

International Business Transactions

FDI

November 2, 2009

FDI in the EUROPEAN UNION

Stakeholders of a Firm

- Shareholders
- Employees
- Officers and senior management
- Customers
- Suppliers
- Creditors
- The local community
- The public at large/society
- The Government

Possible Scope of a Nation's Body of Corporate Law

Corporate formation
Naming requirements
Shareholder rights
Director and officer rights and responsibilities
Stock issuance requirements
Limited liability provisions
Dividend policies
Requirements for By-laws
Board and shareholder voting procedures
Shareholder meeting requirements (notice, frequency)
Proxy rules
M&A restrictions
Sale of assets requirements
Dissolution and winding up procedures
Insolvency and receivership structures



Delaware General Corporation Law

Possible Scope of a Nation's Body of Corporate Law

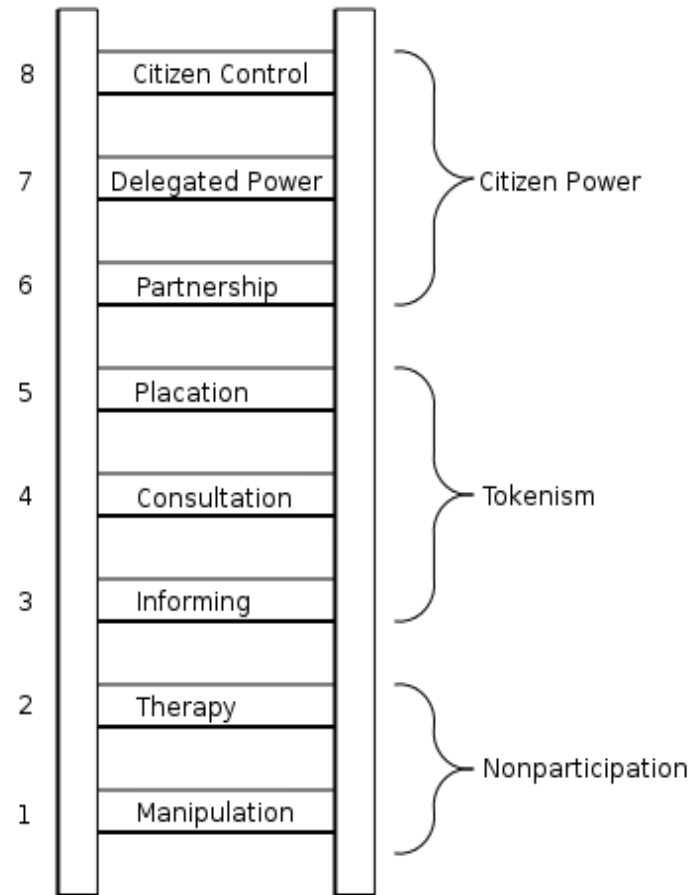
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Minimum capital requirements
Securities law
Consumer protection
Labor rights and labor relations, including

