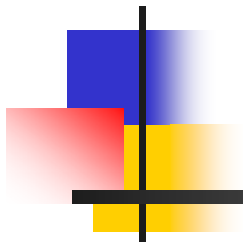
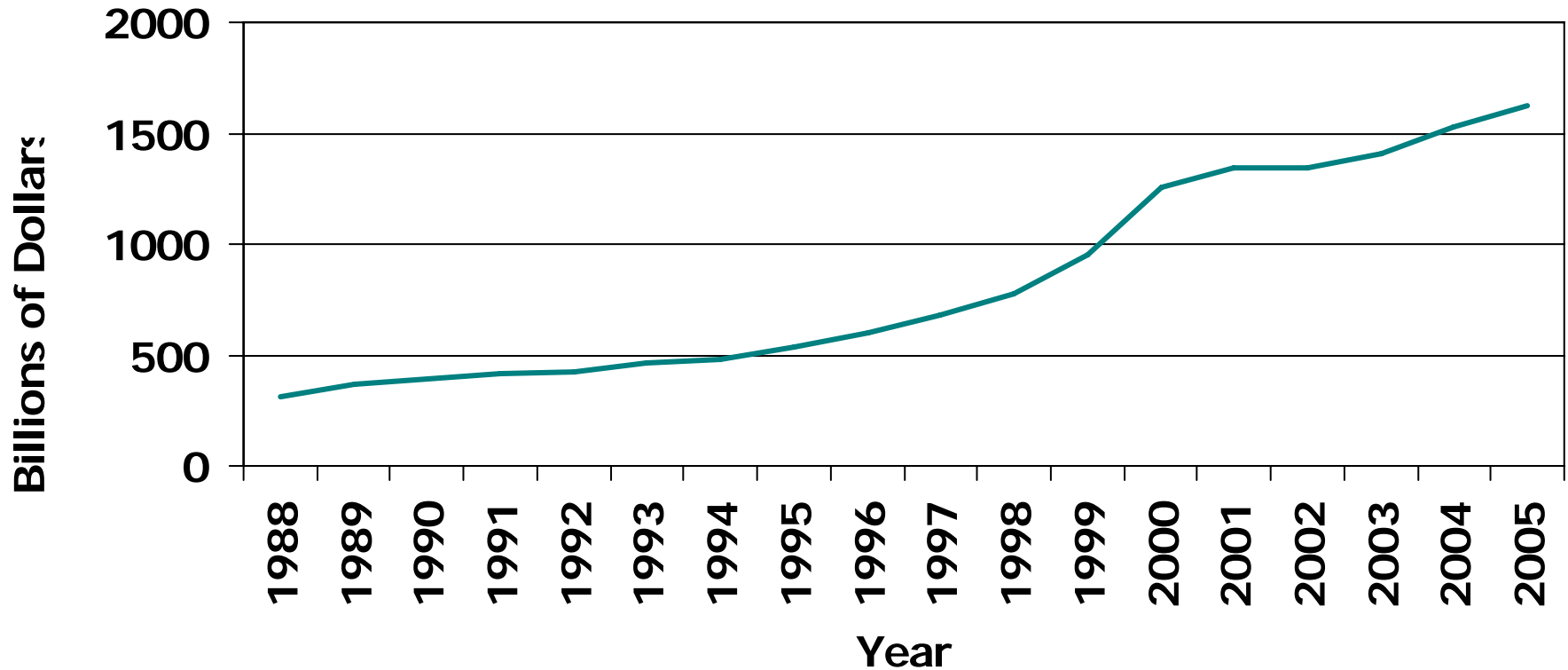


