

LEGAL INSTRUMENTALISM AND DEVELOPMENT FINANCE:
THE LONG GAME

*Drake Powell**

ABSTRACT

The Trump administration's 'America First' policy is an innately principled approach to empowering the American public to actualize a safer, more prosperous future for itself. Current presidential national security guidance, which prioritizes both advancing American influence and promoting American prosperity, emphasizes the need to pursue multilateral solutions to many of the United States' most persistent national security threats—namely China. This Note will introduce one solution that has had little discussion, the BUILD Act, particularly as an impetus to advance U.S. national security strategy priorities through development finance tools. Specific components of the current National Security Strategy will be analyzed with regard to China's growing, tragic economic influence in the developing world. Unlike China's state-led infrastructure-investment scheme to advance national security, this Note next discusses why the BUILD Act is both a better alternative for developing countries seeking foreign direct investment as well as a force multiplier for U.S. national security interests. This Note concludes that U.S. policymakers and businesses can advance the rule of law by renegotiating trade agreements with partner countries and pressuring internal judicial reform needed to support U.S. foreign investment through BUILD Act activities, thus mitigating the effect of U.S. national security threats and ensuring better outcomes for host country partners and domestic firms.

* Copyright © 2020 Drake Powell; J.D., Michigan State University College of Law, 2020. I would like to thank all who support U.S. national security efforts and protect the American way of life.

TABLE OF CONTENTS

I. Introduction	128
A. ‘America First’	131
1. Promote American Prosperity	132
2. Advance American Influence	132
B. The China Problem	133
C. Legislative Solutions	135
III. The BUILD Act	136
A. Summary of Legislative History	137
B. Core Components of the BUILD Act	137
C. Some Overlooked Implications of the BUILD Act	140
1. Executive Reorganization Plan	140
2. Governance Issues by the Board	141
3. Transitioning Away From OPIC	142
IV. Why Development Finance?	143
A. State Interests in Attracting Foreign Direct Investment	144
B. U.S. Development Finance as a Common-Pool Resource (CPR)	145
V. Conclusion	146

“The Artist is he who detects and applies the law from observation of the works of Genius, whether of man or nature. The Artisan is he who merely applies the rules which others have detected.”

– Henry David Thoreau

I. INTRODUCTION

With the passage of the Better Utilization of Investments Leading to Development (BUILD) Act of 2018, the United States consolidated several of its development finance institutions and its related functions under the umbrella of a singular entity, the International Development Finance Corporation (hereinafter “DFC”), a wholly owned government corporation. The Act directly implements the current U.S. National Security Strategy (hereinafter “U.S. NSS”) framework by conditionally subsidizing U.S. private sector investment projects in developing countries. The Act gives the DFC a greater maximum contingent liability with full government backing to promote investment opportunities for U.S. businesses in developing countries. Ultimately, the ramifications of consolidating development finance tools to advance U.S. national security interests give private sector actors a unique

opportunity to advance U.S. NSS by promoting the rule of law on a regional basis.

In many ways, the DFC will carry on the legacy of the United States' former flagship development finance institution, the Overseas Private Investment Corporation (hereinafter "OPIC"). This paper explores what necessitated such a transition and then forecasts basic criteria upon which the efficacy of those changes may be gauged. Particularly, this paper explores how the DFC's dual mandate of subsidizing economic development while protecting foreign policy interests may influence the laws of partner countries. It will also assess the implications of that mandate on the self-determination of partner states and whether the BUILD Act accounted for such results.

Part II of this paper sets the stage for the discussion by framing U.S. interests and obligations with regard to this issue under the lens of the U.S. NSS. Part III briefly explores the impetus behind the BUILD Act and then analyzes the legislation in depth, highlighting significant provisions that will be of interest to the critical reader. Part IV further refines the big questions of "why" and "how" discussed in Parts II and III by explaining the basis for U.S. development finance tools and forecasts how this weaponry should be employed to achieve intended national security outcomes. This paper concludes with several questions' researchers should consider going forward.

This research deserves consideration because the segue between OPIC and the DFC has noteworthy implications for a myriad of legal scholars, economists, and defense officials in the context of an evolving national security landscape. Foreign legal scholars also deserve to have a better understanding of the rationale for U.S. legislation that positively impacts their legal systems. Moreover, the DFC is relatively new and has received little academic attention. This paper will hopefully invigorate the discussion around research for new mechanisms to advance U.S. national security strategy.

II. THE U.S. NATIONAL SECURITY STRATEGY

The backbone of the national security regime was established by the National Security Act of 1947.¹ In the U.S., national security strategy is iterative and multilateral.² It is iterative because Congress has enacted requirements for the executive branch to publish annual strategy updates that account for changes to overall national security as strategy is implemented. In addition, it is multilateral because the national security framework is the result of collaborative guidance provided by multiple groups.³ The U.S. NSS is an

¹ 50 U.S.C.A. § 3001 (Westlaw through Pub. L. No. 80-253).

² CATHERINE DALE, CONG. RSCH. SERV., R43174, NATIONAL SECURITY STRATEGY: MANDATES, EXECUTION TO DATE, AND ISSUES FOR CONGRESS (2013), <https://fas.org/sgp/crs/natsec/R43174.pdf>.

³ *See id.* This is a non-exhaustive list of documents that contribute to the United States' National Security Strategy includes the President's National Security Strategy (NSS), the Secretary of

opportunity for the government to signal its intent to link prioritized objectives to the methods of national power that it will use to meet those ends to both the U.S. public and stakeholders abroad. While a high-level analysis of the nexus between core national security documents and overall strategy is beyond the scope of this paper, one contributing element—the U.S. NSS—is discussed in turn.

The President, in fulfilling his statutory mandate, is required to submit a report on national security strategy to Congress shortly after⁴ taking office and an updated annual report thereafter.⁵ The report must identify worldwide interests, goals and objectives of the U.S. that are vital to national security. In addition, the report must contain proposed short-term and long-term uses of political, economic, and military elements of U.S. national power to promote its interests and achieve clearly defined goals and objectives.⁶ Proponents of the Congressionally mandated annual NSS requirement argue that agencies can signal to both Congress, as well as the public, the current Administration's intent.⁷ However, some critics question this rationale; they counter this by arguing that over-publication of the U.S. NSS reduces an important policy to a customary procedure.

