish); H.R. 945 (Roe); H.R. 954 (Roe); H.R. 1573 (Ashbrook); H.R. 2052 (Stark); H.R. 2329 (Minish); H.R. 2757 (Talcott); H.R. 2867 (Brademans; H.R. 3085 (Helstoski); H.R. 3398 (Broomfield; H.R. 3401 (Broomfield); H.R. 3811 (Wolff); H.R. 4492 (Burleson); H.R. 4677 (Dent); H.R. 5491 (Solarz); H.R. 5617 (St. Germain); H.R. 5887 (Roe); H.R. 5888 (Roe); H.R. 5962 (Ottinger); H.R. 6857 (Brodhead); H.R. 6907 (Eshleman); H.R. 7023 (Carney); H.R. 7024 (Carney); H.R. 7578 (Carney); H.R. 7589 (Carney); H.R. 10637 (Moss); H.R. 12103 (Rees); S. 329 (Scott); S. 425 (Williams); S. 953 (Stevenson); S. 958 (Proxmire, by request); S. 995 (Williams); S. 1132 (Sparkman); S. 1303 (Inouye); S. 1303 (Stevens amendment No. 393); S. 1461 (Humphrey); and S. 2839 (Inouye).

37. Hearings on Foreign Investments, supra note 7 at 199. The Department of Commerce maintains an office called the Domestic Investment Services Staff, which was established in 1961 to promote inward investment to improve the balance of payments. Its recent mission has been to help states attract FDI for development purposes.
FOREIGN INVESTMENT IN THE U.S.

inward direct and portfolio investment to be completed by late April, 1976. The second was an amendment to the Federal Energy Administration Act of 1974, requiring the Administrator to report on foreign influence and ownership in the energy sector and to monitor this investment.

Several features of the political climate in which these measures were enacted deserve attention. While there were a large number of restrictive bills introduced in the House, there were none in the Senate. Both bills that eventually passed originated in the Senate. Despite the urgent concern expressed by some Representatives, none of the restrictive bills received a hearing. Some criticisms of those bills may be thoroughly justified, but the public utterances of some Members should not belie the fact that Congress was most constructive and deliberate in its approach. The two measures finally enacted were congressional initiatives which the Administration supported. The Study Act, in particular, met a need which the Administration conceded exists but on which there had been no executive action.

Legislative proposals in the 94th Congress fall into similar categories: informational and restrictive. Many of the bills show an increased sophistication and deal with specific issues rather than strike indiscriminately at FDI. An example of this genre is S. 995, which focuses on foreign government direct investment, an issue which is one of the principal concerns of the Executive. Naturally, not all the bills deserve equal attention. Moreover, evaluating the prospects for legislation necessarily involves a large element of personal judgment. Inasmuch as there have been no hearings on House measures in the 94th Congress, the focus of this analysis will be on Senate proposals, with the possibility that the House may act later on some bills. Of the Senate proposals, five appear at this time to be important enough to be mentioned or have favorable prospects.

S. 425, introduced by Senator Harrison Williams of New Jersey, would amend the Securities Exchange Act of 1934 to require notification by foreign investors of proposed acquisition of equity securities of United States companies and to authorize the President to prohibit any such acquisition as appropriate for national security reasons. Hearings on this bill have been concluded.

S. 958, introduced by Senator William Proxmire at the request of the Federal Reserve Board, provides for federal regulation of foreign banks establishing, acquiring, operating, or controlling banks, branches, and agencies in the United States. The legislation is designed to end the dispar-

40. Hearings on Foreign Investments, supra note 7 at 40.
41. Hearings on Foreign Investment Legislation, supra note 9 at 55.
ity in treatment of foreign and domestic banks. Hearings were held in January, 1976, and they have been concluded. A bill embodying similar provisions may receive House consideration soon, but chances for passage are unclear.

S. 953, introduced by Senator Adlai Stevenson, Jr., would amend the Export Administration Act of 1969 to clarify and strengthen the authority of the Secretary of Commerce to take action in the case of restrictive trade practices or boycotts. While this bill, as originally introduced, was only tangentially related to FDI, it has been amended to include a provision to amend the Securities Exchange Act of 1934 to enhance disclosure of equity ownership by both domestic and foreign investors. This latter provision is an outgrowth of S. 425, on which action has been deferred.