ABA Section of Business Law Negotiated Acquisitions Committee Forum



Foreign Investment in the
United States:
The CFIUS Process

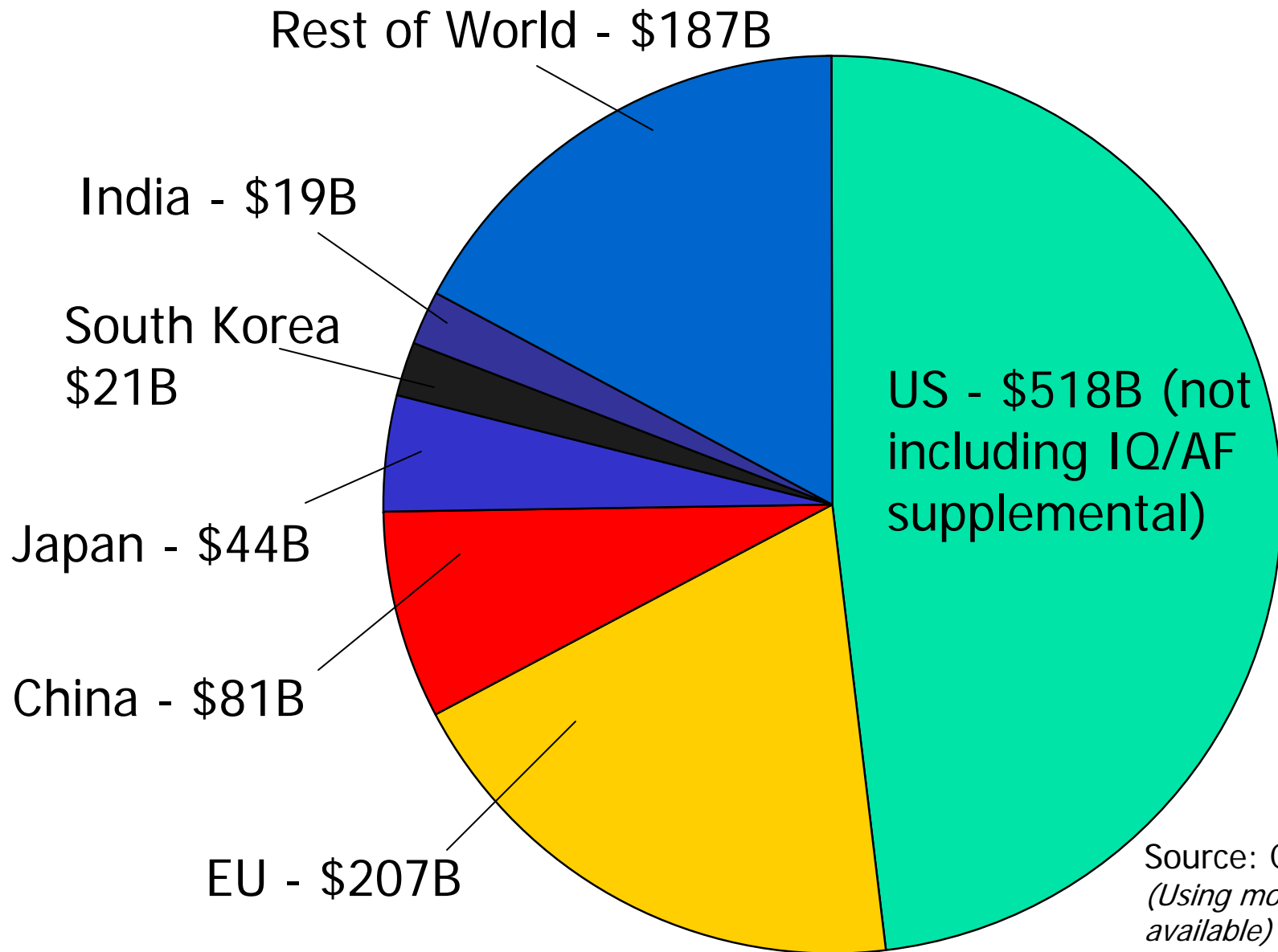
FDI into the United States, 1988-2005



FDI in the reporting economy comprise capital provided (either directly or through other related enterprises) by a foreign direct investor to an enterprise resident in the economy (called FDI enterprise).

Source: United Nations Conference on Trade and Development (UNCTAD)

Global Military Spending (est.)



Source: CIA Fact Book
(Using most recent figures available)



Hypothetical

- US Subsidiary of Foreign Company is looking to acquire US Target.
- Foreign Company is publicly-traded, and has a “Golden Share” arrangement with its home government.
- US Target is a US Government subcontractor, and maintains a facility security clearance.
- US Target is a Registrant under the International Traffic in Arms Regulations.



Unique and Important Conditions Precedent

- Successful completion of the Exon-Florio review of the proposed transaction by the Committee on Foreign Investment in the United States (CFIUS).
- US Government approval of a Foreign Ownership, Control or Influence (FOCI) Mitigation arrangement.
- Notification and coordination with the Directorate of Defense Trade Controls (DDTC) at the Department of State pursuant to the International Traffic in Arms Regulations (ITAR).



Regulatory Approvals: Step 1 Preliminary Notifications

- Notification to the DDTTC under the ITAR.
 - 22 CFR 122.4(b): 60 days prior to closing.
- Notification to the Defense Security Service (DSS) under the National Industrial Security Program Operating Manual (NISPOM).
 - Describe type of transaction;
 - Identity of foreign buyer;
 - Proposed FOCI mitigation arrangement;
 - Intention to file with CFIUS; and
 - Copies of relevant documentation.



Regulatory Approvals: Step 2

Negotiate FOCI Mitigation with DSS

- In majority foreign ownership cases, FOCI is mitigated via a Proxy Agreement, Voting Trust or a Special Security Agreement.
 - Proxy Agreement/Voting Trust: premised on the concept of risk avoidance.
 - Foreign representation on board prohibited.
 - Proxy Holders/Trustees control the company, subject to limited authority of foreign owner.
 - Special Security Agreement (SSA): premised on the concept of risk mitigation.
 - Minority foreign representation on the board.
 - Requires the appointment of independent Outside Directors.
 - National Interest Determinations required for access to “proscribed” classified information.
- In minority foreign investment cases, the FOCI mitigation option hinges on whether the foreign investor is entitled to board representation or not.
 - Board Resolution: available in cases with no foreign investor representation on the board.
 - Security Control Agreement (SCA): available in cases of minority foreign investor representation on the board of directors.
 - May require the appointment of an independent Outside Director.



Regulatory Approvals: Step 3

CFIUS Review

- Start the formal CFIUS review process once you have an agreement in principle with the relevant agency (DSS in our hypothetical) on the required mitigation arrangement.
- Under Exon-Florio, the President has broad authority to review all “mergers, acquisitions, and takeovers [that] could result in foreign control of persons engaged in interstate commerce in the United States.” Following review, the President may block a transaction that the President deems a threat to national security that cannot otherwise be addressed.
- Current CFIUS Members: Secretaries of Treasury (Chair), State, Defense, Commerce, Homeland Security, Attorney General, Director of OMB, USTR, Chairman of the Council of Economic Advisors, Director of the Office of Science and Technology Policy, and the Assistants to the President for National Security Affairs and Economic Policy.
- CFIUS is normally a joint voluntary notification process.
 - Initial 30 day review by CFIUS of mergers, acquisitions and takeovers which “could result in foreign control of persons engaged in interstate commerce in the United States.”
 - CFIUS requests that notices be “pre-filed” 5 to 7 day before filing.
 - If CFIUS determines that transaction poses national security concerns, a 45-day investigation follows which culminates in a recommendation to the President.
 - Full 45-day investigation required when an entity “controlled or acting on behalf of a foreign government” is engaged in an acquisition that could affect national security.
 - Following CFIUS’ recommendation, President has 15 days to decide what action to take.