

DUBAI PORTS WORLD UNDER EXON-FLORIO: A THREAT TO NATIONAL SECURITY OR A TEMPEST IN A SEAPORT?

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I. INTRODUCTION

In January and February of 2006, Congress and the public played a variation of the game “Which of these things does not belong?” This variation instead asked “Which of these transactions does not belong?” The list included a Singaporean company taking over a U.S. telecommunications business,¹ a Dutch company acquiring a U.S. semiconductor company,² a German company buying a U.S. telecommunications provider,³ a Chinese company acquiring a U.S. personal computer business,⁴ and a United Arab Emirates (U.A.E.) company named Dubai Ports World (DP World) acquiring rights to run terminal operations at six U.S. ports.⁵ The answer seemed obvious. The DP World transaction did not belong.

Congresspersons of both parties vociferously opposed this transaction, causing the Executive Branch, which had championed it, to withdraw its support. This Article examines the debacle of the DP World transaction, in light of the statute and regulations that govern foreign acquisitions of U.S. assets, to see if the brouhaha was

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¹ *E.g.*, Dennis K. Berman, *The Economy: Bush Is Expected to Approve Global Crossing Deal*, WALL ST. J., Sept. 9, 2003, at A2 (discussing Singapore Technologies Telemedia’s acquisition of Global Crossing).

² Press Release, ASML, ASM Lithography and Silicon Valley Group Receive CFIUS Approval to Proceed with Merger (May 3, 2001), <http://asml.com/asmldotcom/show.do?ctx=5869&rid=982>.

³ *E.g.*, *Technology Briefing Telecommunications: Wireless Deal Heads for Finish Line*, N.Y. TIMES, May 2, 2001, at C4 (addressing Deutsche Telekom’s nearing acquisition of VoiceStream Wireless).

⁴ Anthony Michael Sabino, *Transactions That Imperil National Security: A Look at the Government’s Power to Say “No,”* 77 N.Y. ST. B.J. 20, 20 (2005) (noting that “IBM proposed to sell its personal computer business to Lenovo Group Ltd., the largest personal computer maker in the People’s Republic of China”).

⁵ For a full discussion, see *infra* Parts VI.B, VII.A.2.

warranted. It concludes that the statute and its implementing regulations protect U.S. national security and that the reaction to the DP World transaction was a tempest in a seaport.

As a result of ever-increasing foreign investment in the United States, Congress created a mechanism to review transactions in which foreign companies seek to acquire U.S. companies. This is the Exon-Florio Amendment to the Omnibus Trade and Competitiveness Act of 1988 (1988 Trade Act).⁶ Under Exon-Florio, the Committee on Foreign Investment in the United States (CFIUS), which is composed of representatives of twelve U.S. government agencies and departments, may review proposed transactions to see if they pose a threat to national security.⁷ If CFIUS believes a transaction does pose such a threat, it recommends that the President take action.⁸ The President has the power to block a contemplated acquisition or to order divestment of a transaction already completed.⁹ From the beginning, implementation of Exon-Florio has resulted in pitting the goal of “[s]purring the U.S. [e]conomy”¹⁰ against the goal of enforcing national security.¹¹

Part II of this Article discusses foreign investment in the United States as background for understanding passage of Exon-Florio in 1988. Part III discusses how Exon-Florio works. Part IV discusses two transactions that prompted calls for revision of Exon-Florio, culminating in the passage of the Byrd Amendment (Byrd). Part V discusses the passing of Byrd in 1993. Byrd’s changes remain in effect today.

Part VI discusses economic and political concerns as they affect transactions subject to Exon-Florio review. If there is a fly in the Exon-Florio ointment, it is the intrusion of economic and political protectionism during CFIUS review or thereafter. The proposed

⁶ Pub. L. No. 100-418, § 5021, 102 Stat. 1107, 1426 (codified as amended at 50 U.S.C. app. § 2170 (2000)).

⁷ EDWARD M. GRAHAM & DAVID M. MARCHICK, U.S. NATIONAL SECURITY AND FOREIGN DIRECT INVESTMENT 34–35 (2006).

⁸ *Id.* at 35–36, 40.

⁹ See 50 U.S.C. app. § 2170(d).

¹⁰ Ellison F. McCoy, *The Reauthorization of Exon-Florio: A Battle Between Spurring the U.S. Economy and Protecting National Security*, 22 GA. J. INT’L & COMP. L. 685, 685 (1992).

¹¹ See, e.g., Jim Mendenhall, *United States: Executive Authority to Divest Acquisitions Under the Exon-Florio Amendment—The MAMCO Divestiture*, 32 HARV. INT’L L.J. 286, 286 (1991); Patrick L. Schmidt, *The Exon-Florio Statute: How It Affects Foreign Investors and Lenders in the United States*, 27 INT’L LAW. 795, 800–02 (1993); Cecelia M. Waldeck, *Proposals for Limiting Foreign Investment Risk Under the Exon-Florio Amendment*, 42 HASTINGS L.J. 1175, 1211 (1991).

acquisition of Unocal in 2005 by a subsidiary of the state-owned China National Offshore Oil Corporation (CNOOC) was derailed by a combination of political and economic protectionism. This kind of protectionism is further complicated by the national preoccupation with terrorism. DP World, a company owned by the government of the United Arab Emirates, wanted to acquire Peninsular and Oriental Steam Navigation Company (P&O), a U.K. company that ran terminal operations at six U.S. ports.¹² The acquisition passed CFIUS review.¹³ The transaction ultimately failed, however, because of the enormous political backlash that followed the announcement of the deal.¹⁴ While the politicizing of decision-making is often decried, CNOOC and DP World present textbook cases where this happened.

Part VII examines the implications of the CNOOC and DP World transactions. As a result of the CNOOC transaction, some in Congress called for changes to Exon-Florio by demanding more reviews in a more public manner, focusing more specifically on economic protection.¹⁵ The DP World deal also generated criticism of Exon-Florio that focused, predictably, on the ownership of the acquiring company. This section concludes that Exon-Florio does not need to be changed. It functions as it was intended. Executive review of mergers and acquisitions examines transactions that may implicate national security. Economic welfare is protected as a byproduct of protecting national security. The process was designed not to be open because of the sensitive nature of the information involved in mergers and acquisitions. The statute already mandates that review be carried out in any transaction where a foreign government has a controlling interest in the acquiring company.¹⁶

Political quarterbacking should not subvert the CFIUS review process. The statute provides for information sharing with Congress.¹⁷ Congress should fight against blindly espousing economic protectionism. Two views of national security motivate economic protectionism. One is the historically entrenched view that national security is synonymous with economic security.¹⁸ The

¹² See *infra* Part VI.B.

¹³ See *infra* Part VI.B.

¹⁴ See *infra* Part VI.B.

¹⁵ See *infra* Part VII.A.1.

¹⁶ See 50 U.S.C. app. § 2170(a) (2000).

¹⁷ See *id.* § 2170(g).

¹⁸ See *infra* Part VII.A.

other is the more recent but emotionally powerful drive to make terrorism the only lens through which to view national security.¹⁹ Revising Exon-Florio based on these views is a mistake. First, a revision does not necessarily protect us. Further, such revision does not consider the realities of our increasingly global economy. In today's economy, focusing on narrow views of economic and political security can have serious repercussions for the review process, foreign companies seeking to invest in the United States, U.S. companies seeking foreign investment partners, the U.S. economy itself, and for our reputation and relationships with the world as a whole.

Part VIII concludes that CFIUS review need not be changed. CFIUS must follow its own rules properly, and Congress must play its behind-the-scenes role without political grandstanding. If these recommendations are followed, CFIUS reviews will continue to protect the national economy and security.

II. BACKGROUND—FOREIGN INVESTMENT IN THE UNITED STATES

Foreign investment has played an important role in our economy since the nation's inception. Even though foreign investment has always been seen as necessary, foreign imports have often been perceived as a threat to the U.S. economy. The stock market crash of 1929 led to the passage of the Smoot Hawley Tariff Act of 1930 (Tariff Act), which "set some of the highest rates of tariff duties in the history of the United States."²⁰ In 1934, Congress amended the Tariff Act to authorize the President, for a period of three years, to enter into trade agreements with foreign nations.²¹ The focus under the early Act was on economic protection. For example, section 307 of the Tariff Act was enacted "to *protect* domestic producers, production, and workers from the unfair competition which would

¹⁹ See *infra* Part VII.B.

²⁰ RALPH H. FOLSOM ET AL., PRINCIPLES OF INTERNATIONAL BUSINESS TRANSACTIONS, TRADE AND ECONOMIC RELATIONS 229 (2005). The Smoot Hawley Act was the last piece of tariff legislation that Congress passed without international negotiations. . . .

Since 1930, changes in the levels of tariffs applicable to goods entering the United States have chiefly been achieved through international trade agreements negotiated by the President and affirmed by Congress. During the 1930s and 40s, the Smoot-Hawley tariffs generally applied unless altered through bilateral trade agreements. The Reciprocal Trade Agreements Act of 1934 gives the President the authority to enter into such agreements, and under various extensions this authority remains in effect today. *Id.* (footnote omitted).

²¹ Reciprocal Trade Agreements Act of 1934, Pub. L. No. 73-316, ch. 474, 48 Stat. 943, 944.

result from the importation of foreign products produced by forced labor.”²²

The focus widened over time to include national security. The President’s authorization to enter into trade agreements was extended into the 1950s through various trade and tariff acts, so long as the President’s decisions considered national security.²³ The 1954 extension, however, was treated differently than the previous ones. It enabled the President to intervene in trade agreements if the foreign investment would threaten national security not only directly but also by depressing “domestic production needed for projected national defense requirements.”²⁴ The extensions of trade and tariff legislation throughout the later 1950s continued to give the President authority to limit imports when the President believed that these imports would damage national security through curtailing industries vital to the national defense.²⁵ The Trade Agreements Extension Act of 1958 obligated the Executive to comply whenever a government department or other interested party requested an investigation.²⁶ If a trade transaction was found to pose a threat to national security, the President may take action to adjust imports “to a level that will not threaten to impair the national security.”²⁷

The acts of the 1930s through the 1950s generally pertained to products imported into the United States. At first the focus was on the effect of imports on the domestic economy. Later, it included the ability of the domestic economy to meet defense needs. The Trade Expansion Act of 1962 (1962 Trade Act) brought these two strands together, enunciating the philosophy that the Executive “shall ‘recognize the close relation of the economic welfare of the Nation to our national security, and shall take into consideration the impact of foreign competition on the economic welfare of individual domestic industries.’”²⁸ This Act was considered necessary because

²² Hilary K. Josephs, *Upstairs, Trade Law; Downstairs, Labor Law*, 33 GEO. WASH. INT’L L. REV. 849, 854 n.16 (2001) (quoting *McKinney v. U.S. Dep’t of Treasury*, 799 F.2d 1544, 1552 (Fed. Cir. 1986)).

²³ Edward E. Groves, Note, *A Brief History of the 1988 National Security Amendments*, 20 LAW & POL’Y INT’L BUS. 589, 590 & n.6 (1989) (referencing legislative history from the 1930s through the 1950s in which presidential power to enter trade agreements was extended).

²⁴ *Id.* at 590 (internal quotation marks omitted).

²⁵ *See id.*

²⁶ Pub. L. No. 85-686, 72 Stat. 673, 678 (codified as amended in scattered sections of 19 U.S.C.).

²⁷ Groves, *supra* note 23, at 590 (quoting Trade Agreements Extension Act of 1955, Pub. L. No. 84-86, ch. 169, 69 Stat. 162, 166 (codified as amended in scattered sections of 19 U.S.C.)).