Recent administrations have signaled their concurrence with the latter position. Following President George W. Bush's second term, U.S. presidents have shirked their obligation to publish annual updates to the NSS. The 2006 U.S. NSS echoed a large part of the 2002 U.S. NSS. However, it also contained large sections that emphasized the challenges to and opportunities from globalization in the wake of national security concerns that arose during President Bush's second term. The U.S. NSS has become less of a customary practice and more of a practical instrument of national power that allows new administrations to demonstrate their commitment to national security strategy at the outset of a president's term by allowing *other* guidance to drive national security strategic decisions in the interim.⁸ Recent national security strategies have rarely assigned roles and responsibilities to agencies to accomplish stated objectives; rather, stated priority actions have encouraged certain agencies to evolve and expand their mandate to accommodate for new trajectories in the national security strategy. Congress has accommodated for this shifting need for strategic flexibility by, in some

Defense's National Defense Strategy (NDS), Quadrennial Defense Review reports (QDR), and the Chairman of the Joint Chiefs of Staff's National Military Strategy (NMS), as well as quadrennial reviews performed by the Department of Homeland Security, the Department of State, and the Intelligence Community (i.e., NSA, CIA).

⁴ See 50 U.S.C.A. § 3043(a)(3) (Westlaw through Pub. L. No. 116-216).

⁵ § 3043(a)(1).

⁶ § 3043(b)(1)-(5).

⁷ Dale, *supra* note 2, at 21.

⁸ See, e.g., Dale, *supra* note 2, at 4.

cases, providing unanimous support for expanding agency power to accomplish national security priorities.⁹

The Trump administration's 'America First' strategy¹⁰ is facially similar to the Obama administration's national security strategy that recognized America's "enduring interests."¹¹ While the Obama administration's national security strategy echoed the benefits of liberalization, it also expressed a staunch commitment to ensuring protection for the American people.¹² The Obama administration, like the Trump administration, complied with the Congressional mandate on a quadrennial basis—only at the outset of a new term. In this way, while the Trump administration's NSS appears facially similar to the Obama administration's, some would argue that Trump's NSS is guided by lofty political commitments rather than realpolitik. This paper will explore this argument by carefully examining the 2017 NSS and its nexus to Congressional action.¹³

A. 'America First'

The current U.S. NSS is structured under four pillars. Those pillars are to protect the American people, the homeland, and the American way of life; promote American prosperity; preserve peace through strength; and advance American influence by containing specific subcategories of national security objectives that are driven by "priority actions."¹⁴ The strategy calls itself one of "principled realism"; however, some would argue that upon reading between the lines, the U.S. NSS steps beyond principle and into the territory of a darker pragmatism. Political lenses aside, it is clear that the Trump administration's national security strategy debunks the idea that Congressional requirements have resulted in a routinization of U.S. NSS over time. This strategy, at its very core, is a clear departure from the U.S. NSS that have been published by earlier administrations. American protection is emphasized, but so is American prosperity. By reflecting on American

⁹ See Better Utilization of Investments Leading to Development (BUILD) Act of 2018, Pub. L. No. 115-254, 132 Stat. 3186 (2018).

¹⁰ THE WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2017) [hereinafter NATIONAL SECURITY STRATEGY], <https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf>.

¹¹ THE WHITE HOUSE, NATIONAL SECURITY STRATEGY (2010), https://obamawhitehouse.archives.gov/sites/default/files/rss_viewer/national_security_strategy.pdf.

¹² *Id.* at 4.

¹³ Limitations of the research question are clear. Assessing the efficacy of the national security strategy as a whole by exploring the effect of a single law's enactment on US national security is rarely the case, especially here. The argument made in this paper is meant only to explore the effect of the national security strategy to drive several priority actions related to US development tools abroad in supporting national security.

¹⁴ NATIONAL SECURITY STRATEGY, *supra* note 10, at 35.

traditions and future challenges ahead, the national security strategy makes one thing clear: the “rule of law” is a stalwart of U.S. national power that America can count on.

1. Promote American Prosperity

The Trump administration has asserted that American prosperity and security is threatened by the actions that our strategic competitors have taken in a broader economic context. By selectively choosing benefits without adherence to institutional mandates for participation in a global economic system in which the U.S. developed, U.S. adversaries have undermined the rule of law and manipulated a fundamentally U.S. system. Thus, integrating American prosperity with the U.S. NSS is a main focus of the Trump administration’s national security strategy under Pillar II.¹⁵ Promoting ‘reciprocal, free, and fair’ economic relationships is one way that the NSS asserts that this can be done. For example, the NSS is keenly focused on the importance of adopting and modernizing new or existing investment agreements. The U.S. NSS calls on government bodies to modify or enter into bilateral trade and investment agreements with the U.S. These agreements include heightened standards in intellectual property, digital trade, agriculture, labor, and the environment. In addition, the NSS appreciates the importance of countering unfair trade practices through enforcement actions, countering foreign corruption, and facilitating new market opportunities that incentive private sector growth. Relatedly, the National Security Innovation Base (hereinafter “NSIB”) is earmarked as a key protection under the NSS. Although primarily focused on illicit appropriations by foreign competitors in the U.S., the NSS calls for prioritizing counterintelligence and law enforcement actions to curtail intellectual property theft with broad implementation language. The administration goes on to say it “[w]ill explore new legal and regulatory mechanisms to prevent and prosecute violations.” Finally, with regard to energy as an element of national security, the national security strategy is committed to strengthening relationships with allies to become “more resilient against [competitors] that use energy to coerce.”

2. Advance American Influence

Under Pillar IV, “Advance American Influence,” the U.S. NSS contends that an ‘America First’ foreign policy is good for allies, partners, and the developing world. Democracy allows the best ideas to flourish and promotes equality for all people. The U.S. NSS vows to uphold the rule of law in all priority actions and seeks to establish coalitions based on shared

¹⁵ *Id.* at 4. For purposes of this research, select components of Pillars II and IV, “promote American prosperity,” and “advance American influence,” are examined.

interests. It argues that “[t]here can be *no moral equivalence* between nations that uphold the rule of law, empower women, and respect individual rights—and those that [suppress] their people.” A central focus of the NSS is to advocate for modernization of development institutions that can “catalyze conditions to help [like-minded states improve the conditions of their people].” In support, the NSS reflects on how post-war foreign assistance programs to longstanding U.S. allies effectively promoted American prosperity and developed sovereign states by improving the lives of their citizens.