S. 1303, which I introduced, would authorize the establishment of a Foreign Investment Administration within the Department of Commerce headed by a director appointed by the President with the advice and consent of the Senate. The director would be authorized to establish procedures for the submission by foreign investors of information on significant investments in U.S. companies. The bill also sets the criteria for the establishment of reporting requirements. Hearings on the bill have been concluded.

Finally, S. 2839, which I also introduced, would authorize the Secretary of Commerce to collect and publish information on inward and outward investment and to take periodic surveys. The objective of this bill is to provide unambiguous authority for the collection of data which is needed for policy-making purposes but whose compilation may be legally questionable under the Bretton Woods Agreements Act. This bill, if enacted, would cure a serious deficiency in existing authority and consequently has received Administration endorsement.

III. DEVELOPING A CONTEMPORARY FDI POLICY

The American experience with recent foreign direct investment provides little guide as to the appropriate approach to analyzing the impact of foreign direct investment on the domestic economy and on our national security. As far as we know, there have been no shocking examples of untoward managerial behavior, no acquisitions of important defense con-

44. Testimony by Gerald Parsky, Assistant Secretary of the Treasury, Before the Subcomm. on Foreign Commerce and Tourism, Senate Comm. on Commerce, February 23, 1976. The hearings have not been printed at the time of this writing.
tractors, no attempt by Arab investors to gain control of major industrial firms, and no evidence that FDI has had a detrimental impact on firms acquired or has compromised the national sovereignty.

A restatement of this litany, however, begs a more sophisticated analysis of the issues raised by FDI in the United States. In view of the dearth of detailed academic and investigative research into this issue, is the failure to detect the potential adverse effects due to a lack of adequate information, an analytical framework, and measuring tools? Can we ever develop a set of proper analytical tools to assess the costs and benefits of FDI, or are there too many elusive factors which cannot be quantified? Furthermore, even if an investor's immediate behavior were not detrimental to the corporation or to employees' welfare, are there activities nevertheless which could work to the detriment of the national interest—however that may be defined—over the long run?

The congressional decision-making process compounds the difficulty of dealing with FDI issues. The formulation, development, enactment, and implementation of any kind of policy with controversial ramifications can be painfully slow. Even the non-controversial Foreign Investment Study Act of 1974 required ten months to become public law. While procedures can undoubtedly be expedited, the deliberative pace of the legislative process must be taken into consideration in evaluating any strategy to cope with what may emerge as a sudden, volatile issue. The legislative process works best when it encourages thorough discussion and review, and in some cases it may not lend itself well to emergency situations.

In devising a strategy to deal with FDI, the Congress necessarily must plan for a wide spectrum of possibilities, some of which may be very remote. The general provisions must be sufficiently flexible to take into account hypothetical situations lest we face a situation in which a public law cannot meet unplanned and unusual developments. Therefore, blanket criticism of congressional concern with extreme situations is misplaced. A rational FDI policy should be judged in terms of its relationship to previous experience, current developments, projected potential, and hypothetical possibilities informed by national security and national economic considerations. The order of priority of these different factors may be subject to debate, but all are essential to an FDI policy, and the last consideration cannot and should not be dismissed.

The need for a more detailed and structured FDI policy would diminish considerably if further FDI were to end or significantly decrease. No one, however, has assumed this, and the prospect for further FDI is bright if for no other reason than reinvestment by existing domestic subsidiaries.45

45. Forbes at 28 (Nov. 1, 1975). See also Boston Consulting Group, The Prospect for Japanese Direct Investment in the United States 1974-1980 (Jan. 1974). This study, undertaken before the recent recession, which undoubtedly affected the figures, projected Japanese
Political hostility is directly related to both aggregate volume and the type of FDI. Under the assumption that the world economy recovers and that no further significant controls on investment capital flows are imposed in Europe, Japan, or Canada—the major sources of FDI—it does not appear realistic to forecast a significant long-term reduction in FDI in the United States.

In its defense of current U.S. policy, the Administration has repeatedly stressed that foreign investors have acted rationally to maximize their return or to meet other corporate needs such as preserving existing markets. It is logical to assume, therefore, that foreign investment will occur principally in the most promising firms—those in which Americans have a technological lead or which are unusually profitable or productive or which are underpriced relative to replacement value. Furthermore, it would be reasonable to assume that some of these investments may be on a large scale similar to the recent acquisition of Copperweld by SocitŽe Imetal for $200 million. By the same token, however, it is also apparent that the potential for conflict is very high in these areas. The opposition by local governmental and labor interests in the Copperweld case was well documented. It is also unclear whether the national interest is served by foreign acquisition of American firms which would not benefit significantly from foreign capital, technology, or managerial talent. Acquisition of innovative, high-technology domestic firms by foreign investors gives rise to interesting and troubling questions.