²⁸ Groves, *supra* note 23, at 591 (quoting Trade Expansion Act of 1962, Pub. L. No. 87-794,

the amount of foreign funds invested in the United States had nearly doubled 1950s levels.²⁹ The Act maintained the Executive's obligation to investigate, vesting it in the Director of the Office of Emergency Planning.³⁰ The investigative function was later transferred to the Secretary of the Treasury.³¹ Investigations continued to be triggered in response to requests from heads of government departments or other interested parties—principally individual domestic industries.

Some in Congress had feared that the voluntary nature of the investigative process would result in overwhelming numbers of U.S. industries requesting investigations.³² Such numbers did not materialize. From 1962 to 1986, private industry requests for investigations came from manufacturers of metal alloys and refined metals, miniature and precision instruments makers, and makers of metal cutting and metal forming machine tools.³³ These investigations were either terminated at a company's request or because the import was not deemed to threaten national security.³⁴ Whereas investigations triggered by private industry requests did not generally garner protection under the Act, investigations triggered by government requests produced a different outcome. Presidents Nixon, Ford, Carter, and Reagan responded to government initiated investigations by imposing controls over the import of oil.³⁵ All four Presidents perceived the need for foreign oil by the United States as a potential national security problem.³⁶

In the 1970s, partly as a result of "the depreciation of the dollar against other major foreign currencies," foreign investment continued to pour into the United States.³⁷ In response, Congress passed the Foreign Investment Study Act of 1974, requiring the Secretaries of Treasury and Commerce to conduct a comprehensive

§ 232(c), 76 Stat. 872, 877 (codified as amended at 19 U.S.C. § 1862(d) (2000)).

²⁹ Paul I. Djuriscic, Comment, *The Exon-Florio Amendment: National Security Legislation Hampered by Political and Economic Forces*, 3 DEPAUL BUS. L.J. 179, 181 & n.21 (1991).

³⁰ See 1962 Trade Act, Pub. L. No. 87-794, § 232(b), 76 Stat. 872, 877 (codified as amended at 19 U.S.C. § 1862(b)).

³¹ President Nixon adopted a Reorganization Plan that transferred responsibility from the Director of the Office of Emergency Preparedness to the Secretary of the Treasury. See Exec. Order No. 11,725, 3A C.F.R. 190 (1973).

³² See, e.g., S. REP. NO. 85-1838 (1958), as reprinted in 1958 U.S.C.C.A.N. 3609, 3630-31.

³³ Groves, *supra* note 23, at 593 n.29.

³⁴ *Id.* at 593.

³⁵ *Id.* at 593-94 nn.30-33.

³⁶ See *id.*

³⁷ Djuriscic, *supra* note 29, at 182 n.27.

review of foreign investment in the United States.³⁸ This review led to the conclusion that the United States lacked a coherent mechanism to monitor foreign investment. In response, President Ford created CFIUS, charged with “primary continuing responsibility within the Executive Branch for monitoring the impact of foreign investment in the United States . . . and for coordinating the implementation of United States policy on such investment.”³⁹

Despite the apparent solemnity of the charge to monitor and coordinate foreign investment policy, CFIUS had little actual authority to prohibit or even restrict foreign investment that raised security concerns. Under President Ford, CFIUS existed as just another committee.⁴⁰ In contrast, foreign investment in the United States increased dramatically under President Reagan.⁴¹

During the 1980s, foreign capital played a major role in mergers and acquisitions in the American business sector.⁴² Proponents of foreign direct investment argued that the U.S. economy had always welcomed foreign investment and that free trade (including the free flow of investment) was good for countries on either end of the flow.⁴³

Opponents of unbridled foreign investment feared a host of economic and political consequences “cast in terms of national security, labor relations, micro- and macroeconomic consequences, anticompetitive effects, or foreign political control.”⁴⁴ For example, if a foreign owner acquired a U.S. defense contractor, then confidential information might have been at risk.⁴⁵ If a foreign

³⁸ Foreign Investment Study Act of 1974, Pub. L. No. 93-479, 88 Stat. 1450, 1450 (codified at 15 U.S.C. § 78b (2000)).

³⁹ Exec. Order No. 11,858, 3A C.F.R. 160 (1975), *reprinted in* 15 U.S.C. § 78b note (2000).

⁴⁰ *See* Djuricic, *supra* note 29, at 182–83.

⁴¹ Foreign direct investment in the United States was \$83 billion in 1980, and by 1989, it had reached approximately \$408 billion. *Id.* at 183.

⁴² *See generally* *Foreign Investment in the United States: Hearing Before the Subcomm. on International Economic Policy and Trade of the Comm. on Foreign Affairs*, 100th Cong. 54-111 (1988) (statement of Elliott L. Richardson, Chairman, Association for Foreign Investment in America) (discussing the extent to which foreign direct investment has benefited U.S. industry).

⁴³ *E.g.*, James A. Lewis, *New Objectives for CFIUS: Foreign Ownership, Critical Infrastructure, and Communications Interception*, 57 FED. COMM. L.J. 457, 460–61 (2005). “American foreign policy for more than a century has encouraged an open, international economy and the removal of restrictions to trade and foreign investment. . . . The United States routinely seeks bilateral and multilateral investment trade agreements to promote free trade.” *Id.*

⁴⁴ Jose E. Alvarez, *Political Protectionism and United States Investment Obligations in Conflict: The Hazards of Exon-Florio*, 30 VA. J. INT’L L. 1, 5 (1989).

⁴⁵ *Id.*

owner was located in states with low wages, then collective bargaining may become difficult.⁴⁶

Eventually, public opinion turned against the influx of foreign capital. The American public increasingly believed that their country was being sold off piece by piece to foreign interests. A few headlines of the period make the point: "For Sale: America,"⁴⁷ "Brits Buy Up the Ad Business,"⁴⁸ and "Japan Goes Hollywood."⁴⁹ Congress was becoming increasingly concerned that CFIUS lacked authority to control foreign takeovers deemed risky to national security. Major catalysts for alarm were the 1986 attempts by the corporate raider Sir James Goldsmith to take over Goodyear Tire and Rubber (Goodyear) and by the Japanese company Fujitsu to take over Fairchild Semiconductor (Fairchild).⁵⁰

Goodyear, founded in Akron, Ohio in 1898, had been one of the world's largest tire makers since 1916.⁵¹ British financier Sir James Goldsmith tried to take over the company in 1986 with a \$5 billion hostile bid.⁵² To fight off this bid, Goodyear sold the company's non-tire businesses and borrowed heavily.⁵³ Goodyear succeeded in retaining control of the company, but at a cost of \$90 million in greenmail⁵⁴ to Goldsmith and, according to some, the "abandonment of its long-term corporate strategy."⁵⁵ Goodyear's publicity campaign against the attack on a "treasured midwestern 'institution'"⁵⁶ helped set the stage for legislation to slow foreign investment.

In a similar vein, Fairchild, characterized as "the 'mother company' of Silicon Valley,"⁵⁷ was a leader in the semiconductor industry. The potential takeover of this company, at the forefront of an industry considered vital in both the consumer computer chip

⁴⁶ *Id.* at 6.

⁴⁷ Stephen Koepf, *For Sale: America; From Manhattan's High-Rises to Oregon's Forests, the Big Buyout Is On*, TIME, Sept. 14, 1987, at 52.

⁴⁸ Randall Rothenberg, *Brits Buy up the Ad Business*, N.Y. TIMES, July 2, 1989, § 6, at 614.

⁴⁹ John Schwartz et al., *Japan Goes Hollywood*, NEWSWEEK, Oct. 9, 1989, at 62 (addressing Sony's proposed acquisition of Columbia Pictures).

⁵⁰ Alvarez, *supra* note 44, at 56.

⁵¹ Posting of Don Iannone to <http://www.don-iannone.com/edfutures/2006/01/corporate-history-goodyear-tire-rubber.html> (Jan. 13, 2006) [hereinafter Iannone].

⁵² Alvarez, *supra* note 44, at 56-57.

⁵³ Iannone, *supra* note 51.

⁵⁴ In a hostile takeover, the target company may employ greenmail as a defense to the takeover. The target company repurchases the hostile "bidder's shares at a premium." ALAN R. PALMITER, CORPORATIONS: EXAMPLES AND EXPLANATIONS 574 (4th ed. 2003).

⁵⁵ Alvarez, *supra* note 44, at 57.

⁵⁶ *Id.*

⁵⁷ *Id.*

market and the high-tech weapons market, raised red flags that Japan might corner the market on semiconductor technology⁵⁸ and “that existing statutory mechanisms could not adequately protect sensitive industries from military and economic competitors.”⁵⁹ As it turned out, Fujitsu abandoned the attempt in light of the political pressure brought to bear on it. This political pressure was the result of an “ideological brawl” between those who espoused free trade and those who wanted to protect American industry.⁶⁰ The brawl spread to “U.S. government officials at Commerce, Defense, State, USTR, Justice, Treasury, and the White House.”⁶¹ The “techno-hawks”⁶² argued “a domino theory that the Japanese would take over the industry and U.S. companies would eventually only market and distribute Japanese products.”⁶³ The “free traders”⁶⁴ saw the national security arguments as a “smokescreen” for ‘Japan-bashing’⁶⁵ and argued that the sale would help Fairchild, in particular, and U.S. competition and competitiveness in general.⁶⁶ The common conclusion between these two factions was that existing law could not block the transaction unless the sale violated the antitrust laws or unless the President declared a national emergency.⁶⁷

Ultimately, the Fairchild deal was not consummated.⁶⁸ Based on his belief that the Goodyear and Fairchild transactions posed a threat to national security, Senator Exon proposed an amendment to the Technology Competitiveness Act, which was being considered at the time. The proposed amendment granted the President discretionary authority to limit various types of foreign investment initiatives should they be perceived to threaten national security or necessary U.S. commerce.⁶⁹ Representative J. Florio had introduced

⁵⁸ Susan W. Liebeler & William H. Lash III, *Exon-Florio Harbinger of Economic Nationalism?*, CATO REV. BUS. & GOV'T, <http://www.cato.org/pubs/regulation/reg16n1d.html> (last visited Nov. 10, 2006).

⁵⁹ Christopher R. Fenton, Note, *U.S. Policy Towards Foreign Direct Investment Post-September 11: Exon-Florio in the Age of Transnational Security*, 41 COLUM. J. TRANSNAT'L L. 195, 202 (2002).

⁶⁰ Alvarez, *supra* note 44, at 58 (quoting Donna K.H. Walters, *The Fairchild Deal Trade War: When Chips Were Down*, L.A. TIMES, Nov. 30, 1987, at 1).

⁶¹ *Id.*

⁶² *Id.* (quoting Walters, *supra* note 60, at 1).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 59.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 62. For a discussion of why and the resulting effects, see *id.* at 61–63.

⁶⁹ See *id.* at 63.

a similar proposal in the House.⁷⁰ These proposals were supported and attacked in line with the philosophies of the techno-hawks and the free traders.⁷¹ The Exon and Florio proposals were finally adopted as part of the 1988 Trade Act.⁷² Adoption of Exon-Florio was a direct response to congressional worries that the 1962 Trade Act did not protect national security from uncontrolled foreign investment in sensitive sectors of the American economy.⁷³ However, the scope of Senator Exon's initial proposal was limited in several ways between its initial appearance and its final incorporation into the 1988 Trade Act.⁷⁴

One of several changes was that the final version of Exon-Florio afforded the President greater discretion in choosing which cases to investigate. Instead of requiring investigation into every "joint venture[] and licensing arrangement[],"⁷⁵ the final version reached only more significant business dealings such as mergers and acquisitions.⁷⁶ In another change, the President could suspend an agreement leading to a merger, acquisition, or takeover only on a finding of "credible evidence that . . . the foreign interest exercising control might take action that *threatens to impair the national security*."⁷⁷ The standard, "threatens to impair the national security," which gives greater discretion to the President, is a looser standard than was the standard initially recommended by Senator Exon which specified the United States as the threatened party.⁷⁸

In a third change, the phrase "national security and essential commerce" was rejected.⁷⁹ In Exon-Florio as finally passed, the only consideration became "national security."⁸⁰

National security is deliberately not defined in the statute. In commentary, the drafters explain that they deliberately did not include "either positive lists of products and services considered essential to the national security, or negative lists of areas that are

⁷⁰ *Id.* at 64 n.350.