However, the Trump administration signaled its intent to take development assistance in a *new direction*. Private sector-led development, rather than state-led development assistance, is the new model that the U.S. will cultivate strategic partnerships. The U.S. NSS vows to respect the values of partners but embodies an intent to use soft power diplomacy and assistance to pressure states—partners or not—into making choices that improve governance, rule of law, and sustainable development.¹⁶ Special emphasis is placed on working with states that are in the midst of political reform and those that are committed to programs that will empower women and the youth as well as reduce human suffering.¹⁷

B. *The China Problem*

Popularized in the early 21st century, the term “lawfare”¹⁸ is associated with the idea that a more humanitarian proxy to war may be accomplished through simple manipulation of the rule of law in order to achieve a military objective. Interwoven throughout the national security strategy is this very concept. Garnering respect for Western systems and the rule of law in developing countries is a major priority. It is imperative to demonstrate to these would-be-allies as to why alternatives to state-directed investment schemes and authoritarian governments are preferable. At times the U.S. NSS is restrained, but more frequently than not the NSS makes it very clear: China is a leviathan worthy of the U.S.’ attention.¹⁹

Economic tools have always had a clear relationship with foreign policy interests. During the Cold War, Congress was responsive to corporate

¹⁶ NATIONAL SECURITY STRATEGY, *supra* note 10, at 39.

¹⁷ *Id.* at 42.

¹⁸ Charles Dunlap, *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts*, SCHOLARS@DUKE (Nov. 29, 2001), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6193&context=faculty_scholarship.

¹⁹ See *China Vows a “Fight to the End” In Trade Feud with America*, THE ECONOMIST (May 16, 2019), <https://www.economist.com/finance-and-economics/2019/05/16/china-vows-a-fight-to-the-end-in-trade-feud-with-america>.

lobbying efforts when it passed the Hickenlooper Amendment.²⁰ However, as the national security landscape shifted, the State Department and the CIA eventually grew wary of sanctions that would push host states into the orbit of communist regimes in the Soviet Union or China, and it was lifted.²¹

When Deng Xiaoping announced China's "open-door" policy in 1984, the country quickly signed over 100 bilateral investment treaties with foreign partners in a very short period of time.²² Although those treaties did not originally contain national treatment obligations or provide for investment treaty arbitration, they have been updated to contain full advance consent to investment treaty arbitration. As a result, some have argued that China is especially dangerous as a capital importer with defensive interests, as well as a capital exporter²³ whose foreign investors seeking investment protection are state controlled.²⁴

Developed Western economies insist that China has failed to adhere to international minimum standards of the global economic framework.²⁵ For example, there is widespread consensus that China is in non-compliance with World Trade Organization (hereinafter "WTO") obligations relating to property rights.²⁶ When China acceded to the WTO in 2001, it used an "agreement plus" status to signal to the world that it had made serious headway with regard to its domestic intellectual property rights legislation. In contravention to WTO pressure to adopt market principles, China has argued that its development model is a "right" that has higher value than social or political rights.²⁷ It has also maintained that WTO pressure is a result of U.S. pressure to manipulate the WTO's legal structure on intellectual property rights protections to impose extra obligations on developing members.

In the broader economic context, powerful governments sometimes seek to prevent a group or nation from achieving a focal identity. Some scholars have argued that a deliberate policy of creating overlapping identities

²⁰ See JONATHAN BONNITCHA ET AL., THE POLITICAL ECONOMY OF THE INVESTMENT TREATY REGIME 194 (2017) (the Hickenlooper Amendment, while in effect, cut off foreign aid to countries that nationalized US business assets).

²¹ *Id.* at 194.

²² U.N. Conference on Trade and Development, *World Investment Rep.*, 86, U.N. Doc. UNCTAD/WIR/2003 (2003).

²³ See BONNITCHA ET AL., *supra* note 20, at 181 (studies indicate Chinese Bilateral Investment Treaties increase partner country foreign direct investment in China, with stronger BITs having stronger effects).

²⁴ *Id.* at 229.

²⁵ *Id.* at 110.

²⁶ WHITE HOUSE OFF. OF TRADE AND MFG. POL'Y, HOW CHINA'S ECONOMIC AGGRESSION THREATENS THE TECHNOLOGIES AND INTELLECTUAL PROPERTY OF THE UNITED STATES AND THE WORLD (June 18, 2018), <https://www.whitehouse.gov/wp-content/uploads/2018/06/FINAL-China-Technology-Report-6.18.18-PDF.pdf> [<https://perma.cc/28NW-DZ5K>]

²⁷ SHAILAJA FENNELL, THE INTERRELATIONS BETWEEN LEGAL REFORM AND INTERNATIONAL DEVELOPMENT 136 (2010).

amongst distinct groups can keep the larger group under control.²⁸ Chinese economic development practices prevent other states from developing a focal identity by locking their governments into unsustainable debt commitments²⁹, while simultaneously undermining the rule of law.³⁰ China keeps the ‘larger group’ in each country under control by lending directly to the state without acknowledging small and medium-sized enterprises.³¹ Meanwhile, the communist state’s early aspirations of simply promoting economic development through foreign investment have been eclipsed by an ambitious, state-led directive to incorporate national security into its investment decisions.³²

From a U.S. perspective, several questions arise. First and foremost, what does China’s quasi-adherence to the international investment treaty regime mean for U.S. national security, and what should be done about it? The second consideration is whether the U.S. has the ability to promote national security interests by using development finance tools as effectively as its state-led, strategic competitors. Can the U.S. counter China’s national security efforts through foreign investment projects without similar state backing? Is the concept of “lawfare” a viable solution to countering the swift rise of the U.S.’ most ambitious national security threat?