- co-determination
- work councils

A Ladder of Participation

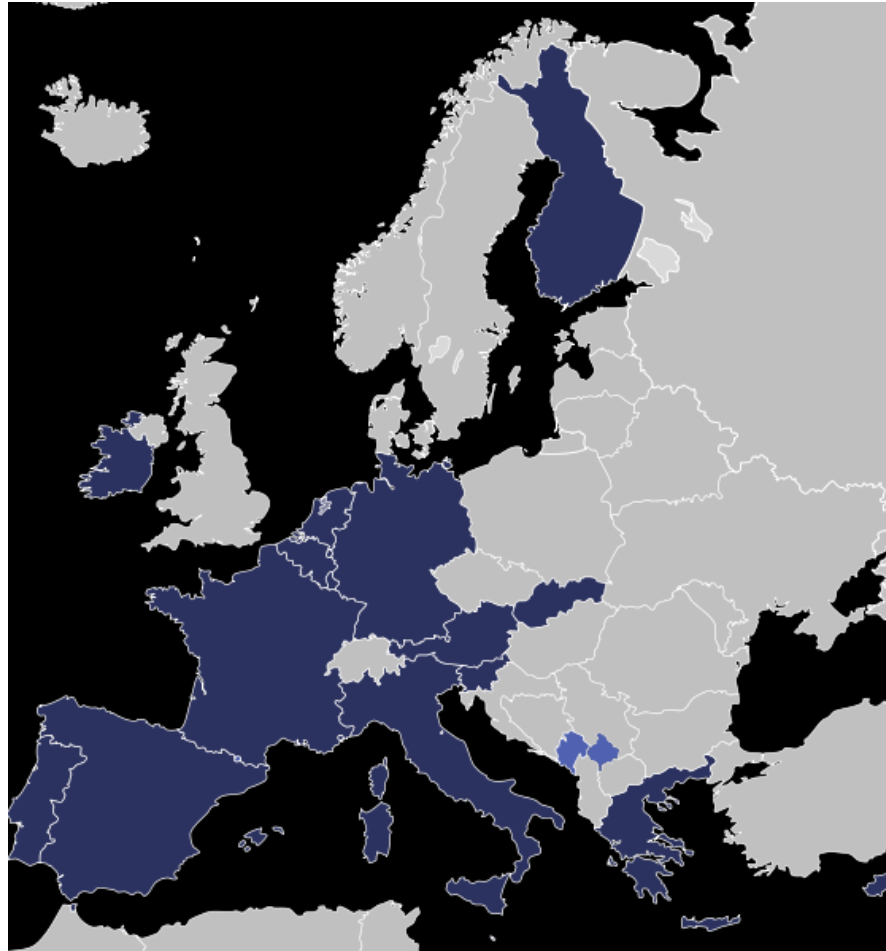


Source: Arnstein, Sherry R. "A Ladder of Citizen Participation," JAIP, Vol. 35, No. 4, July 1969, pp. 216-224

An Economic Integration Framework

- **Free Trade Area:** Members eliminate all trade restrictions against each other's goods (e.g., NAFTA).
- **Customs Union:** Members adopt uniform tariffs and other trade restrictions vis-à-vis countries outside the union (e.g., EEC).
- **Common Market:** Members all the free movement of the factors of productions (goods, services, labor, capital).
- **Economic Union:** In addition to incorporating the three earlier stages, members harmonize their monetary and fiscal policies (e.g., EU?).
- **Political Union:** Members are not only in an economic union but also yield significant economic and non-economic decision making authority to supranational entities.

Eurozone



Six non-EU nations also use the euro as their currency:
The Vatican, San Marino, Monaco, Andorra, Kosovo, and Montenegro.

Consolidated Version of the Treaty Establishing the European Community

Article 43:

“Within the framework of the provisions set out below, restrictions on the ***freedom of establishment*** of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

“***Freedom of establishment*** shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the chapter relating to capital.”

Consolidated Version of the Treaty Establishing the European Community

Article 48:

“Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.

“‘Companies or firms’ means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.”

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Some Unanswered Questions Regarding Freedom of Establishment

- To what extent may a corporation incorporated outside a particular Member State be subject to the corporation laws of that Member State without violating the freedom of establishment rules? Some restrictions of the freedom of establishment are "conceivable," but what might they be?
- Is there a difference in treatment between corporations incorporated in a Member State and those incorporated in a non-EU state? (For example, is a company incorporated under British law and operating in Germany better able to avoid application of domestic German corporate and corporate-related law than a company incorporated under Delaware law and operating in Germany?)
 - Some scholars have expressed concern that without some *substantial link* between the place of incorporation and the corporation in question, there will be pseudo-foreign corporations in Europe, e.g. corporations governed by the corporate law of a sovereign, e.g. Delaware, with which it might have only minimal connection.

Societas Europaeae (SE)

- An SE is a “European public limited liability company.”
- The SE form is a creature of the European Company Statute.
- There are two components to the European Company Statute:
 - A European Council regulation
 - A European Council directive
 - Both of these components must provision must be applied “concomitantly.”

Societas Europaeae (SE)

- The Regulation component applies to member States without their having to enact it into their domestic law.
- The Regulation component addresses:
 - Ways to form an SE
 - Ownership and managerial structure
 - Shareholder rights
 - Requirements regarding shareholder meetings
 - Annual accounting requirements
 - Winding up/liquidation process
 - Requirements in the case of insolvency
- The Regulation does not address the involvement of employees in the affairs of an SE.

Ways to Form an SE: Merger

1. Two or more companies can merge to form an SE.
 - Each of these companies must
 - be publically held,
 - be incorporated under the laws of a Member State, and
 - have their head offices in a Member State,
 - At least two of the companies to merge must be “governed by the laws of different Member States.”

Ways to Form an SE: Holding Company

2. Two or more companies may form a holding company which is an SE.
 - Each of these companies must
 - be incorporated under the laws of a Member State, and
 - have their head offices in a Member State.
 - At least two of the companies to be held by the holding SE must either:
 - be governed by the laws of a different Member State, or
 - have had, for at least two years, either
 - a subsidiary company governed by the law of another Member State, or
 - a branch located in another Member State.