⁷¹ *Id.* at 64–68.

⁷² *See supra* note 6 and accompanying text.

⁷³ *See Alvarez, supra* note 44, at 69 (noting that the critics of Exon-Florio did not recognize any existing law that authorized the President to prevent a foreign corporate takeover).

⁷⁴ *See id.* at 69–71, 75–77.

⁷⁵ *Id.* at 70.

⁷⁶ *See id.*

⁷⁷ Fenton, *supra* note 59, at 204 (emphasis added) (quoting 50 U.S.C. app. § 2170(e)(1) (2000)).

⁷⁸ *See Alvarez, supra* note 44, at 63.

⁷⁹ Fenton, *supra* note 59, at 204.

⁸⁰ *Id.*

not so considered.”⁸¹ They also declined to “incorporate a multi-factor test, based on a list of products and services the significance of which to the national security would depend on a number of other factors, such as the dollar value of the transaction, or the availability of the product or service from other U.S. suppliers.”⁸² The drafters rejected these lists and tests because “they could improperly curtail the President’s broad authority to protect the national security, and, at the same time, not result in guidance sufficiently detailed to be helpful to parties.”⁸³ According to the drafters, in general, “transactions that involve products, services, and technologies that are important to U.S. national defense requirements will usually be deemed significant with respect to the national security.”⁸⁴

These changes were necessary because President Reagan would have vetoed the 1988 Trade Act if it had contained Senator Exon’s original proposals.⁸⁵ Various Administration officials believed that “the proposal would chill foreign investment to the detriment of the U.S. economy, was unnecessary given existing laws, would increase uncertainty for the foreign investor, undermine U.S. efforts to eliminate investment barriers abroad, and invite retaliation against U.S. investors abroad.”⁸⁶ A Treasury Department representative testified that existing legislation was sufficient to regulate foreign direct investment.⁸⁷ He expressed the Administration’s worry that passage of Exon-Florio would lead to a public distrust for, and hindrance of, foreign investors.⁸⁸ With the changes, President Reagan signed the legislation into law on August 23, 1988.⁸⁹ The President designated CFIUS to be the body in charge of investigating transactions that could potentially create threats to national security.⁹⁰ President Reagan’s designee to CFIUS was the

⁸¹ Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons, 56 Fed. Reg. 58,774, 58,775 (Nov. 21, 1991) (codified at 31 C.F.R. pt. 800).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ See Alvarez, *supra* note 44, at 74.

⁸⁶ Alvarez, *supra* note 44, at 64. For a discussion of other laws, see Harry L. Clark & Sanchitha Jayaram, *Intensified International Trade and Security Policies Can Present Challenges for Corporate Transactions*, 38 CORNELL INT’L L.J. 391 (2005); Christopher F. Corr, *A Survey of United States Controls on Foreign Investment and Operations: How Much Is Enough?*, 9 AM. U. J. INT’L L. & POL’Y 417 (1994).

⁸⁷ See *id.* at 73 (addressing the testimony of Assistant Secretary for International Affairs at Treasury David C. Mulford).

⁸⁸ See *id.*

⁸⁹ See *supra* note 6 and accompanying text.

⁹⁰ Exec. Order No. 12,661, 3 C.F.R. 618 (1988), *reprinted as amended in* 15 U.S.C. § 78b

Treasury Department.⁹¹

III. HOW THE EXON-FLORIO AMENDMENT WORKS

With the passage of Exon-Florio in 1988, a foreign company that wants to acquire all or part of an interest in a U.S. company may find that the transaction will be reviewed by CFIUS. The Treasury Secretary is the Chair of CFIUS, which is composed of twelve Cabinet and Executive Branch heads in all.⁹² The current members include the Secretaries of State, Defense, Homeland Security, and Commerce; the Attorney General, representing the Justice Department; the National Security Advisor; the U.S. Trade Representative; the Assistant to the President for Economic Policy; and representatives from the Office of Management and Budget, the President's Council of Economic Advisers, and the Office of Science and Technology.⁹³ The Chair may invite representatives from other agencies as appropriate.⁹⁴ CFIUS is authorized to review any foreign takeover transaction that implicates national security.⁹⁵ When a takeover or merger between a foreign and a U.S. company is contemplated, either a party to the transaction or any CFIUS representative may voluntarily notify CFIUS, such notification triggering review of the transaction.⁹⁶ Voluntary review may actually benefit the foreign company. If CFIUS objects to the transaction, the company has the opportunity to restructure it and submit it for further review.⁹⁷ If the transaction successfully passes the review, CFIUS will not revisit the transaction later; the review functions effectively as a statute of limitations.⁹⁸ Thus, a transaction that does not undergo voluntary review at the outset runs the risk of review at any time in the future, with the potentially devastating possibility of divestment months or years later.

In summary, under subsection (a) of Exon-Florio, "[t]he President

note (2000) (amending Executive Order 11,858 through which CFIUS was created).

⁹¹ See Mendenhall, *supra* note 11, at 289.

⁹² See *supra* note 7 and accompanying text.

⁹³ Sabino, *supra* note 4, at 20–21.

⁹⁴ *Id.* at 21.

⁹⁵ *Id.*

⁹⁶ See 31 C.F.R. § 800.401(a)–(b) (2006) (“A party or parties to an acquisition . . . may submit a voluntary notice” and that “[a]ny member of the Committee may submit an agency notice of a proposed or completed acquisition to the Committee.”).

⁹⁷ See Sabino, *supra* note 4, at 24.

⁹⁸ See 31 C.F.R. § 800.601(d)(2).

or the President's designee may make an investigation to determine the effects on national security of mergers, acquisitions, and takeovers . . . by or with foreign persons which could result in foreign control of persons engaged in interstate commerce in the United States."⁹⁹

If an investigation is to be undertaken, it must commence no later than thirty days after the President or his designee receives written notification of the proposed transaction, and it must be completed no later than forty-five days after the determination to investigate.¹⁰⁰

Under subsection (b), the President or his designee shall make an investigation, as described in subsection (a), in any instance in which an entity controlled by or acting on behalf of a foreign government seeks to engage in any merger, acquisition, or takeover which could result in control of a person engaged in interstate commerce in the United States that could affect the national security of the United States.¹⁰¹

The timetable is the same as in subsection (a).¹⁰²

Subsection (c) sets up confidentiality standards.¹⁰³

In subsection (d), "the President may take such action . . . to suspend or prohibit any acquisition, merger, or takeover, of a person engaged in interstate commerce in the United States . . . by or with foreign persons so that such control will not threaten to impair the national security."¹⁰⁴ Furthermore, "[t]he President shall announce the decision to take action . . . not later than 15 days after the investigation . . . is completed."¹⁰⁵

Subsection (e) provides the standard under which the President exercises authority.¹⁰⁶ The President may exercise authority only on credible evidence that a foreign interest might take action that threatens to "impair the national security" and if other provisions of law do not "provide adequate and appropriate authority for the President to protect the national security."¹⁰⁷

⁹⁹ 50 U.S.C. app. § 2170(a) (2000).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* § 2170(b).

¹⁰² *See id.* § 2170(b)(1)–(2).

¹⁰³ *See id.* § 2170(c).

¹⁰⁴ *Id.* § 2170(d).

¹⁰⁵ *Id.*

¹⁰⁶ *See id.* § 2170(e).

¹⁰⁷ *Id.* § 2170(e)(1)–(2).

Subsection (f) sets out factors to be considered in the investigation.¹⁰⁸

Subsection (g) provides for communication with Congress.¹⁰⁹ Subsection (g) requires the President to provide written reports immediately to the Secretary of the Senate and the Clerk of the House explaining whether or not he has determined to take action, including explanations of the findings made and factors considered.¹¹⁰

Subsection (k) requires the President to report to Congress every four years on: (A) “evidence of a coordinated strategy . . . to acquire United States companies involved in research, development, or production of critical technologies” and (B) evaluations of industrial espionage activities involving foreign governments against U.S. companies “aimed at obtaining commercial secrets related to critical technologies.”¹¹¹

Effectively, it is CFIUS that receives notice, rather than the President. As the President’s designee, CFIUS has thirty days to review the acquisition after it has accepted the voluntary notice.¹¹² This mirrors the thirty days given to the President or his designee under subsection (a) of Exon-Florio.¹¹³ CFIUS must complete its investigation no later than forty-five days after the date of commencement of the investigation.¹¹⁴ This also mirrors the forty-five days given to the President or his designee under subsection (b) of Exon-Florio.¹¹⁵ Upon completion or termination of the investigation, CFIUS reports to the President and presents its recommendation.¹¹⁶ The President then has fifteen days to announce his decision to take action.¹¹⁷ This mirrors the fifteen days set out in subsection (d) of Exon-Florio.¹¹⁸

Therefore, under Exon-Florio, to see if a proposed merger or takeover action will threaten national security, the President or his designee reviews, on a case-by-case basis, proposed foreign investment schemes under which the foreign player would acquire,

¹⁰⁸ See *id.* § 2170(f); see also *infra* Part V.

¹⁰⁹ See 50 U.S.C. app. § 2170(g).

¹¹⁰ See *id.*

¹¹¹ *Id.* § 2170(k)(1)(A)–(B).

¹¹² 31 C.F.R. § 800.404(a) (2006).

¹¹³ See 50 U.S.C. app. § 2170(a).

¹¹⁴ 31 C.F.R. § 800.504(a).

¹¹⁵ See 50 U.S.C. app. § 2170(b)(2).

¹¹⁶ 31 C.F.R. § 800.504(b).

¹¹⁷ *Id.* § 800.601(a).

¹¹⁸ See 50 U.S.C. app. § 2170(d).

merge with, or take over a U.S. company. The President's standard for investigation is discretionary for foreign corporate players and mandatory for foreign government players.¹¹⁹ Once a deal has been reviewed, however, the standard for suspending or prohibiting the takeover, merger, or acquisition no longer depends on whether the foreign players are corporate or governmental. The standard is

only if the President finds that—(1) there is credible evidence that leads the President to believe that the foreign interest exercising control might take action that threatens to impair the national security, and (2) provisions of law . . . do not . . . provide adequate and appropriate authority for the President to protect the national security in the matter before the President.¹²⁰

IV. TRANSACTIONS LEADING TO REVISION OF EXON-FLORIO

In the first several years after passage of Exon-Florio, CFIUS reviewed very few transactions. From 1988 through 1994, there were 918 voluntary CFIUS notifications.¹²¹ CFIUS conducted forty-five-day investigations of fifteen transactions.¹²² The President took action in one case, and, in five other cases, the companies withdrew their investment offers.¹²³

Arguably, the process worked, but two particular situations among the fifteen that CFIUS had reviewed led Congress to believe that Exon-Florio should be broadened. Just as Exon-Florio itself grew out of two specific transactions, Goodyear and Fairchild,¹²⁴ an amendment to Exon-Florio grew out of two later transactions. In the first case, the China National Aero-Technology Import and Export Corporation (CATIC), a Chinese government agency, proposed purchasing MAMCO Manufacturing Inc., an aircraft parts maker located in Seattle, Washington.¹²⁵ MAMCO notified CFIUS of the proposed purchase.¹²⁶ The transaction was concluded in

¹¹⁹ See *infra* Part V (discussing the adoption of the mandatory standard with the passage of Byrd in 1993).

¹²⁰ 50 U.S.C. app. § 2170(e)(1)–(2).

¹²¹ U.S. GEN. ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL REQUESTORS: FOREIGN INVESTMENT IMPLEMENTATION OF EXON-FLORIO AND RELATED AMENDMENTS 3 (1995) [hereinafter IMPLEMENTATION OF EXON-FLORIO].