C. Legislative Solutions

Large variations in resources, power and control amongst various groups can generally be regarded as a contributor to aggression, invasion, and war.³³ The U.S. has an inherent national security interest in stabilizing regions that are susceptible to these activities. This interest is twofold. Initially, the U.S. can achieve a first-mover advantage on the national security front by building coalitions amongst would-be allies and partners before China pressures them into accepting the poison chalice. In terms of using

²⁸ Kaushik Basu, *Participatory Equity, Identity, and Productivity: Policy Implications for Promoting Development* 17 (Cornell Univ. Ctr. for Analytic Econ., Working Paper No. 06-06, 2006).

²⁹ See Vandana Menon, *China Will Take Over the World, One Port at a Time*, THEPRINT (Apr. 19, 2018, 3:11 PM), <https://theprint.in/defence/china-will-take-over-the-world-one-port-at-a-time/51006/> (China strategically procures long-term leases from foreign governments to operate ports in order to establish political clout and build a national security net. In Sri Lanka, massive debts eventually resulted in Chinese ownership).

³⁰ NATIONAL SECURITY STRATEGY, *supra* note 10, at 52.

³¹ See generally *Modernizing Development Finance: Hearing Before the S. Comm on Foreign Relations*, 115th Cong. (2018) (statement of Daniel F. Runde, William A. Schreyer Chair and Dir., Project on Prosperity and Dev., Ctr. for Strategic and Int’l Stud.).

³² NATIONAL SECURITY STRATEGY, *supra* note 10, at 25 (unofficial Chinese reports indicate that China selectively chooses to build political influence in the Indo-Pacific by leasing foreign ports).

³³ FENNELL, *supra* note 27, at 64.

development finance to promote national security, U.S. soft power diplomacy should encourage more fair-trade agreements and seek to smooth over gaps in labor markets and legal systems.

A successful “lawfare” strategy using development finance, properly deployed, will account for several interrelated issues. For example, while intellectual property rights protections are imperative, most of the developed world is in consensus that China does not currently honor international minimum standards on multiple fronts,³⁴ yet continues to benefit from the global economic system. Thus, the U.S. should “map backwards” to determine the intermediate steps that need to be taken to counter China’s infrastructure investment-driven national security strategy.³⁵ China’s investment schemes often leave developing countries worse off and fail to direct their development to the right groups, ultimately hindering recipients from developing a focal identity. In addition, state-led Chinese companies frequently mandate investment treaty arbitration in their agreements, which undermines the rule of law.

Ultimately, an effective development-finance driven NSS should accentuate Chinese weaknesses while acknowledging these strengths. Hostile treaty provisions related to investment protections and mandatory arbitration undermine the rule of law. Although somewhat of a catch-22, the U.S. will need to negotiate with would-be partners for enough investment protections in its trade agreements. This way, these agreements would be attractive to investors and simultaneously key-in on the downsides of Chinese economic development practices, which often results in “take-it-or-leave it” deals from an abuse of bargaining power. It may be a bitter pill to swallow, but a U.S. strategy that promotes the rule of law requires some element of restraint, at least in the beginning.

III. THE BUILD ACT

On October 5, 2018, President Donald Trump signed the BUILD Act into law. The Act directly implements core components of the U.S. National Security Strategy framework. With this framework, U.S. development finance tools and functions were consolidated under the DFC, a new and wholly owned government corporation. The DFC’s mandate is to facilitate market-based private sector development in order to overcome identifiable market gaps in developing countries. Through the provisions of loan guarantees, equity investment and other financial support, the BUILD Act empowers the

³⁴ WHITE HOUSE OFF. OF TRADE AND MFG. POL’Y, *supra* note 26, at 2 (additional areas include human rights protections for workers, environmental safeguards, and energy practices).

³⁵ James K. Sebenius, *A Better Way to Negotiate: Backward*, HARVARD BUS. SCH. WORKING KNOWLEDGE (Jul. 26, 2004), <https://hbswk.hbs.edu/item/a-better-way-to-negotiate-backward>.

DFC to promote clearly defined economic and social development activities that complement U.S. foreign policy and national security objectives.³⁶

A. Summary of Legislative History

By passing the BUILD Act, Congress placed the mitigation of the effects of China's activities in the developing world in the vanguard of national security objectives. The Center for Strategic and International Studies touted the BUILD Act as the most important piece of soft power legislation in over a decade.³⁷ With the Act, Congress sought to provide developing countries with a robust alternative to state-directed investments by authoritarian governments. The Act effectively terminated OPIC and merged its functions with certain U.S. Agency for International Development (hereinafter "USAID") activities under the DFC. However, despite having bipartisan support, the Trump administration was critical of OPIC in 2016 and considered eliminating it entirely.³⁸ The BUILD Act, receiving unanimous approval, was tacked on to H.R. 30239 on September 28, 2018 and approved by the Senate on October 5, 2018 without discussion.⁴⁰ Consistent with Congressional support for OPIC, the BUILD Act nearly doubled the newly created DFC's authorization from its predecessor's \$29 billion maximum contingent liability to \$60 billion.⁴¹ However, this legislative history should cause the critical reader to question whether current legislature is more concerned with form rather than substance.⁴² Put alternatively, does Congressional support for the BUILD Act acknowledge that national security is more dynamic than national security legislation mandates?

B. Core Components of the BUILD Act

³⁶ See generally NATIONAL SECURITY STRATEGY, *supra* note 10.

³⁷ See, e.g., Daniel F. Runde and Romina Bandura, *The BUILD Act Has Passed: What's Next?*, CTR. FOR STRATEGIC AND INT'L STUD. CRITICAL QUESTIONS BLOG (Oct. 12, 2018), <https://www.csis.org/analysis/build-act-has-passed-whats-next>.

³⁸ See Adva Saldinger, *Inside the Fight for OPIC Reauthorization*, DEVEX (Feb. 21, 2017), https://www.devex.com/news/inside-the-fight-for-opic-reauthorization-89612?utm_source=article&utm_medium=88888&utm_campaign=line.

³⁹ BUILD Act of 2018, *supra* note 9, § 3485.

⁴⁰ BUILD Act of 2018, *supra* note 9.

⁴¹ BUILD Act of 2018, *supra* note 9, § 1433-34(e), 3501.