Ways to Form an SE: Subsidiary

3. Two or more companies may form a single subsidiary which is an SE.
 - Each of these companies must
 - be incorporated under the laws of a Member State, and
 - have their head offices in a Member State.
 - At least two of the companies to own the SE must either:
 - be governed by the laws of a different Member State, or
 - have had, for at least two years, either
 - a subsidiary company governed by the law of another Member State, or
 - a branch located in another Member State.

Ways to Form an SE: Transformation

4. A company may reincorporate as an SE.
 - This company must
 - be publically held,
 - be incorporated under the laws of a Member State,
 - have its head office in the EU, and
 - have had, for at least two years, a subsidiary a governed by the laws of another Member State.

Benefit of Being an SE

- SEs would be able to operate in several nations within the EU without having to deal with adhering to several national management and reporting requirements.
- SEs can move its operations including its head offices from Member State to Member State without having to incur potentially costly administrative requirements (e.g., to re-register the company).
- SEs operating in many EU countries, therefore, would save on administrative and other transaction costs.
- To date, the SE form has not been particularly popular.

Societas Europaeae (SE)

- The Directive component governs the involvement of employees in the affairs of an SE.
- Requires ownership and employees to negotiate on the terms of employee participation.
- Essentially attempts to preserve worker participation rights which existed prior to the formation of an SE (e.g., in a transformation or a merger)
- Failure to agree to terms trigger default participation provisions. These default provisions are referred to as “Standard Rules.”
- Like all Commission directives, Member States must adopt laws, regulations and/or other administrative provisions necessary to comply with this directive.

Societas Europaeae (SE)

- Standard Rules include:
 - The establishment of an employee representation body.
 - Requirements that employees are *informed* and *consulted* regarding the progress of the business and any possible relocations, business closures and lay-offs.
 - A requirement that agendas for meetings of all managerial bodies and copies of all documents provided to shareholders be provided to the employee representative body.
- Note that except as may be required due to prior (i.e., pre-SE formation) employee participation, the Standard Rules do not require that employees directly participate or vote in the management of the company.

FDI in NAFTA

NAFTA



Revision to Syllabus

- Monday, Nov. 9:* Investing in the US; NAFTA
- Tuesday, Nov. 10:* No additional reading.
(We will continue with NAFTA)
- Wednesday Nov. 11:* Currency Exchange Controls and Transfer Pricing
- Monday, Nov. 16:* Anti-Bribery Regimes
- Tuesday Nov. 17:* Expropriation and Nationalization
- Wednesday Nov. 18:* Third World Debt

Note that I have eliminated the readings for **Project Financing**. However, I will give a brief lecture on project financing.

Let's Vote

1. Worthwhile and stimulating.
2. Worthwhile.
3. Definitely worthwhile but the process is dreadful.
4. What are we talking about? (No opinion)
5. Not worthwhile but I really enjoy it.
6. Not worthwhile.
7. Not worthwhile and definitely dreadful.

INVESTING IN THE US


Foreign Investment and National Security Act of 2007

Factors to be considered by the CFIUS include (this not a complete list) :

- domestic production needed for projected national defense requirements, including the availability of human resources, products, technology, materials, and other supplies and services;
- the potential effects of the proposed or pending transaction on sales of military goods, equipment, or technology to any country
 - identified by the Secretary of State
 - as a country that supports terrorism; or
 - as a country of concern regarding missile proliferation or the proliferation of chemical and biological weapons; or
 - identified by the Secretary of Defense as posing a potential regional military threat.
- the potential effects of the proposed or pending transaction on US international technological leadership in areas affecting US national security;
- the potential national security-related effects on US critical technologies and critical infrastructure, including major energy assets; and
- the adherence of the subject country to nonproliferation control regimes, and the relationship of such country with the US, specifically on its record on cooperating in counter-terrorism efforts.

Source: Subsection (f) of Section 721 of the Defense Production Act of 1950, 50 U.S.C. App. 2170

FINSA

REVIEW  INVESTIGATION

An “investigation” is initiated if:

- foreign government-controlled transaction,
- acquisition threatens national security,
- transaction would result in control of critical national infrastructure, or
- the lead agency recommends it and the Commission concurs.