¹²² *Id.* at 3–4.

¹²³ *Id.* at 4.

¹²⁴ See *supra* notes 50–74 and accompanying text.

¹²⁵ *E.g.*, Alvarez, *supra* note 44, at 96.

¹²⁶ *Id.* at 96–97.

November 1988 while CFIUS review was still going on.¹²⁷ MAMCO's President believed that the transaction did not affect national security, noting that MAMCO sold metallic components that could be used in any type of aircraft, and thus they were not intended for military use.¹²⁸ Buyers of MAMCO's products were U.S. manufacturers of commercial aircraft.¹²⁹ The manufacturers provided the specifications for the parts they wanted, and MAMCO produced them.¹³⁰ MAMCO neither designed its products nor had any full-time engineers.¹³¹ It also did not have classified contracts with the federal government.¹³² MAMCO, in other words, had an innocuous reputation. CATIC, on the other hand, "had a reputation for disregarding foreign-export-control laws in order to obtain sensitive Western technology."¹³³ CATIC was a purchasing agent for the Chinese Ministry of Aerospace Industry.¹³⁴ The Chinese Ministry "purchased, manufactured, and developed both civilian and military aircraft."¹³⁵ To thwart CATIC, the United States had already imposed controls on aerospace exports to China.¹³⁶ In response, CATIC bought and disassembled two General Electric airplane engines.¹³⁷ When MAMCO notified CFIUS of the transaction, CFIUS investigated both MAMCO's industrial capabilities¹³⁸ and "the national security implications of CATIC's purchase of MAMCO."¹³⁹ This review apparently led CFIUS to recommend that the President require divestiture. Based on a CFIUS report, President Bush announced that a portion of MAMCO's equipment was subject to U.S. export controls.¹⁴⁰ As a result, on May 1, 1990, the President ordered CATIC to divest itself of its holdings in MAMCO within three months.¹⁴¹ Although CATIC never admitted that it would divest itself, it announced on August 2, 1990 that it would sell MAMCO to DeCrane Aircraft Holdings Inc.,

¹²⁷ *Id.* at 97.

¹²⁸ *See id.* at 97-98.

¹²⁹ *Id.* at 97.

¹³⁰ *See* Andrew Rosenthal, *Bush Urged to Void Sale of Airplane-Parts Maker to Chinese*, N.Y. TIMES, Feb. 2, 1990, at A9.

¹³¹ Mendenhall, *supra* note 11, at 290.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *See* Alvarez, *supra* note 44, at 97.

¹³⁹ Mendenhall, *supra* note 11, at 291.

¹⁴⁰ *See* Alvarez, *supra* note 44, at 97.

¹⁴¹ *See* Mendenhall, *supra* note 11, at 291.

a U.S. company.¹⁴²

According to one commentator, MAMCO illustrated what many observers believed was wrong with Exon-Florio.¹⁴³ Critics of Exon-Florio¹⁴⁴ believed that a basic problem was the undefined nature of “national security.” In announcing the divestiture order, the White House’s official statement concluded that CATIC’s control of MAMCO was a possible threat to U.S. national security.¹⁴⁵ The nature of this threat to national security, however, was never clear during the three months granted for the divestiture.¹⁴⁶

Furthermore, nothing in the statute itself or in its legislative history gave rise to an exact definition of “divestiture.”¹⁴⁷ CATIC did not at first agree to fully divest itself of MAMCO.¹⁴⁸ Instead, CATIC stated that it would look for a mutually acceptable solution.¹⁴⁹ Some theorized that CATIC might have been able to divest itself of control while retaining actual ownership of MAMCO.¹⁵⁰

The second case that led Congress to believe that Exon-Florio should be revisited was the attempted acquisition in 1992 of LTV Corporation’s Missile Division by Thomson, a company owned by the French government.¹⁵¹ Thomson produced consumer electronics and semiconductors.¹⁵² Thomson-CSF tried to take over LTV Corporation’s Missile Division as a way to produce “a complete missile system”¹⁵³ and as a “source of high technology wealth.”¹⁵⁴ Though bankrupt, LTV would be an invaluable acquisition because of its “cutting edge systems incorporating secret, government-funded technology.”¹⁵⁵ CFIUS investigated the transaction, as Congress and the media scrutinized it.¹⁵⁶ Recognizing that

¹⁴² *Id.* at 292.

¹⁴³ *See id.* at 289.

¹⁴⁴ *See, e.g., id.*

¹⁴⁵ *See id.* at 291.

¹⁴⁶ *See id.* One factor may have been that CATIC reportedly had ties to the People’s Liberation Army. *See* W. Robert Shearer, Comment, *The Exon-Florio Amendment: Protectionist Legislation Susceptible to Abuse*, 30 HOUS. L. REV. 1729, 1757 (1993).

¹⁴⁷ Mendenhall, *supra* note 11, at 291.

¹⁴⁸ *Id.*

¹⁴⁹ *See id.*

¹⁵⁰ *E.g., id.*

¹⁵¹ IMPLEMENTATION OF EXON-FLORIO, *supra* note 121, at 4.

¹⁵² *See* Jeremy David Sacks, Note, *Monopsony and the Archers: Rethinking Foreign Acquisitions After Thomson-LTV*, 25 LAW & POL’Y INT’L BUS. 1019, 1024 (1994).

¹⁵³ Fenton, *supra* note 59, at 207.

¹⁵⁴ Sacks, *supra* note 152, at 1024.

¹⁵⁵ *Id.*

¹⁵⁶ *See, e.g.,* Bruce van Voorst, *Giving Away the Weapons Store; The Proposed Sale of a*

President Bush was likely to officially reject it, Thomson-CSF withdrew its offer and significantly restructured its proposal. Thomson-CSF finally partnered with Loral Corporation, a U.S. based company, in a joint acquisition of LTV.¹⁵⁷

These two proposed transactions, MAMCO and Thomson-LTV, fueled Congress's belief that Exon-Florio must be revised to be able to aggressively protect national security. The common point in the rejection of these two transactions was not necessarily the severity of the threat to national security, but rather that both foreign investors were governmental actors. The decision to require divestiture in the MAMCO transaction was contrary to the Bush Administration's history in these cases. The Bush Administration had previously refused to order divestiture in seemingly more serious cases in which takeovers involved U.S. companies that were subject to "munitions controls," that produced "microchip and electronics technology," or that produced "hardware and software for aerospace and spacecraft."¹⁵⁸ According to one commentator, "Bush appeared loathe to use Exon-Florio as a tool of economic protectionism."¹⁵⁹ The only way to understand the divestiture order is that "[t]he administration may have viewed the transaction less as one between two private parties than as a deal between a domestic manufacturer and the Chinese government."¹⁶⁰

Thomson was also fundamentally different from the foreign companies that routinely slid through CFIUS review to consummate acquisitions of U.S. companies. First, Thomson, unlike CATIC, was directly trying to take over a U.S. defense industry company. Second, like CATIC, Thomson was "essentially a nationalized industry, approximately sixty percent of which [was] owned by the French government."¹⁶¹

V. THE BYRD AMENDMENT OF 1993—REVISION OF EXON-FLORIO

To address Exon-Florio's perceived weakness against possible takeovers by foreign governments or their sponsored actors, Congress passed the Byrd Amendment to Exon-Florio as part of the

Troubled Defense Contractor to the French Triggers an Argument Over America's Security Needs, TIME, June 1, 1992, at 37.

¹⁵⁷ Fenton, *supra* note 59, at 207.

¹⁵⁸ Mendenhall, *supra* note 11, at 293.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Sacks, *supra* note 152, at 1025.

National Defense Authorization Act for Fiscal Year 1993.¹⁶² Byrd changed Exon-Florio in three ways.¹⁶³

First, Byrd made changes regarding what is reviewed and when it is reviewed. Byrd mandated review in instances where the company seeking to merge, acquire, or take over a U.S. company was “controlled by or acting on behalf of a foreign government.”¹⁶⁴ This mandatory review is triggered if the transaction “could result in control of a person engaged in interstate commerce in the United States that could affect the national security of the United States.”¹⁶⁵ This change is significant because it is a broader standard than the “threatens to impair the national security” standard that is employed when the transaction involves a foreign entity that is not a foreign government.¹⁶⁶

Second, Byrd added two factors to those originally included for the President or his designee to consider in reviewing proposed takeover transactions. The original three factors were

- (1) domestic production needed for projected national defense requirements,
- (2) the capability and capacity of domestic industries to meet national defense requirements, including the availability of human resources, products, technology, materials, and other supplies and services, [and]
- (3) the control of domestic industries and commercial activity by foreign citizens as it affects the capability and capacity of the United States to meet the requirements of national security.¹⁶⁷

Byrd added two more factors. The first related to the “potential effect[]” of the transaction on various military sales to foreign countries that meet specified criteria.¹⁶⁸ The second related to the “potential effect[]” of the transaction on the technological leadership role of the United States in areas “affecting United States national security.”¹⁶⁹

The “potential effects” language under subsection (f)(4) makes it

¹⁶² Pub. L. No. 102-484, § 837, 106 Stat. 2315, 2463–65 (1992) (codified as amended at 50 U.S.C. app. § 2170 (2000)).

¹⁶³ *See id.*

¹⁶⁴ 50 U.S.C. app. § 2170(b).

¹⁶⁵ *Id.*

¹⁶⁶ 31 C.F.R. § 800.101 (2006).

¹⁶⁷ 50 U.S.C. app. § 2170(f)(1)–(3).

¹⁶⁸ *Id.* § 2170(f)(4).

¹⁶⁹ *Id.* § 2170(f)(5).

easier for CFIUS to reject transactions that might eventually result in sales of military items to countries with terrorism ties or possible “weapons of mass destruction” capabilities. The “potential effects” language under subsection (f)(5) enables CFIUS to consider transactions that the acquirer could enter into with other companies later, after successfully merging with or taking over a U.S. company.

Third, Byrd added the following notification requirements. Under subsection (g), “[t]he President shall immediately transmit to the Secretary of the Senate and the Clerk of the House of Representatives a written report of the President’s determination of whether or not to take action . . . , including a detailed explanation of the findings made . . . and the factors considered.”¹⁷⁰ Under subsection (k), the President shall report every four years as to “whether there is credible evidence of a coordinated strategy by 1 or more countries or companies to acquire United States companies involved in research, development, or production of critical technologies for which the United States is a leading producer”¹⁷¹ and “whether there are industrial espionage activities directed or directly assisted by foreign governments against private United States companies aimed at obtaining commercial secrets related to critical technologies.”¹⁷² This addition to Exon-Florio has been posited as the most important because “[i]t sends a clear message to CFIUS that Congress will carefully review its consideration of proposed investments involving foreign government-owned entities.”¹⁷³

The other changes were arguably unnecessary. For example, upon notification, CFIUS could already conduct an investigation of any transaction that implicated national security, and certainly transactions with foreign governments would raise red flags.¹⁷⁴ Furthermore, although Byrd created a mandatory review of transactions involving foreign governments, it did not create a mandatory reporting mechanism for the parties.¹⁷⁵ Since the parties need not notify CFIUS, the mandatory review may never be triggered.¹⁷⁶

¹⁷⁰ *Id.* § 2170(g).

¹⁷¹ *Id.* § 2170(k)(1)(A).

¹⁷² *Id.* § 2170(k)(1)(B).