⁴² See Daniel F. Rund & Romina Bandura, *The BUILD Act Has Passed: What's Next?*, CTR. FOR STRATEGIC & INT'L STUDIES (Oct. 12, 2018), <https://www.csis.org/analysis/build-act-has-passed-whats-next> (China pledged \$60 billion in late September 2018 to Africa alone during the latest forum on Africa China Cooperation).

The BUILD Act is clearly linked to the U.S. NSS because its statement of policy aligns closely with priority actions concerning national security objectives. Pursuant to clearly defined economic and social development goals, the DFC subsidizes private-sector investments that strengthen civic institutions in developing countries.⁴³ Predictably, those objectives must promote U.S. foreign policy interests, which likely gives the DFC tremendous discretion to screen proposals.

DFC support for a project is determined on a case-by-case basis.⁴⁴ The DFC has several financing tools that it can use to support private sector actors and qualifying sovereign entities.⁴⁵ Support must be provided in the most efficient way possible. While the traditional tools of OPIC, the DFC's predecessor, such as loans and guaranties, are still available under the BUILD Act, the DFC can now maintain a minority equity interest in new projects.⁴⁶ However, before a proposed equity investment can pass muster, it should first have a clearly defined foreign policy objective and outweigh competing considerations in favor of U.S. foreign policy interests.⁴⁷ The caveat, however, is that the DFC must sell or liquidate its support for a project in the form of an equity investment "as soon as commercially feasible." However, it is significant that the DFC may determine that divestiture is inappropriate under certain circumstances, even when it is otherwise commercially feasible to sell its equity stake.⁴⁸ In addition to equity investment, certain projects or programs may receive special consideration. The DFC may directly provide grants and incentives towards energy initiatives, women's economic empowerment, and microenterprise households in developing countries.⁴⁹ The BUILD Act also permits the DFC to administer and operate enterprise funds when consistent with foreign policy objectives.

The Act also calls for a Board of Directors.⁵⁰ The nine-member Board, led by the Secretary of State, consists of four specified government

⁴³ BUILD Act of 2018, *supra* note 9.

⁴⁴ BUILD Act of 2018, *supra* note 9, § 1422(b)(1)(B), 3497.

⁴⁵ *Id.*

⁴⁶ Loans and guaranties may be provided on such terms as the Corporation deems appropriate. However, DFC equity interests shall not exceed 30% of aggregate support *at the time* the DFC approves support for the project.

⁴⁷ Advisory considerations include whether the [equity investment] support for the project would 'more likely than not substantially reduce or overcome the effect of an identified market failure; whether the project would not have proceeded or would have been substantially delayed without the support; and whether support is aligned with commercial partner incentives and will contribute to long term commercial sustainability.

⁴⁸ The Corporation may retain an ownership interest in a project if in the interest of national security. The DFC's overarching policy of supporting national security through development finance outweighs its statutory obligation to divest itself when it would otherwise be commercially feasible to do so.

⁴⁹ BUILD Act of 2018, *supra* note 9, § 1421(f), 3492.

⁵⁰ BUILD Act of 2018, *supra* note 9, § 1413, 3487.

officers⁵¹, the Chief Executive Officer of the Corporation, and four non-government employees. Non-government board members must have relevant experience, which may be from the private sector, environment, labor organizations, or international development.⁵² The Act calls for a Development Advisory Council (DAC) to advise the Board on challenges and opportunities to achieve the development objectives of the DFC. Council membership is restricted to non-governmental organization members, think tanks, advocacy organizations, and international development foundations.⁵³ Furthermore, the Board will guide a Risk and Audit Committee (RAC) in developing policies and procedures in connection with support provided to private actors and any foreign entities. The Committee is required to evaluate, prior to providing any support to any entity for a project, whether recipients of aid have systems in place to prevent money laundering and corruption.⁵⁴

Project approval is contingent on whether the U.S. has entered a bilateral agreement with the host country that has specifically authorized DFC participation.⁵⁵ In deciding where to allocate funds, the DFC will assign priority to projects based on a number of factors. The BUILD Act calls on the DFC to prioritize projects carried out in countries that are in current compliance with international trade obligations or have made substantial progress⁵⁶ in meeting those obligations. In addition, the DFC may only support projects in countries that have made steps to implement, or are in the process of implementing, laws that extend internationally recognized rights to workers. All contracts executed with project partners must include “substantially the same” contract language in relation to workers’ rights.⁵⁷ The DFC should also consider whether a prospective or current project applicant has participated in foreign boycotts.⁵⁸

⁵¹ Specified officers include: the Secretary of State, the Administrator of the U.S. Agency for International Development, the Secretary of the Treasury, and the Secretary of Commerce. Each of these agencies may appoint a designee to represent in their stead.

⁵² BUILD Act of 2018, *supra* note 9, § 1413(b)(2)(C)(ii), 3487 (gives non-exhaustive list to satisfy relevant experience but determination ultimately rests with the President, whose selection is subject to Congressional approval).

⁵³ BUILD Act of 2018, *supra* note 9, § 1413(i)(2), 3487.

⁵⁴ BUILD Act of 2018, *supra* note 9, § 1441(b)(5), 3503.

⁵⁵ BUILD Act of 2018, *supra* note 9, §§ 1431, 1463(d), 3512.

⁵⁶ As determined upon meeting with the US Trade Representative.

⁵⁷ BUILD Act of 2018, *supra* note 9, § 1451, 3507; *see also* 19 U.S.C. § 2467 (1996). The clause recommended by the BUILD Act, § 1451, is as follows: “The person receiving support agrees not to take actions to prevent employees of the foreign enterprise from lawfully exercising their right of association and their right to organize and bargain collectively. The person further agrees to observe applicable laws relating to a minimum age for employment of children, accepting conditions of work with respect to minimum wages, hours of work, and occupational health and safety, and not to use forced labor or the worst forms of child labor (as defined in section 507 of the Trade Act of 1974 (19 U.S.C. 2467)). The person is not responsible under this paragraph for the actions of a foreign government.”

⁵⁸ BUILD Act of 2018, *supra* note 9, § 1451, 3507.