Very little attention has been given to the position of organized labor on this issue even though unions have evinced a strong interest in FDI. Last year the AFL-CIO convention adopted a resolution condemning foreign takeovers and promising support for legislative efforts to curb acquisitions. Since no major takeover has occurred since then, it is impossible to determine whether organized labor will maintain its antagonistic attitude toward FDI acquisitions. Nevertheless, this resolution must be considered an important factor, and one ignores the concern of labor at his peril.

Views on FDI in the United States will necessarily be colored by attitudes toward multinational enterprises in general. As long as multinationals remain generally suspect within politically, economically or intellec-

FDI at $6 billion to $7 billion by 1980, exclusive of private securities purchases and banking assets (estimated at $1.5 billion to $2 billion and $12 billion to $16 billion, respectively).


tually influential groups, it will be impossible to isolate inward investment from outward investment. FDI could thus become a component in the much larger controversy on multinational enterprises and international investment.

FDI in the United States has political as well as economic implications. Multinational enterprises in general face intense pressures from many academic researchers and politicians, as well as from labor. The prospect that FDI will fade as a public issue is dim even though the intensity of concern may fluctuate.

IV. PROSPECTS FOR CONGRESSIONAL ACTION

Regardless of one's position on FDI, it has become obvious that there are still several areas where congressional action would be desirable or where such action may be anticipated.

The first is in the area of data collection.\footnote{48} Information on inward and outward investment has been collected pursuant to the Bretton Woods Agreements Act, which authorizes the President to require persons to furnish information which he determines to be essential to comply with requests from the International Monetary Fund for data under Article VIII of the Articles of Agreement of the IMF.\footnote{49} The IMF never has given any specific instructions on what statistics it requires for balance of payments information, and each country has discretion to determine how the information should be collected. The request for balance of payments information is considered a standing request from the IMF, and data collection programs, designed to elicit information for the IMF, are clearly authorized. The legal authority to collect information principally for domestic reasons, however, is dubious. A great deal of information is only indirectly related to the balance of payments but still is invaluable for analytical purposes; examples include technology flows, employment patterns, and pricing practices.

The uncertainty about the statutory authority for the collection of this type of information and the requirement for a clear congressional statement about the public's need for this data were the reasons for the introduction of S. 2839, the International Investment Survey Act. The bill would authorize the periodic collection, analysis, and publication of data on both outward and inward FDI. The measure, if enacted, would have the dual effect of removing any legal ambiguities and of directing the federal government to establish permanent, systematic data collection programs. Falling into this same category would be those bills which would compel the monitoring of major foreign direct investors. Existing proposals are

\footnote{48} Relevant bills here are S. 2839, S. 1303, S. 1461, and S. 329.
specific in providing for detailed criteria for such a program, but it would appear that a comprehensive data collection program would implicitly include a monitoring function, since its establishment necessarily would entail the identification of significant foreign investors.

A second area in which further Congressional action would be justified is where existing regulation falls short of its objectives and leaves an incomplete or inequitable regulatory pattern. The outstanding—and thus far only known—example of this category occurs in the regulatory treatment of foreign banks, which have become increasingly important in the American economy. The Senate Committee on Banking is currently considering S. 958, introduced at the request of the Federal Reserve, to provide for the federal regulation and supervision of foreign bank operations in the United States. As a result of work performed by a Federal Reserve Committee established in 1973, the Board of Governors concluded that foreign bank operations have become significant and that there now should be a national policy on foreign banks operating in the United States and that there should be a system of federal regulation, supervision, and examination of those operations. The Federal Reserve told the Committee:

The present patchwork system of State and Federal regulation has resulted in illogical differences in the regulatory treatment of domestic and foreign banks. While difficult to quantify, certain competitive advantages and disadvantages for foreign banks vis-a-vis domestic banks have occurred as a result of these differences.