¹⁷³ Corr, *supra* note 86, at 430.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

It may be difficult to prove that every step of the review process works ideally, since the process is designed to work “in the shadows.”¹⁷⁷ However, there are no reported instances of foreign acquisitions leading to security breaches. Critics argue that there has only been one divestment among the 1,600 cases reviewed since Exon-Florio was enacted in 1988.¹⁷⁸ “However, these figures do not reflect the full impact of the CFIUS process on addressing national security concerns raised by proposed foreign acquisitions of U.S. companies.”¹⁷⁹ First of all, “the vast majority of foreign acquisitions have no bearing on U.S. national security. Rather, they play a positive role and make significant – and increasing – contributions to our economy by creating millions of jobs . . . and enhancing our competitive position in the global marketplace.”¹⁸⁰ Second, if CFIUS does decide that a particular transaction warrants the opening of an investigation, in general, “companies respond by abandoning the planned acquisition or, in a smaller number of cases, by offering to restructure the acquisition in a way that addresses the security concerns raised by CFIUS.”¹⁸¹ A further criticism of the CFIUS process is that it may pay too little attention to the transactions it reviews because it is “staffed by midlevel officials.”¹⁸² However, if the reviewing members dispute a decision to approve a transaction, the decision “would be escalated to the cabinet level or to the President for appeal.”¹⁸³

¹⁷⁷ Sabino, *supra* note 4, at 25.

¹⁷⁸ The only case in which the President has ordered divestiture was the MAMCO transaction. *See supra* Part IV.

¹⁷⁹ *CFIUS and the Role of Foreign Direct Investment in the United States: Hearing Before the Subcomm. on Domestic and International Monetary Policy, Trade, and Technology of the H. Financial Serv. Comm.* 3 (2006) (statement of the Honorable Donald L. Evans, Chief Executive Officer, The Financial Services Forum), available at <http://financialservices.house.gov/media/pdf/042706de.pdf> [hereinafter Statement of the Honorable Donald L. Evans].

¹⁸⁰ *Id.* at 1–2.

¹⁸¹ Lewis, *supra* note 43, at 465.

¹⁸² *Id.* at 464.

¹⁸³ *Id.* at 465.

VI. CALLS FOR CHANGE TO CFIUS REVIEW—CNOOC AND DUBAI PORTS WORLD

A. CNOOC

Two recent transactions have triggered calls in Congress for further changes to the CFIUS review process. Some have advocated expanding both the CFIUS review criteria and Congress's role in the process.¹⁸⁴ These proposals were triggered by a potential takeover involving a Chinese company with ties to the Chinese government.¹⁸⁵ A second round of discussion was touched-off by the potential agreement between DP World, a company owned by the United Arab Emirates, and a U.K. company to sell control of port operations in six American ports to the U.A.E. company.¹⁸⁶ Various congressional bills, introduced specifically in response to the DP World situation, would have forced either a forty-five-day investigation or a complete blockage of the transaction.¹⁸⁷ Another bill would have required giving Congress the same power to veto foreign acquisitions that the President had.¹⁸⁸ Still another would have "require[d] majority American ownership of US critical infrastructure (including divestiture of critical infrastructure currently not majority American owned)."¹⁸⁹

On June 23, 2005, CNOOC, a subsidiary of the state-owned China National Offshore Oil Corporation, made an all cash bid totaling \$18.5 billion for Unocal Oil.¹⁹⁰ Unocal had already agreed to be acquired by Chevron for \$16.5 billion.¹⁹¹ China experts recognized that the deal would trigger concern in Congress "because CNOOC [was] a government-owned company."¹⁹² But, for a variety of

¹⁸⁴ *E.g.*, Edward M. Graham & David M. Marchick, Op-Ed., *A Misplaced Curb on Investment*, FIN. TIMES (London), Oct. 5, 2005, at 15.

¹⁸⁵ See Jonathan Weisman & Peter S. Goodman, *China's Oil Bid Riles Congress*, WASH. POST, June 24, 2005, at A01 (addressing an "\$18.5 billion bid . . . by China's third-largest oil producer to buy California-based Unocal Corp").

¹⁸⁶ *E.g.*, Patrick McGeehan, *Despite Fears, a Dubai Company Will Help Run Ports in New York*, N.Y. TIMES, Feb. 17, 2006, at B1.

¹⁸⁷ Randall Jackson & Maeve Dion, *CFIUS Update -- Dubai Ports World*, GEO. MASON U.: CRITICAL INFRASTRUCTURE PROTECTION PROGRAM, Mar. 2006, <http://cipp.gmu.edu/research/CFIUS-DPWorld.php>.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ Weisman & Goodman, *supra* note 185, at A01.

¹⁹¹ *Id.*

¹⁹² *Is CNOOC'S Bid for Unocal a Threat to America?*, KNOWLEDGE @ WHARTON, Nov. 21, 2005, <http://knowledge.wharton.upenn.edu/article.cfm?articleid=1240>.

reasons, observers thought that the deal would be able to pass CFIUS review.¹⁹³ For example, in China's favor, CNOOC held "billions of dollars in U.S. Treasury securities," which helped finance the operations of the U.S. government.¹⁹⁴ On the other hand, the deal presented two problems for U.S. regulators. First was the controversial nature of the commodity—oil. Unocal was attractive to CNOOC because seventy percent of Unocal's oil and natural gas reserves were in Asia or near the Caspian Sea—areas that China could more easily develop than Unocal.¹⁹⁵ Unfortunately for CNOOC, according to a Chinese Ministry of Commerce researcher, "[a]s a strategic energy resource, petroleum has seen its price rocket on the international market since last summer. To take over a foreign oil company at such a time would not only increase takeover costs, but also heighten worries in the country of the bought company."¹⁹⁶ This was indeed the case. In July 2005, the House of Representatives, by a vote of 398 to 15, called on President Bush to review the bid.¹⁹⁷ The measure cited national security threats.¹⁹⁸ U.S. officials acknowledged "fierce disquiet over a Chinese company controlling a major player in the sensitive US energy sector."¹⁹⁹

Because CNOOC was a government-owned entity, it expected CFIUS review. CNOOC's Chief Executive came to the United States to help negotiate the deal. He said in an interview that the company would cooperate with CFIUS in any review it undertook.²⁰⁰ The Chinese Foreign Ministry characterized the deal as a "normal commercial activity between enterprises" and expressed the hope that politics would not interfere.²⁰¹ "Unocal . . . insisted [that] CNOOC raise its offer to compensate for the . . . delays" that might have resulted from the review process.²⁰² CNOOC, apparently thinking that the transaction was doomed, withdrew its offer.

¹⁹³ *E.g., id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *CNOOC Withdraws Unocal Bid*, CHINA INTERNET INFO. CENTER, Aug. 3, 2005, <http://www.china.org.cn/english/2005/Aug/137165.htm> (internal quotation marks omitted).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *FM: CNOOC's Unocal Bid Is Pure Business*, CHINADAILY.COM.CN, June 29, 2005, http://www.chinadaily.com.cn/english/doc/2005-06/29/content_455555.htm.

²⁰⁰ *Id.*

²⁰¹ Peter S. Goodman, *China Tells Congress to Back Off Businesses; Tensions Heightened by Bid to Purchase Unocal*, WASH. POST, July 5, 2005, at A01 (internal quotation marks omitted).

²⁰² *CNOOC Withdraws Unocal Bid*, *supra* note 196.

B. Dubai Ports World

DP World, “a state-owned company located in the United Arab Emirates,” and London-based P&O, which ran port operations at six American ports, entered into an agreement whereby DP World would acquire P&O.²⁰³ In October 2005, the two companies informally asked for voluntary CFIUS review under Exon-Florio.²⁰⁴ According to a Treasury Department press release, various analyses and threat assessments were undertaken even before the companies formally requested review on December 16, 2005.²⁰⁵ Thus, the thirty-day formal review required under section 2170(a) began on December 17. During this thirty-day period, the Department of Homeland Security took the lead as the specific CFIUS member with expertise on port security.²⁰⁶ On January 17, 2006, CFIUS unanimously agreed to allow this transaction to proceed.²⁰⁷ CFIUS also unanimously agreed that it need not undertake the additional forty-five-day investigation mandated by section 2170(b) for entities controlled by or acting on behalf of foreign governments.²⁰⁸ Members of Congress voiced strong concerns about why the mandatory forty-five-day review had been dispensed with and how the deal would affect security at the six ports.²⁰⁹ In response, DP World resubmitted the transaction to CFIUS for the forty-five-day review.

Critics continued to worry that allowing DP World to take over port operations posed a national security risk based on “the UAE’s history as an operational and financial base for the hijackers who carried out the Sept. 11, 2001, attacks.”²¹⁰ In addition, “a bipartisan group of seven House and Senate members” argued that “although the UAE may have a strongly pro-U.S. government, the country was traversed by some of the Sept. 11, 2001, hijackers and its banking system has been used by groups affiliated with al Qaeda.”²¹¹

²⁰³ Press Release, Dep’t of the Treasury, CFIUS and the Protection of the National Security in Dubai Ports World Bid for Port Operations (Feb. 24, 2006), <http://www.treas.gov/press/releases/js4071.htm> [hereinafter CFIUS and the Protection of National Security].

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ Jackson & Dion, *supra* note 187.

²⁰⁹ *Id.*

²¹⁰ *Lawmakers Seek Review of Dubai Ports World Deal*, NEWSMAX.COM, Feb. 16, 2006, <http://www.newsmax.com/archives/articles/2006/2/16/140709.shtml?s=lh>.

²¹¹ Paul Blustein, *Some in Congress Object to Arab Port Operator*, WASH. POST, Feb. 17,

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Supporters, including President Bush, pointed out that the transaction involved only operations at the six ports and that DP World would not own any ports or manage port security.²¹²

Even though the forty-five-day review was still in progress, DP World, responding to the strong negative reaction to the transaction in Congress and in the media, announced that it would sell the U.S. port operations to a U.S. company.²¹³

VII. IMPLICATIONS OF THE CNOOC AND DUBAI PORTS WORLD TRANSACTIONS

A. *Balancing Two Imperatives: Economic Welfare and National Security*

1. CNOOC

The CNOOC and DP World transactions illustrate the two imperatives, economic welfare²¹⁴ and national security, that have dominated review of foreign investment in the United States. Both transactions triggered CFIUS reviews on the basis of national security because the acquiring companies were government owned. The CNOOC deal also implicated national security because the result of the transaction would have been the foreign acquisition of a sensitive sector of the U.S. economy—oil. CNOOC's acquisition of Unocal would have meant that CNOOC controlled some amount of a commodity that was vital to U.S. interests. Rejecting this transaction seemed to protect national security interests by protecting the economic welfare of the oil sector.

Congress had struggled with the balance between these two imperatives, finally writing economic welfare out of Exon-Florio in 1988.²¹⁵ It creeps back into the calculation from time to time, as in the CNOOC transaction, where control of oil as a commodity was seen to have economic and security ramifications. According to Christopher Mark, Chairman of the Signal Group, Unocal's

2006, at A11.

²¹² Press Release, White House, Fact Sheet: The CFIUS Process and the DP World Transaction (Feb. 22, 2006), <http://www.whitehouse.gov/news/releases/2006/02/print/20060222-11.html>.

²¹³ *E.g.*, Jackson & Dion, *supra* note 187.

²¹⁴ Economic welfare refers to policies intended to protect domestic industry.

²¹⁵ *See supra* note 6.

shareholders should have decided CNOOC's offer to buy Unocal.²¹⁶ According to Mark, the deal "d[id] have political sensitivities written all over it. And we have seen . . . some of the expected criticism of the deal in terms of scarce American resources being snapped up by a Communist-run government. That, on the face of it, create[d] political concern."²¹⁷ That concern was outweighed for Mark by the broader concern of "attracting foreign investors to th[e] country" so as to support the investment needs of the United States.²¹⁸

Yihong Xia, a Wharton finance professor, also saw the CNOOC deal as a legitimate business transaction with no

serious threat to the national interest of the U.S. It is not like a Chinese company taking over the production of F-16 fighters. A free and open capital market is a two-way, not a one-way, street. There will be capital inflows and outflows, and there will be foreign direct investment to developing countries such as China and vice versa.²¹⁹

Although national security was the ostensible reason for opposing the Chinese takeover of Unocal, the CNOOC transaction ultimately failed because of the protectionism inherent in economic welfare.