Instead of requiring partners to be U.S. citizens, the Act lowers the threshold to simply give priority to U.S. citizens. Consistently, countries that embrace private enterprise are prioritized. For example, the Act encourages the DFC to prioritize projects in countries that protect private property rights, respect the rule of law, and enact systems to combat corruption and bribery.⁵⁹ Projects that reduce gender gaps and maximize the development impact on women's economic outcomes also receive priority. With regard to projects that require an impact assessment, the DFC Board shall not approve projects that are likely to have a significant, adverse environmental or social impact that is "sensitive, diverse, or unprecedented."⁶⁰

C. *Some Overlooked Implications of the BUILD Act*

1. Executive Reorganization Plan

The Trump Administration was required to submit a Reorganization Plan after the BUILD Act was enacted in order to facilitate a smooth transition to the new entity.⁶¹ Congress intended for the DFC to work in tandem with other government entities, such as the Millennium Challenge Corporation and the Department of State, to share data to help integrate prior entities' expanded functions.⁶² While the Act *authorized* the transfer of many functions of OPIC and USAID to DFC,⁶³ the President was allowed to determine which functions would not be retained by the DFC under the Plan. Determination of allowing DFC to assume certain functions is important because the DFC requests annual appropriations, and the authorized transfer of OPIC and USAID functions would count against the DFC's increased maximum contingent liability. As such, while the Trump administration decided to not transfer existing enterprise funds from the USAID to the DFC, the Plan indicated that the DFC would be allowed to establish new enterprise funds in order to reduce the fragmentation of development finance functions under existing U.S. agencies.⁶⁴ Moreover, the Plan also indicated the redundancy of transferring USAID's Sovereign Loan Guaranty (hereinafter "SLG")

⁵⁹ *Id.*

⁶⁰ *See id.* (DFC may choose to approve a project after an impact notification detailing the adverse environmental impact is given to the Board within a certain number of days prior to the Board's vote).

⁶¹ BUILD Act of 2018, *supra* note 9, § 1462, 3511 (required the President to identify functions of agencies officially transferred to DFC and specify steps for organization of DFC).

⁶² RICHARD SHELBY, CHAIRMAN OF S. COMM. ON APPROPRIATIONS, 116TH CONG., REORGANIZATION PLAN FOR THE UNITED STATES INTERNATIONAL DEVELOPMENT FINANCE CORPORATION (Comm. Print 2019) [hereinafter REORGANIZATION PLAN].

⁶³ *See* BUILD Act of 2018, *supra* note 9, § 1463, 3512.

⁶⁴ *See* REORGANIZATION PLAN, *supra* note 62, at 4.

exposure to the DFC.⁶⁵ Ultimately, these decisions reflect U.S. efforts to reinforce the appearance of limited government support for private sector-led growth in developing economies. The retention of certain functions reflects U.S. government intent to prove that private sector-led growth promotes the rule of law and empowers nations to avoid dealing with authoritarian governments.

2. Governance Issues by the Board

Both the executive branch and legislature support integrating public officials with private actors to advise the Board and its Committees; there is a level of consensus that doing so will provide unique insight in driving key strategies, priorities, and projects. That consensus, however, departs at the level of control by private sector actors. All DFC powers are vested in and exercised by the authority of the Board, creating the potential for some interesting governance issues, depending on who is ultimately selected. Although the Act indicates that the President should choose four Board members from a list submitted by Congressional leaders after consultation with House and Senate Committees on Foreign Affairs, the Trump administration indicated that it considers Congress's limitation on the proscription against government employees for those Board seats to be advisory and non-binding. In practice, this might create an interesting principal-officer debate. While President Trump had asserted his ability to select discretionarily, selections must still be confirmed by the Senate.

The BUILD Act requires the Board to prescribe the manner in which the DFC will conduct its business and exercise its powers pursuant to bylaws.⁶⁶ The Board's bylaws exemplify the disconnect between the executive and legislature in the Board member selection process. Some provisions are fairly innocuous, such as the requirement for semi-annual public Board meetings. Additionally, the Board must meet at a minimum four times per year. The bylaws state that five members of the Board constitute a quorum for purposes of satisfying the quarterly meeting requirement. Moreover, the action of a majority of Board members present at any meeting "constitute[s] the action of the Board."⁶⁷

Reading between the lines, the BUILD Act potentially authorizes three non-governmental officers of the DFC Board to utilize U.S.

⁶⁵ *Id.* Sovereign Loan Guarantees allow foreign governments to issue debt that is guaranteed by the United States. Currently, five countries—Israel, Tunisia, Jordan, Ukraine, and Iraq—have issued approximately \$22 billion in SLGs backed by the United States. SLGs alone would count against nearly two-thirds of the DFC's \$31 billion increased authorization.

⁶⁶ See BUILD Act of 2018, *supra* note 9, § 1462, 3511; see REORGANIZATION PLAN, *supra* note 62, at 6.

⁶⁷ See U.S. INT'L DEV. FIN. CORP., BDR(19)01, BYLAWS OF THE U.S. INTERNATIONAL DEVELOPMENT FINANCE CORPORATION (2019) [hereinafter BYLAWS].

development finance tools to promote the NSS. Thus, the President's interpretation of the BUILD Act's screening prerequisite for his selections is rather significant. Even though selections are subject to Senate approval, the Board's bylaws tend to lean in favor of these four non-governmental members. The President therefore is in a unique position to determine who has relevant experience for purposes of Board membership.

However, the bylaws anticipate potential conflicts of interest. Any voting member of the Board must disqualify himself from participation on any official matter in which he appears to have a conflict of interest.⁶⁸ In addition to regular duties of loyalty and care,⁶⁹ Board members should also consider the applicability of federal fraud statutes in circumstances where the appearance of actual presence of impropriety exists.⁷⁰ A member may disqualify himself when a quorum is otherwise present without jeopardizing the ability of a majority to still vote on official Board matters.⁷¹ In all cases, the Chairperson or acting Chairperson must be present.⁷² The Board may still vote in the absence of a quorum on official DFC actions, but a unanimous vote of four members is required.⁷³

3. Transitioning Away From OPIC

With the termination of OPIC, all outstanding claims and pending judgments were transferred to the DFC.⁷⁴ Most, if not all, of OPIC's development finance tools and statutory grant of power remained intact. However, the BUILD Act importantly changed a few things regarding project partner preference and type. As noted above, all project partners that apply for, not just receive, DFC assistance must sign a statement that the use of such appropriated funds is for a "valid purpose" to prevent the influence of

⁶⁸ *Id.* at art. III, § 5.