CFIUS Covered Transaction Activity

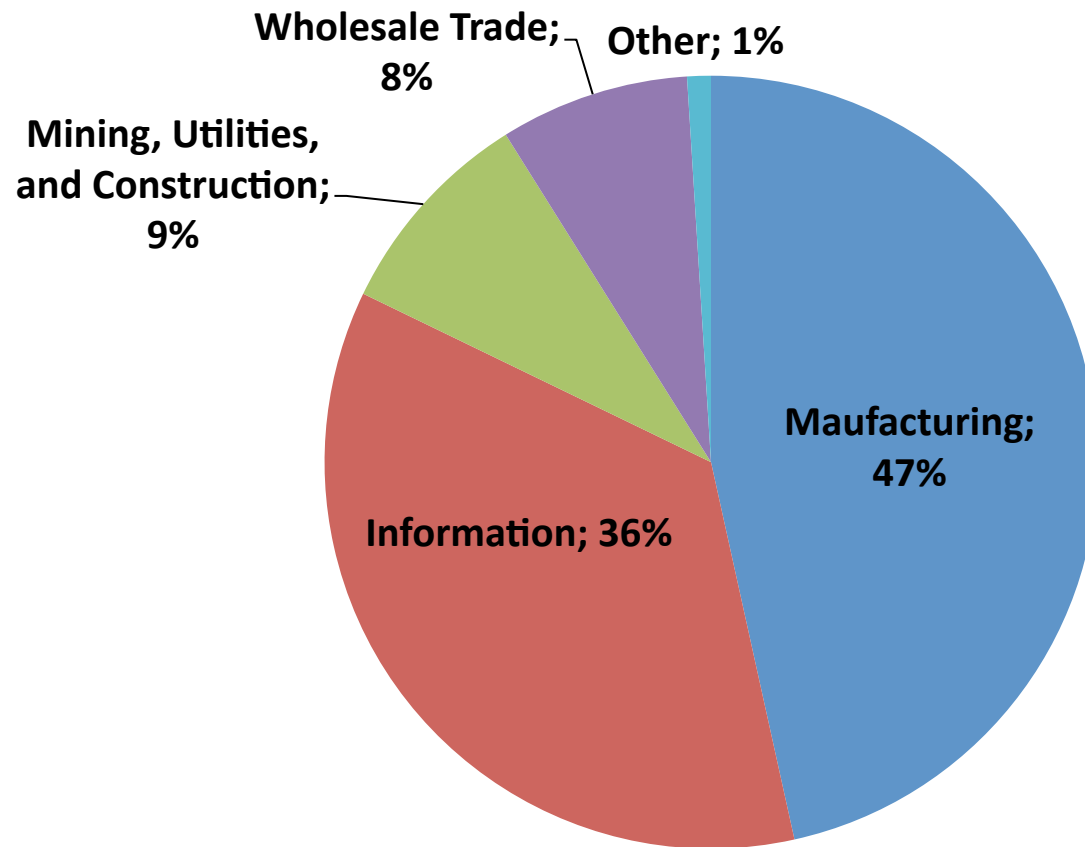
<i>Year</i>	<i>Number of Notices Received</i>	<i>Notices Withdrawn During Review</i>	<i>Number of Investigations</i>	<i>Notices Withdrawn During Investigation</i>	<i>Presidential Decisions</i>
1988-2005	1,593	?	25	13	12
2006	111	14	7	5	2
2007	138	10	6	5	0
2008	155	18	23	5	0
Total	1,997		61		22

So of nearly 2,000 foreign takeovers of US firms since 1988:

- 3% were investigated
- 1% were restricted or prohibited. (Note that this 1% does not include those notices that were withdrawn.)

Source: US Department of the Treasury

Covered Transaction Notices (2005-07)



“Information” includes technical and scientific services, publishing, financial services, telecommunications.

“Wholesales Trade” includes wholesales traders and distribution systems

Source: US Treasury Dept., CFIUS 2008 Annual Report to Congress (public version)

Some Notable Cases

- CATICs 1990 acquisition of, MAMCO, a US commercial aircraft parts manufacturer. CATIC was later forced to divest under CFIUS.
- French government's 1992 withdrawal of its attempt to purchase a LTV, a defense contractor/missile manufacturer. The withdrawal occurred during a CFIUS proceedings and concern that France had previously sold weapons to countries hostile to the US (Iraq, Iran and Libya).
- Chinese government-owned China National Offshore Oil Corporation 2005 attempted takeover of Unocal. Under public pressure, CNOOC withdrew its bid.
- Dubai Ports World's 2006 acquisition of British company which owned several US ports, including NYC, Philadelphia, Baltimore, Tampa and New Orleans. CFIUS had permitted the acquisition, but Congressional outcry prompted DPW to sell its US ports to a US entity.
- Smartmatic, a Venezuelan software company, 2005 acquisition of Sequioa Voting Systems, a voting machine company. The government of Hugo Chavez had previously owned a minority stake in Smartmatic.