The CNOOC transaction prompted two reactions in Congress. The first reaction was to advocate a rejection of the current standard of "national security," calling instead for a reinstatement of the old concept, introduced in 1962 and eliminated in 1988, that CFIUS review should focus on "national and economic security."²²⁰ However, the problem with broadening the scope of review in this way was that it would have taken Exon-Florio back to Senator Exon's original proposal by adding in the very language that would have caused President Reagan to veto the 1988 Trade Act.²²¹ It allowed too much scope for the protection of domestic industries that had nothing to do with national security. In the past, producers of "clothespin[s], peanut[s], pottery, shoe[s], pen[s], paper, and pencil[s]" have invoked national security to protect their industries.²²² Most importantly, adding economic security back to Exon-Florio confuses the distinction between economic welfare and

²¹⁶ See *Is CNOOC'S Bid for Unocal a Threat to America?*, *supra* note 192.

²¹⁷ *Id.* (internal quotation marks omitted).

²¹⁸ *Id.* (internal quotation marks omitted).

²¹⁹ *Id.* (internal quotation marks omitted).

²²⁰ Graham & Marchick, *supra* note 184, at 15 (internal quotation marks omitted).

²²¹ See *supra* notes 75–86 and accompanying text.

²²² Liebler & Lash III, *supra* note 58.

economic policy. CFIUS review should be able to consider economic foreign policy, but economic welfare should not be a serious factor in the review. Based on the insight “that it is not economically viable to ensure that all strategic technologies are ‘made in the USA,’ and indeed that there are security benefits from global competition,”²²³ it is proper to make economic foreign policy a part of the national security review. Bringing back the protectionist standard of economic security makes it too easy to deter legitimate business deals that do not truly implicate national security.

The second reaction to the CNOOC transaction was to call for expanding the role of Congress to enable it to require CFIUS to conduct extended reviews of certain transactions.²²⁴ This proposal would have created a congressional veto by enabling Congress to stop transactions that the President had already approved.²²⁵ It would have effectively removed review from the Executive, and it would have made the review process needlessly more political.²²⁶

2. Dubai Ports World

In contrast to the CNOOC situation, DP World illustrates the national security imperative in a situation where economic welfare was not a factor. DP World, in contrast to CNOOC, dealt in services, not commodities. Thus the transaction would not have resulted in the control of a vital commodity. It would, however, have seemed to result in control of another sensitive sector of the economy—our ports. The national security implications of the DP World transaction were fundamentally different from the earlier situations in which foreign companies established a physical presence in the United States. When the Japanese bought Rockefeller Plaza in 1989, there was an outcry based on the perceived inappropriateness of a foreign owner taking over a beloved American landmark.²²⁷ But aside from hurt pride at loss of ownership, Americans had no real reason to dispute the soundness

²²³ Peter Lichtenbaum, *National Security, and U.S. Trade and Investment Policy*, in *COMMERCIAL LAW AND PRACTICE, COPING WITH U.S. EXPORT CONTROLS* 313, 319 (2005).

²²⁴ *E.g.*, Graham & Marchick, *supra* note 184, at 15.

²²⁵ *Id.*

²²⁶ See Statement of the Honorable Donald L. Evans, *supra* note 179, at 2. In his overview remarks, Mr. Evans said that “it is instructive that upon establishing CFIUS Congress wisely chose to insulate it from political influence. . . . The rationale supporting [this] decision[] is as valid today as it was two decades ago.” *Id.*

²²⁷ See, e.g., Dorothy J. Glancy, *Preserving Rockefeller Center*, 24 *URB. LAW.* 423, 423 (1992) (“The Japanese investment was extensively, even sensationally, reported in the press.”).

of that business decision.

However, in the post-September 11 world, America has adopted a siege mentality. The country is more insular and more suspicious of the outside world than it was prior to the September 11 attacks.²²⁸ The thought of a Middle Eastern government running U.S. port operations struck many as putting the fox in charge of the henhouse.²²⁹ The physical presence of DP World in the United States was an important difference between this transaction and the CNOOC situation. Controlling operations at six U.S. ports would have woven the foreign company into the fabric of the homeland in a way that giving access to oil from offshore sources would not. Even though DP World offered assurances that its key employees in the United States would be American citizens,²³⁰ and although it welcomed the further forty-five-day CFIUS review, the transaction could not overcome the public's perception that the President had been blind to the security risks when he allowed the deal to be consummated. The DP World transaction forced us to confront a third, and new, imperative for reviewing foreign investment—protection of the homeland against the threat of terrorism.

B. Adding a Third Imperative: Super-National Security

The DP World transaction brought a third imperative in foreign investment review to the fore—protecting the homeland, a sort of super-national security. Uncontrolled, it could dominate traditional national security concerns. Homeland security is the very stuff of politics, and it is, for this reason, far better examined under the rational light of CFIUS than under the white heat of the political arena.

This imperative to protect the homeland can be expressed neutrally. Political observers do this. For example, one pair of commentators described a significant focus for the current Administration as “protection of critical infrastructure.”²³¹ This is a change from the focus of prior Administrations on the export of

²²⁸ See, e.g., Op-Ed., *Good-bye to Dubai*, BLADE, Mar. 16, 2006, at 12 (“Though the actual security risk may have been more perception than reality, the deal still disturbed millions of Americans not yet ready to relegate 9/11 to the history books.”).

²²⁹ See, e.g., *Arab Firm OKs Review of Takeover*, BLADE, Feb. 27, 2006, at 1 (“[M]embers of both political parties erupted in furor, questioning the administration's judgment and promising to delay the deal, if not scuttle it.”).

²³⁰ See, e.g., Editorial, *An Ally Bows Out*, BALT. SUN, Mar. 10, 2006, at 16A.

²³¹ Graham & Marchick, *supra* note 184, at 15.

sensitive technologies. Blocking the sale of Unocal's or DP World's purchase of P&O can be explained in neutral terms as protection of critical infrastructure.²³²

Much more often, the principle of protecting the homeland will be expressed emotionally. Political actors are driven to this form of expression. A bill by Republican Representative Duncan Hunter of California, Chairman of the House Armed Services Committee, would protect critical infrastructure by barring foreign ownership.²³³ According to Mr. Hunter, "[t]o those who say this is protectionism, I say, America is worth protecting."²³⁴ This type of rhetoric is not confined to one side of the aisle. Democratic Senators Robert Menendez, Hillary Rodham Clinton, Frank Lautenberg, and Barbara Boxer also authored legislation to prevent sales of U.S. port operations to companies with foreign ownership.²³⁵ In their letter to Senate Majority Leader William Frist, in which they asked him to bring this legislation up for debate, the Senators' tone is less blatantly cheerleading than Hunter's but equally calculated to appeal to the emotions.²³⁶ Without establishing a factual basis, they conclude that "[t]his sale will create an unacceptable risk to the security of our ports."²³⁷ They justify their emergency legislation with an emotionally amorphous antiterrorism appeal, stating that "[t]his issue transcends philosophical posturing and partisan bickering – it is about our nation's security."²³⁸

This type of rhetoric was not confined to members of Congress. It was employed at leadership levels as well. House Republican Conference Chairwoman Deborah Pryce issued a statement whose combination of apparently neutral commentary and emotionally-laden sentiments manages simultaneously to trash the CFIUS process, to proclaim the patriotism of Congress, and to patronize the United Arab Emirates. Pryce stated:

²³² See Clark & Jayaram, *supra* note 86, at 395. Other examples of the Bush Administration's broader view of the types of transactions it considers threats to national security are "acquisitions of telecommunications and Internet service companies. These have included Nippon Telegraph and Telephone's purchase of Verio, Vodafone's purchase of AirTouch, and Deutsche Telekom's purchase of VoiceStream." *Id.* (footnotes omitted).

²³³ *Port Deal Has Many Asking Who Owns U.S.*, BLADE, Mar. 20, 2006, at 1.

²³⁴ *Id.* (internal quotation marks omitted).

²³⁵ See Press Release, Senator Hillary Rodham Clinton, Menendez, Clinton, Lautenberg, Boxer Urge Frist to Immediately Consider Legislation to Block Foreign Governments from Controlling Operations at U.S. Ports (Feb. 21, 2006), <http://clinton.senate.gov/news/statements/details.cfm?id=251764>.

²³⁶ *Id.*

²³⁷ *Id.* (internal quotation marks omitted).

²³⁸ *Id.* (internal quotation marks omitted).

Since 9/11, Congress has rightfully invested millions of dollars to strengthen our nation's seaports, and has called for comprehensive security improvements costing billions more over the next decade. Selling the management rights of these ports to foreign interests without thorough review, however, undermines public confidence in our efforts to date, and appears antithetical to our goal of improving port security.

While I am certain that CFIUS used dispassionate, objective criteria in its decision-making process, the profound importance of this decision made by an agency relatively unknown to the American public requires that transparency be applied to the process. While CFIUS is required to reach its conclusion devoid of political considerations or public perception, Congress is not similarly hamstrung, and can thus evaluate the transaction to ensure it does not diminish public confidence in our security.

As the Chair of the Subcommittee on Domestic and International Monetary Policy (DIMP) which oversees CFIUS, I have directed the subcommittee to thoroughly evaluate the process CFIUS used in approving the sale of the management rights of these ports. Should it be determined that greater oversight or subsequent action is needed pursuant to this review, my subcommittee will be prepared to take the next appropriate steps.

The United Arab Emirates is a partner and ally in the War on Terror. And for that reason, the UAE should welcome a thorough review of this transaction – if Dubai Ports World can effectively manage these ports without putting any aspect of America's security at risk, then a Congressional analysis of the matter should bear this out.²³⁹

In the first paragraph, Pryce suggests that the management of port rights was sold without thorough review.²⁴⁰ In the second paragraph, Pryce first praises CFIUS (it used "dispassionate, objective criteria") and then damns it ("relatively unknown to the

²³⁹ Press Release, Congresswoman Deborah Pryce: House Republican Conference Chairwoman, Pryce Statement on Dubai Ports World Transaction (Feb. 21, 2006), http://www.house.gov/pryce/06%20releases/022206_dubai_transaction.htm (internal quotation marks omitted).

²⁴⁰ *See id.*

American public”).²⁴¹ She repeats this structure in the next sentence, first praising the CFIUS process (CFIUS’s conclusions must be reached “devoid of political considerations or public perception”) and then damns it (“Congress is not similarly hamstrung”).²⁴² However, these requirements do not hamstring CFIUS. The reason that review is delegated to CFIUS is to keep the review process dispassionate and objective. These are the requirements under which the CFIUS process operates. They free the Committee to reach nonpolitical decisions. By saying that Congress is not hamstrung, Pryce implies that a passionate and subjective congressional review is more likely to protect the nation than CFIUS review. In the final sentence, Pryce assumes that the integrity of the transaction, already analyzed and approved by CFIUS, is still in doubt. Nevertheless, she further suggests that if Congress is able to find a reason to support the transaction, the United Arab Emirates should mind neither the delay nor the aspersions cast on its reputation.²⁴³

The problem lies in balancing the neutral and the emotional views. The Executive must have the flexibility to respond to true threats to national security while still encouraging foreign investment. CFIUS review is set up to achieve that flexibly neutral view. One aspect of this flexibility is providing the Executive Branch with the tools necessary to give close scrutiny to acquisitions of potential concern while avoiding undue exposure of sensitive commercial or classified information. The statute requires the President to report to Congress after completion of CFIUS reviews, as well as every four years.²⁴⁴

Even though the members of Congress have the means to confirm that the Administration is making proper use of this delegated authority, they still may criticize the process as secret. CFIUS is routinely so characterized.²⁴⁵ One of the major criticisms made by Conference Chairwoman Pryce is that the process lacks transparency.²⁴⁶ However, the CFIUS review process is meant to be secret.²⁴⁷ Indeed, loosening the safeguards that protect companies’

²⁴¹ *Id.* (internal quotation marks omitted).