⁶⁹ *See* 22 C.F.R. § 712.100 (2020) (DFC regulations require selected project partners to sign a statement swearing that no appropriated funds have been kicked back to any government employees).

⁷⁰ *See* 18 U.S.C.A § 371 (Westlaw through Pub. L. No. 116-216) (conspiracy to commit offense or to defraud the United States can be subject to punishment). However, in addition to officers and employees, board members have no personal liability for actions taken within the scope of employment with the corporation. *See* BUILD Act of 2018, *supra* note 9, § 1413(h)(3), 3487.

⁷¹ BUILD Act of 2018, *supra* note 9, § 1413(h)(3), 3487. For example, a quorum consisting of four non-government and one government members may still take official Board action. As long as three non-government Board members vote together, the private sector is ultimately approving projects that advance national security strategy.

⁷² The Chairperson of a Board meeting is either the Secretary of State (delegate), USAID Administrator (delegate), or the CEO of the Development Finance Corporation.

⁷³ BYLAWS, *supra* note 67, art. IV, § 1.

⁷⁴ *See generally* Complaint at 1, *Overseas Priv. Inv. Corp. v. Gali*, No. 1:19-cv-05418-WHP (S.D.N.Y. June 10, 2019); Complaint at 1, *Overseas Priv. Inv. Corp. v. Gerwe*, No. 3:20-cv-00365 (N.D. Cal., Jan. 16, 2020) (cases involving enforcement of judgments and general contract disputes).

government employees.⁷⁵ In addition, Congress was much more transparent with its foreign policy interest in the DFC than it was with OPIC.

The DFC can more selectively choose partners than OPIC. The DFC gives “preference” after performing a balancing test,⁷⁶ whereas OPIC’s requirements for aid recipients were much more rigid. For example, OPIC required all aid recipients to be U.S. citizens, whereas the DFC merely gives preference to U.S. citizens. The DFC also takes into *consideration* whether a partner has previously participated in foreign boycotts. The applicant may ultimately be selected if, for example, the DFC determines the boycott participation was aligned with U.S. foreign policy interests. OPIC also precluded equity investment; the DFC is now allowed to maintain an equity stake in foreign projects as a minority investor. Importantly, the requirement for equity investment only states that it must be a minority investor *at the time* of the application. This opens up the door for the DFC to actually maintain a majority stake in foreign projects if a local partner pulls out, for example.

Trade agreement requirements with potential host countries are required for DFC investment. Any existing trade agreements in place permitting OPIC investment will satisfy this requirement for DFC purposes, but renegotiation will be required to account for different investment protections and investment types. The BUILD Act indicates a strong preference for countries that are compliant or effecting change to comply with international minimum standards for worker’s rights, intellectual property rights, the environment, bribery and corruption. In practice, the DFC should ultimately encourage sustainable lending practices in developing countries with project partners. It will be important to monitor the terms aid recipients receive for projects and any effects on local partners. The DFC should funnel its resources to projects that focus on curing market failure and allow disadvantaged groups to adopt a focal identity. Women’s initiatives, microfinance programs, and investment for small and medium enterprises are but a few examples.

IV. WHY DEVELOPMENT FINANCE?

The U.S. has an inherent interest in responding to China’s state-led foreign direct investment programs. Its interest in mitigating China’s relatively strengthened national security position resulted in the BUILD Act, which acknowledged an important shift in the national security landscape and retooled America’s development finance capabilities. The legislation

⁷⁵ The four non-government Board members are likely “government employees” for purposes of the regulation precluding kickbacks. *See* 5 U.S.C. § 2105 (1956).

⁷⁶ *See* discussion *infra* Section III.A.

ultimately leverages private sector synergies with limited government backing to promote the rule of law in the developing world.

A. State Interests in Attracting Foreign Direct Investment

Wealth accumulation is inherently tied to the rights individuals have been granted by the law.⁷⁷ Western scholars are in near consensus that property rights frequently determine who is able to accumulate wealth in society. However, the explicit grant of property rights very rarely shakes out neatly for all members of society, often resulting in market failures. For this reason, the state frequently weaponizes the law to fight these outcomes. The argument goes, according to some, that if the law is unable to remedy market failures that violate the rights of individuals, there will be a desertion of such a market and individuals will move on to more lucrative markets.⁷⁸

The implications of a legal system that creates market failure on the basis of property rights requires a historical understanding of how such failure became embedded in individual outcomes. Not surprisingly, states have a natural inclination to hold onto customs and social norms as they develop modern, more formal legal systems.⁷⁹ Developing countries often run into this problem while seeking to attract foreign investment. This problem makes possible the collaboration between internal and external groups to develop common pool resources to remedy historical inequities in legal outcomes faced by certain groups, prior to or concurrent with actual legal change.⁸⁰ The state is an intrinsically patriarchal institution with vested interests in regulating human behavior and a real ability to effect behavioral change. In both developing and developed societies, the growing importance of property is closely aligned with human efforts to influence systems of wealth accumulation. Many have argued that capitalist societies set themselves apart from others by ensuring laws are in place to both protect individual economic endeavors and ensure better economic futures through individual earning potential or wealth accumulation.

The state sometimes intervenes as a market participant by creating open access and common-pool resources (hereinafter “CPR”) to ensure better economic futures. CPRs can be created within a community for the use of all without rivalry, but those outside the community are excluded. However, CPRs are routinely created by those outside the community to address a market failure. In answering the ‘better economic futures for whom’ question, one observation is key to such an analysis: CPRs may be distinguished from open-access resources by the principle of exclusivity. However, some legal

⁷⁷ FENNELL, *supra* note 27, at 10.

⁷⁸ *Id.* at 17.

⁷⁹ *Id.* at 22.

⁸⁰ *Id.*

scholars and economists argue that collective action by external groups to develop CPRs may create a ‘club-good,’ but act to the detriment of society as a whole.⁸¹ While this argument has merit, it is clearly not persuasive in some contexts.