As the Federal Reserve Board has pointed out, the present regulatory scheme exempts from federal regulation those operations that have the greatest potential for affecting the nation's economy and its major financial markets. There are numerous advantages for a foreign bank to operate through branch and agency forms of organizations which are not accorded domestic banks. However, foreign banks also suffer from discriminatory provisions which inhibit their operations or impose restraints on entry into the United States. In the case of the banking industry, therefore, there is an overwhelming argument to standardize regulation and to end

50. *Interim Foreign Direct Investment Report*, supra note 4, appendix VIII. This paper describes the major issues and also provides the political background for consideration of the legislation.


the disparity in the treatment of domestic and foreign banks.

Third, FDI may be significantly affected by legislative action as part of efforts to change existing regulation of all domestic corporations. As an example, the Senate Banking Committee has reported out S. 953,\(^ {53} \) which has two separate titles. The first would expand and enforce U. S. anti-boycott policy through amendments to the Export Administration Act, while the second would amend section 13(d)(1) of the Security Exchange Act of 1934 and add a new subsection to that Act to require disclosure of additional information from purchasers and stockholders. Among the new information to be required under this title are citizenship and residence of the purchaser, provisions clearly directed at foreign owners. The Senate report\(^ {54} \) makes apparent that one of the principal motivations for this title is concern about foreign ownership, but this information is required only in the context of greater disclosure from both domestic and foreign owners. While one may dispute the wisdom of the specific provisions, it is entirely predictable that FDI regulation will be accorded special attention as new regulation is enacted.

There are currently before the Congress no bills which are directly related solely to national security. However, to the extent that this is the most sensitive area of FDI, the possibility of a strong negative response to FDI in any important defense contractors cannot be dismissed. Indeed, such an action should be predictable if a takeover of this nature were to transpire.

### IV. Conclusions

Three years after FDI first became a national issue, there is still a lack of a national consensus on an American FDI policy. One has seen instead the co-existence of a number of policies and proposals. The passage of time since the public controversies in 1973 has not brought a retreat from traditional U.S. policy, although this official stance has eroded somewhat.

Numerous factors have caused the weakening of this traditional policy. First and foremost has been the opposition by certain interest groups which previously had been indifferent to FDI. This antagonism has been translated directly into congressional concern and legislative proposals. Moreover, in spite of the fact that the volume of FDI has decreased, the hostility of organized labor—at least to acquisitions—promises to keep the issue before the public.

Second, it has become increasingly clear, the Administration's assurances notwithstanding, that policymakers, researchers, and business analysts know little about the impact of foreign investors on the domestic

---

53. *Hearings on Foreign Investment Legislation*, supra note 9 at 55.
A great deal of information is collected, but it is not coordinated, centralized or readily usable. Moreover, there are significant gaps in the data collected, so analyses have not been of a quality nor in such detail that will induce confidence in the policies which are based on this data.

Experience thusfar does not indicate that existing FDI has had a negative impact on the U.S. economy, although, in the absence of comprehensive information, no absolute judgment is possible. Some geographical areas may indeed have been negatively affected by FDI—for example, in the form of additional pollution or microeconomic distortions. Further study to substantiate such allegations is necessary.

The prior existence of a relatively open-door FDI policy has had both positive and negative effects. Its principal function has been to discourage restrictive legislation domestically, but it has also been used to enhance the effort of the United States to maintain an open global investment climate. Executive witnesses stress that a liberal domestic policy is necessary to prevent other countries from enacting restrictive policies, particularly against American FDI.

However, U.S. policy has been generally undiscriminatory to the extent that all FDI has been welcome except for government-owned corporations, which the Executive has conceded should be scrutinized more closely because they are more susceptible to political manipulation. The Administration has considered FDI policy primarily in terms of protecting U.S. overseas investment. Notwithstanding the Administration endorsement of an non-discriminatory, non-preferential policy, it may be desirable for the American Government to consider welcoming some forms of FDI.

Even without imposing limitations on FDI, there are areas where Congress may act and thereby affect FDI in the United States, especially when such legislation may be perceived as informational, as ancillary to improvements in general regulation, or as desirable to end inequities and disparities in current regulation. Consequently, it can be expected that some future action will be taken by the Congress which will fit under the rubric of these categories.

Whatever the future of FDI regulation in the United States, it seems safe to say that the issue will persist in American life for the foreseeable future. It is only fitting that the United States, having generated so much heated discussion as a result of its own multinationals, should now go through the same reappraisal that other countries have undergone for the last several years.