²⁴² *Id.* (internal quotation marks omitted).

²⁴³ *See id.*

²⁴⁴ 50 U.S.C. app. § 2170(g), (k)(1) (2000).

²⁴⁵ For example, a wire service reported that “government-owned Dubai Ports World had won approval for the \$6.8 billion deal from a secretive U.S. panel.” *Lawmakers Seek Review of Dubai Ports World Deal*, *supra* note 210.

²⁴⁶ *See supra* note 239 and accompanying text.

²⁴⁷ Graham & Marchick, *supra* note 184, at 15.

sensitive financial and strategic information would chill foreign direct investment. Further, if Congress could use its proposed veto power²⁴⁸ to overturn the President's national security decisions on particular transactions, then the chill would be even deeper.

If there is no balance between the neutral and the emotional view, then the United States runs the risk of four specific backlashes. First, we could face a backlash in our own future foreign investment transactions. According to Professor Xia, commenting on the then-proposed CNOOC deal, "CNOOC . . . seemed to be caught by surprise that a better and economically sensible offer [for Unocal] would be met by such an uproar in Washington."²⁴⁹ Professor Xia continues by stating that the uproar "may even give the Chinese government a good excuse to meddle with future U.S. business transactions in China."²⁵⁰

Second, we run the risk of a backlash if our actions result in a decline in direct foreign investment. Stigmatizing legitimate business transactions as security risks may weaken "confidence in the dollar as the major global currency."²⁵¹ Foreign investors may think twice about investing in the United States if by doing so they run the risk of being branded as terrorist supporters. In 2004, foreign investors invested about \$100 billion in U.S. businesses and real estate.²⁵² According to a CRS Report for Congress, "[t]he cumulative amount . . . of foreign direct investment in the United States on a historical cost basis increased . . . in 2003 to nearly \$1.4 trillion."²⁵³ This foreign investment matters. Writing about CNOOC approximately a year before the DP World transaction, a *Financial Times* article says that "slow[ing] the flow of foreign direct investment into the US" could potentially "be a huge error given America's need to attract such investment to finance its current account deficit."²⁵⁴ The United States finances its deficit by

²⁴⁸ See Statement of the Honorable Donald L. Evans, *supra* note 179, at 4 (expressing concern over the impact of "overt political considerations" on investor confidence in U.S. markets).

²⁴⁹ *Is CNOOC's Bid for Unocal a Threat to America?*, *supra* note 192 (alteration in original) (internal quotation marks omitted).

²⁵⁰ *Id.* (internal quotation marks omitted).

²⁵¹ Robert J. Samuelson, *Save Us from Our Politicians: The Controversy Over Dubai Ports World Was a Great Victory for Them -- But a Defeat for Candor and Sensible Security and Economic Policies*, NEWSWEEK, Mar. 20, 2006, at 33.

²⁵² JAMES K. JACKSON, CONGRESSIONAL RESEARCH SERVICE (CRS) REPORT FOR CONGRESS, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES: AN ECONOMIC ANALYSIS 1 (2005).

²⁵³ *Id.* at 2 (footnote omitted).

²⁵⁴ Graham & Marchick, *supra* note 184, at 15.

borrowing an equivalent amount.²⁵⁵ It then makes payments “to central bankers in China, Japan, Taiwan, and to other foreign entities and individuals.”²⁵⁶ Debating the ills of a large deficit is beyond the scope of this Article. However, commentators on the deficit point out that anything that tends to prompt foreign entities and individuals to give up their holdings in U.S. dollars can have a widespread effect not only on our economy, but also on the global economy.²⁵⁷

The third backlash could be that we jeopardize the cooperation we want and need from foreign governments in the war on terror. The two imperatives of economic welfare and national security may be seen to correlate with a world view of “us versus them,” arising from state-based considerations such as national competitiveness.²⁵⁸ Goodyear Tire rhetoric symbolizes this.²⁵⁹ However, in today’s increasingly globalized economy, “us versus them” is losing viability as an economic consideration. For example, “the Defense Department now emphasizes procuring from the best-quality, best value supplier, which in many cases may be a foreign supplier. Moreover . . . the Defense Department now procures many commercial items, further increasing the ability of foreign suppliers to compete.”²⁶⁰ DP World is an experienced port operator engaged in port operations around the world,²⁶¹ and thus there is no economic rationale that works to keep it out of American port operations.²⁶²

²⁵⁵ David R. Francis, *Losing Patience with US Trade Deficit*, CHRISTIAN SCI. MONITOR, July 29, 2004, <http://www.csmonitor.com/2004/0729/p17s01-stgn.html>.

²⁵⁶ *Id.*

²⁵⁷ *E.g.*, Samuelson, *supra* note 251, at 33 (“[G]lobal economic stability depends on foreigners’ keeping . . . those [deficit] dollars. Mass dollar sales could trigger turmoil on the world’s currency . . . markets. People outside the United States . . . believe the currency . . . offers a wide menu of investment choices. The message from Congress [after DP World] is that the menu is shorter . . .”).

²⁵⁸ Fenton, *supra* note 59, at 202 (discussing, for example, the idea that the nation which controls semiconductors will also control future computer development).

²⁵⁹ Goodyear touted itself as a “treasured midwestern ‘institution.’” Alvarez, *supra* note 44, at 57.

²⁶⁰ Lichtenbaum, *supra* note 223, at 318.

²⁶¹ DP World operates container terminals in Hong Kong, China, Australia, Germany, Romania, Venezuela, the Dominican Republic, India, Saudi Arabia, the United Arab Emirates, and Djibouti. It is also developing facilities in Turkey, Yarimca, and Qingdao. DP World, http://portal.pohub.com/portal/page?_pageid=761,248333&_dad=pogprtl&_schema=POGPRTL (last visited Nov. 10, 2006).

²⁶² Interestingly, despite the boycott by the United Arab Emirates of Israel, the Israeli shipper Zim wrote a letter to Senator Hillary Clinton on February 22, 2006 to voice its support for DP World in light of the “concerns and misinformation about DP World in the US media.” Letter from Idan Ofer, Chairman of the Bd., Zim Integrated Shipping Servs. Ltd., to

The emotional reaction to transactions such as CNOOC's offer for Unocal harks back to a time when the homeland could more easily be protected because "borders were clearly demarcated, industries were national, and key services were state-owned or provided by national firms."²⁶³ That reaction ignores the reality of a globalized economy based on the internationalization of ownership. Today, "inward and outbound flows of cross-border investment . . . have increased substantially in both quantity and value, with mergers and acquisitions serving as the primary vehicles of growth."²⁶⁴ The broad scale of foreign investment activity in the United States mandates that transactions be reviewed in a consistent manner that considers all aspects. Reacting to each individual transaction with the highly charged rhetoric seen in response to the CNOOC and DP World deals takes us back to the "us versus them" days of secure national borders—days that are gone forever.

In terms of the third imperative, homeland security, however, we still maintain the "us versus them" mentality. "They," the terrorists, want to harm us, and they want to do it on our soil; thus we are driven to implement ever more stringent measures to stop "them" from infiltrating the homeland. Under this view, DP World can never be allowed to operate on our shores. We must be careful not to allow the national preoccupation with terrorism to blind us to the reality of a globalized economy. We must be careful that we do not make terrorism the only lens through which we view national security.

Largely because of the uproar over the DP World deal, CFIUS conducted a forty-five-day review of another Dubai-owned company's transaction.²⁶⁵ Dubai International Capital LLC wanted

Hillary Clinton, Senator, N.Y. (Feb. 22, 2006), *available at* <http://i.a.cnn.net/cnn/2006/images/03/02/zim.letter.final.pdf>. Wrote Zim's Chairman of the Board Idan Ofer:

As an Israeli company, security is of the utmost importance to us and we require rigorous security measures from terminal operators in every country in which we operate, but especially in Arab countries, and we are very comfortable calling at DP World's Dubai ports. During our long association with DP World, we have not experienced a single security issue in these ports or in any of the terminals operated by DP World and have received exemplary service that enhances our efficiency and the smooth running of our operations.

Id.

²⁶³ Lewis, *supra* note 43, at 461.

²⁶⁴ Fenton, *supra* note 59, at 196.

²⁶⁵ See Jim Abrams, *Dubai Gets Green Light for Operations at Connecticut Plants*, BOSTON.COM, Apr. 28, 2006, http://www.boston.com/news/local/connecticut/articles/2006/04/28/dubai_gets_green_light_for_operations_at_connecticut_plants. CFIUS review began on January 28, 2006. *Id.* CFIUS made its recommendation to support the transaction to the

to acquire Doncasters Group Ltd., a U.K. engineering company that supplies parts to makers of aircraft and jet engines with plants in the United States.²⁶⁶ The President approved the transaction on the recommendation of CFIUS,²⁶⁷ after receiving “assurances that the military supply chain would not be broken.”²⁶⁸ Unlike the DP World situation, where congressional opposition ultimately derailed the transaction, congressional response was muted. According to House aides, “lawmakers from both parties on the relevant committees had been briefed on the deal [T]here had been numerous contacts with the administration.”²⁶⁹ Charles Schumer, a Senator from New York who had been a vocal opponent of the DP World transaction, found two differences between the Doncasters takeover and the previous failed DP World transaction. Schumer stated that “this went through the process in a careful, thoughtful way and, second, this is a product, not a service, and the opportunity to infiltrate and sabotage is both more difficult and more detectable.”²⁷⁰ Apparently some tweaking of the process was at work in the approval of this deal as lawmakers felt they were kept informed of the progress of the CFIUS review. Lawmakers also apparently believed that a company that provided products was more controllable than one that provided services.

But perhaps a third factor was also at work. Perhaps legislators realized that they needed to tone down the rhetoric or face the risk of alienating potential allies in the war on terror. While the CFIUS review of the Doncasters takeover was pending, a former senior intelligence official suggested that Congress should consider the possible implications for cooperation in intelligence gathering between Arab governments and the United States.²⁷¹ Unwarranted congressional opposition could have reduced such cooperation.²⁷²

President on April 13, 2006. *See id.* The President’s fifteen-day timeframe to make a decision therefore expired on April 28, 2006. *See id.*

²⁶⁶ *Id.*

²⁶⁷ *See id.*

²⁶⁸ *Bush Approves Dubai Company Takeover*, INT’L HERALD TRIB., Apr. 30, 2006, <http://www.iht.com/articles/2006/04/30/business/web.0430dubai.php>.

²⁶⁹ *Bush Backs Dubai Firm’s Plant Operations*, USATODAY.COM, Apr. 28, 2006, http://www.usatoday.com/news/washington/2006-04-28-bush-dubai_x.htm.

²⁷⁰ Joseph Curl, *Bush Approves Defense Contract for Dubai Firm*, WASH. TIMES, Apr. 29, 2006, at A02 (internal quotation marks omitted).

²⁷¹ *See* Demetri Sevastopulo & Stephanie Kirchgaessner, *US to Investigate Second Dubai Deal*, FIN. TIMES, Mar. 3, 2006, <http://www.ft.com/cms/s/b54633ca-aa48-11da-96ea-0000779e2340.html>.

²⁷² John McLaughlin, former Acting Director of the Central Intelligence Agency, stated that the United States “had had a very good intelligence relationship with the UAE since the 2001 attacks on the US.” *Id.* However, the same article points out that another former senior

Pro-Western sentiment in Dubai had apparently changed to bitterness after the negative views of Arabs and Islam that were exposed in the rejection of the DP World deal.²⁷³ Congressional opposition to a foreign takeover should be based on real threats, not on opportunities for posturing. Fear of terrorism must not be the controlling criterion for judging a foreign investment transaction.