B. U.S. Development Finance as a Common-Pool Resource (CPR)

The greater the individual interest in the collective good of a community, the more likely that it will create a CPR.⁸² Inherent in every country’s claim to sovereignty is the ability to provide for the national defense. In addition, nearly every country in the world has an interest in accumulating wealth and economic expansion. Incentives drive the need to create CPRs. CPRs differ from open access resources because they are exclusive and often seek to remedy a historical imbalance caused by lack of access to a resource. They may be created by internal groups— those directly impacted—or by external groups. External groups alone are unlikely to develop CPRs absent adequate incentives or access. Internal groups are inherently disadvantaged by lack of access to the resource, but it is not always advantageous to develop CPRs if transaction costs are too high. This bifurcated set of costs and incentives forms the basis for collaboration.

Cross-cultural collaboration to develop CPRs through legal reform will ultimately contribute to stakeholder outcomes. The U.S. NSS demonstrates a clear link between America’s interests in ‘protection, prosperity, and advancing its influence’ and the incentives in using development finance to achieve these goals. By leveraging private sector capabilities, development finance not only guarantees an adequate return for the American public, but also allows the private sector to directly compete with authoritarian, government-backed investment initiatives by those that threaten U.S. national security interests. Potential host countries and “internal groups” also have an interest in receiving U.S. development finance in order to promote wealth accumulation. More importantly, however, these groups have a demonstrable interest in avoiding turning over key national security infrastructure to other governments and groups as a result of predatory lending practices. These internal group interests, when matched with U.S. national security and prosperity interests, form the basis for creating a CPR.

This collaboration requires each group to take reciprocal actions. The U.S.’ interests in promoting the rule of law through development finance to achieve national security objectives requires that adequate investment protections are guaranteed for American businesses through trade agreements

⁸¹ *Id.* at 55 (arguing that the right to bear arms is good for the National Rifle Association but detrimental to society as a whole).

⁸² *Id.*

with potential host countries. These trade agreements must be strong enough to ensure positive outcomes for domestic stakeholders. They cannot be so strong, however, to encourage host countries to view China as a better alternative. These agreements should encourage host countries to adopt international minimum standards for human and workers' rights and the environment, as well as guarantee protections for U.S. intellectual property. Investment treaty arbitration, however, is counterproductive to empowering host countries and promoting the rule of law and should be avoided to whatever extent possible.

A substantial market failure creates the potential for a stronger return to the groups that address it than a weaker one. For example, inadequate credit availability for small and medium enterprises or unavailability of microloans to women's groups creates a greater potential to collaborate. In this way, the BUILD Act acknowledges this reality by directly calling on the DFC to allocate preference to projects that empower women's groups, promote the rule of law, and promote human rights.⁸³ Although the DFC should consider whether project approval would create a substantially adverse or unprecedented outcome, the host country may take interim steps to mitigate the impact of project approval by renegotiating its trade agreements, for example, or by drafting local legislation that would establish more substantial property rights for women.

A stronger host country interest in receiving DFC investment would predictably result in a stronger U.S. bargaining position. A stronger U.S. interest in promoting U.S. national security strategy could then result in host countries having to do less locally in order to receive U.S. support. Although sovereign states have the ability to determine whether to open themselves up to foreign direct investment, the DFC ultimately has discretionary authority to consider whether to approve a project that has an unprecedented social outcome. This discretionary authority, pursuant to the BUILD Act, may partially infringe on state sovereignty, but it serves a purpose. Its existence pressures internal legal reform where required to accommodate U.S. businesses while simultaneously promoting the rule of law.

V. CONCLUSION

The DFC invests in the Indo-Pacific, Europe, the Middle East, South and Central Asia, Latin America, and Africa. In 2019 alone, the DFC invested nearly \$2.5 billion primarily in the Indo-Pacific, Middle East, and Latin

⁸³ BUILD Act of 2018, *supra* note 9, §1421, 3492; *but see* § 1451(e) (the BUILD Act requires the DFC to consider whether the ramifications of project approval would create a sensitive, adverse, or unprecedented outcome).

America.⁸⁴ Those projects included: improving credit access to underbanked markets in Asia, building key infrastructure in Latin and South America, gas pipeline and exploration projects in the Middle East, and equity investment in healthcare companies in Africa.⁸⁵

The DFC's '2X Global Women's Initiative' is a powerful example of how the U.S. uses development finance pressures to promote national security interests around the globe. That initiative allows the DFC to provide credit access to women's groups through direct investment, with project partners, or through non-profits.⁸⁶ DFC's support for women's groups is just one example of how shared interest between the U.S. and developing countries in wealth accumulation, promoting social change, and providing for national security allows collaboration to develop a system that promotes the rule of law and encourages groups to adopt a focal identity.

Moving forward, researchers can explore the efficacy of the BUILD Act in supporting purely national security strategy interests by considering whether or not a DFC project has had a clearly stated foreign policy or social objective and whether it was actually achieved. This may be done by looking at amendments to, or the creation of, new trade agreements. Research should also explore whether the U.S. actually achieved a benefit. For example, did Chinese investment projects continue in the region that the DFC provided assistance in, and were lending practices more friendly to host states? Was American prosperity actually promoted (i.e., does the project have a purely positive net present value)? To what extent did the DFC's financially unsuccessful projects promote national security interests?

Rather than simple displacement of the legal system, U.S. development finance creates a need for change at the local level in host states. Unlike the predatory lending practices and debt traps China promotes in the developing world, the DFC's development finance tools do not create a 'club-good' for the U.S. to the detriment of the rest of the world. Promoting the rule of law produces global benefits; the balance of pressure on hosts and respect for sovereignty allows the best legal systems to survive. This would seem to indicate the U.S. has, at the very least, developed a more reticent approach to achieving a purely military objective.

⁸⁴ *Active Projects*, U.S. INT'L DEV. FIN. CORP., <https://www.dfc.gov/our-impact/all-active-projects> (last updated June 30, 2020).

⁸⁵ *Id.*

⁸⁶ *W-GDP, DFC Target Additional \$6 Billion of Investment in Women*, U.S. INT'L DEV. FIN. CORP. (Aug. 6, 2020), <https://www.dfc.gov/media/press-releases/w-gdp-dfc-target-additional-6-billion-investment-women>.