Failing to achieve a balance between the neutral and the emotional views threatens a fourth backlash—cynicism and distrust. The publisher of *Harper's Magazine* described the Democratic Party's reaction to the DP World transaction as a "cash-in on 'Portgate,'" finding the controversy "replete with irony" since neither party had cared much about port security earlier.²⁷⁴ While Senator Hillary Clinton sounded alarms, former President Bill Clinton had advised Dubai on how to handle the situation.²⁷⁵ On the Republican side, President Bush exhibited an "aggressive, rapid-action defense of the ports' purchasers."²⁷⁶ Ironically, "[President Bush's] slow-motion response to Hurricane Katrina [was] so striking that it made you wonder what's so urgently important about the deal's [sic] going through."²⁷⁷ Responding to the political reaction against the transaction, DP World announced that it would sell its U.S. operations to a U.S. company.²⁷⁸ But in an interview, Simon Romero of the *New York Times* stated:

[O]f the top eight terminal operations companies in the world that do . . . this type of work at . . . big international ports, only one is American. And that company is based out of Seattle. It is called SSA Marine. It is a family-owned company. But it's not nearly of the same scale as . . . Dubai Ports World or its competitor in bid for . . . P&O, which was a company that was controlled by Singapore's government.²⁷⁹

intelligence official disputed this statement. *See id.*

²⁷³ Samuelson, *supra* note 251, at 33 (reporting on the increased bitterness in Dubai, primarily as a result of perceived racism).

²⁷⁴ John R. MacArthur, *UAE Paymaster for Bushes and Clinton*, HARPER'S, Mar. 8, 2006, <http://www.harpers.org/UAEPaymaster.html> ("[T]he leadership of both parties supported the Clinton-backed 'free-trade' agreement in 2000 with China, which caused a huge increase in container traffic—conceivably bomb-laden—into the U.S.").

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *E.g.*, Jonathan Weisman & Bradley Graham, *Dubai Firm to Sell U.S. Port Operations*, WASH. POST, Mar. 10, 2006, at A01.

²⁷⁹ Interview by Margaret Warner with Simon Romero, Bus. Reporter, N.Y. Times, in Houston, Tex. (Mar. 9, 2006), *available at* http://www.pbs.org/newshour/bb/transportation/jan-june06/hls-ports_3-9.html (answering after being asked how many U.S.

Following up, Norman Ornstein, a congressional watcher for the American Enterprise Institute, said that the Bush Administration ha[s] got a dilemma now, because there simply aren't American companies that have the know-how and the breadth to do this. Interestingly, and perhaps ironically, what I had heard earlier in the day, as they were looking at those that have the . . . kind of resources, Halliburton was a name that came up. And Democrats, I'm sure, are saying, please, God, let that happen.²⁸⁰

This reference to the company that Vice President Dick Cheney led during the 1990s suggests that many would see the whole deal as a vehicle for the amassing of private wealth at the public's expense.

Distrust is also a problem. In response to the DP World transaction, DIMP held a hearing on April 27, 2006 to evaluate the CFIUS process.²⁸¹ In the opinion of an invited speaker, Georgetown Law Professor Daniel K. Tarullo, the "most important development framing the terms of current debate over the CFIUS process – the development that ha[d] led to your hearings in March and today [was that] Congress ha[d] obviously lost confidence in the Administration's handling of Section 721 cases."²⁸² The loss of confidence stemmed largely because "the public still d[id] not have a complete explanation of the Administration's decision not to take action."²⁸³ In discussing the requirement that CFIUS protect sensitive information, Tarullo stressed the need for communication between the Executive and the public. According to Tarullo:

[P]articularly in light of the current emphasis upon homeland security, the American public deserves to know what approach to national security reviews CFIUS has taken. As the DP World situation made abundantly clear, in the current environment if the Administration does not adequately explain its actions, Congress, the press, and the public will draw their own conclusions – without the benefit

companies are capable of buying and running port operations).

²⁸⁰ Interview by Margaret Warner with Norman Ornstein, Am. Enter. Inst. (Mar. 9, 2006), available at http://www.pbs.org/newshour/bb/transportation/jan-june06/hls-ports_3-9.html.

²⁸¹ See *supra* text accompanying note 239.

²⁸² Daniel K. Tarullo, Law Professor, Georgetown Univ. Law Ctr., Prepared Statement for the Hearing on CFIUS and the Role of Foreign Direct Investment in the United States 4 (Apr. 27, 2006), <http://financialservices.house.gov/media/pdf/042706dt.pdf>.

²⁸³ *Id.*

of full information.²⁸⁴

Lacking information, Congress, while championing a transaction that seemed counterintuitive to homeland security, concluded that the President was not protecting the nation.

VIII. CONCLUSION

The clash of these three imperatives—economic welfare, national security, and the new super-national security—is probably inevitable. The elected members of Congress must respond to the perceived absurdity of inviting into the nation's ports a company associated in the public mind with terrorism. The members of CFIUS must respond to the facts and figures that say a company's transaction will not affect national security. The President is entitled to defend decisions that he believes do not pose threats.

In the DP World uproar, all three actors must be criticized. Although CFIUS review was set up to be sufficiently rigorous to distinguish between run-of-the-mill transactions and those that genuinely warrant blockage on national security grounds, that review might not have been rigorous enough in this case. A Treasury Department press release stressed that CFIUS members did not agree to the DP World transaction until “roughly 90 days after the parties to the transaction first approached CFIUS about the transaction and roughly 75 days after a thorough investigation of the transaction had begun.”²⁸⁵ If the goal of this statement was to justify not conducting the forty-five-day review, it failed. The statute does not allow for CFIUS to choose when it will follow the statute. The mandate is clear in stating that “[t]he President or the President's designee shall make a[] [forty-five-day] investigation” when a transaction involves “an entity controlled by or acting on behalf of a foreign government.”²⁸⁶ Failure to follow the mandate suggests the possibility of complacency in this review—complacency that is not acceptable where a transaction exposed the raw nerves of 9/11.²⁸⁷ CFIUS must follow the requirements set out in Exon-Florio.

²⁸⁴ *Id.* at 8–9.

²⁸⁵ CFIUS and the Protection of National Security, *supra* note 203.

²⁸⁶ 50 U.S.C. app. § 2170(b) (2000).

²⁸⁷ According to *Media Matters for America*, failing to conduct the forty-five-day review was not the only problem with how the DP World transaction was handled. See *Wall Street Journal*, *LA Times Ignored That CFIUS Originally Declined to Investigate Port Deal*, MEDIA MATTERS FOR AM., Mar. 6, 2006, <http://mediamatters.org/items/200603060003>. Articles in the *Wall Street Journal* and the *Los Angeles Times* “omitted the . . . fact that [CFIUS] . . . opted not to conduct such an investigation when it first reviewed the deal. Moreover, both articles

Further, CFIUS must communicate with Congress. CFIUS has to protect proprietary business information that is revealed during ongoing reviews. However, CFIUS should be able to provide Congress with information about completed reviews. As Professor Tarullo pointed out during his testimony at the DIMP hearing on CFIUS, if the Government Accounting Office is able to issue reports about CFIUS without violating confidentiality, as it has in response to congressional inquiries, so should CFIUS itself.²⁸⁸

With respect to transactions that have been agreed to, CFIUS should let Congress know what agreements have been negotiated with the acquiring company so that Congress can track the implementation of these agreements. For example, in 1995, Chinese company San Huan wanted to purchase Magnequench, a General Motors company located in Indiana that made “rare-earth magnets used in guidance systems of smart bombs.”²⁸⁹ San Huan wanted to acquire Magnequench because it had “the best technology, biggest production capability and [the] sole patent for” the special powder needed to manufacture the magnets.²⁹⁰ After CFIUS approved the deal, San Huan opened a plant in Tianjin, China, closer to its source of raw materials.²⁹¹ It then shut down the U.S. facilities.²⁹² The open question was whether this move would result in a national security problem. Dr. Peter Leitner, an adviser to the Department of Defense, has said that “[t]he Chinese are clearly trying to monopolize the world supply of rare-earth materials . . . that are essential to the production of the militarily critical magnets.”²⁹³ On the other hand, Walter Benecki, a consultant for the magnetics industry, does not see possible market domination by China as “conspiratorial,” but “just the natural evolution of technology and manufacturing,” in response to which

quoted members of Congress criticizing the deal . . . failed to note that . . . these congressional members asserted that the Bush administration was legally *required* to conduct a 45-day investigation.” *Id.* The implication is that the press, or at least some particular papers, may have been trying to help the embattled Administration in its defense of CFIUS approval of the DP World deal by not telling the public that the Committee omitted a required step in the review process. *See id.*

²⁸⁸ Tarullo, *supra* note 282, at 9.

²⁸⁹ Stan Crock, *Treating Foreign Buyers Fairly*, BUS. WK., Nov. 1, 2005, http://businessweek.com/print/bwdaily/dnflash/nov2005/nf2005111_1951_db056.htm?chan=search.

²⁹⁰ Sherrie Gossett, *‘Smart Bomb’ Technology Moving to China*, WORLDNETDAILY, Aug. 12, 2003, http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=34037 (internal quotation marks omitted).

²⁹¹ *Id.*

²⁹² *See id.*

²⁹³ *Id.* (internal quotation marks omitted).

“[c]ompanies must establish some sort of China capability to remain profitable.”²⁹⁴ The point is that Congress needs information from CFIUS to fulfill its oversight role. Congress might have stopped the closure of the Indiana facility if it had full information.

Congress is not blameless in the DP World story either. Congressional response to the deal has been described as “a free-for-all on Capitol Hill,” involving members of both parties.²⁹⁵

Congress should refrain from changing Exon-Florio without careful thought. In particular, Congress should not require CFIUS to make protection of specific industries a factor. First, the drafters of the regulations considered and rejected this approach originally. They considered lists of industries and multifactor tests that might be applied to determine if particular industries belong on or off the list; at the same time they limited the authority of the President to protect national security. Such protection of specific industries may also have the effect of driving away foreign investment in related industries and in general. Congress should not incorporate longer timeframes than already exist. Unless CFIUS itself indicates that longer timeframes are necessary, the longer a proposed transaction is kept open, the greater the uncertainty and risk for the parties. Congress should not bar foreign ownership of U.S. companies as Duncan Hunter has called for.²⁹⁶ CFIUS review works effectively now on a case-by-case basis to exclude risky transactions. Barring foreign ownership would unnecessarily deny us potentially advantageous opportunities for partnership. It could lead to closing the door to U.S. companies that wish to enter transactions with companies abroad.

Neither does the Administration deserve credit in this affair. The President’s strident championing of the deal struck a sour note with both Congress and the public alike. It may be beyond human nature for elected members of Congress not to strut about in the peacock feathers of righteous indignation. It falls to the President to communicate more effectively if CFIUS review suggests that the transaction will not have homeland security risks. If the review process seems to ignore the dominant fears that drive society at any

²⁹⁴ *Id.* (internal quotation marks omitted).

²⁹⁵ Samuelson, *supra* note 251, at 33. Furthermore, Samuelson writes that “[a]s political theater, the posturing might be harmless. But all the grandstanding--precisely because the criticisms were overblown--damages American interests. It’s a public-relations disaster in the Middle East. . . . Much bitterness is reported in Dubai, especially among those who are pro-Western.” *Id.*

²⁹⁶ *See supra* notes 233–34 and accompanying text.

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particular time, the recommendation to go forward in certain transactions will startle and confound the public. When these recommended transactions are then undone after-the-fact, the Administration loses face, the affected foreign companies are insulted, and everyone involved in the transaction loses time and money.

President Reagan's worry about Exon-Florio was that it would create a public climate or a bureaucratic disposition to hinder foreign investors.²⁹⁷ That has not happened. If the review process had been correctly implemented by CFIUS, not improperly bashed by Congress, and reasonably explained by the President, the CFIUS review of the DP World transaction would have been nothing more than a tempest in seaport.

²⁹⁷ See *supra* notes 85–88 and accompanying text.