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CONTROLLING FOREIGN OWNERSHIP OF U.S. STRATEGIC ASSETS: THE CHALLENGE OF MAINTAINING NATIONAL SECURITY IN A GLOBALIZED AND OIL DEPENDENT WORLD

Joseph Mamounas*

THE protection of American domestic and international interests is one of the foremost roles of the U.S. government. As enumerated in the Constitution, one of our government's purposes is to provide for "the common defense."¹ This responsibility has been tested myriad times—yet today is wrought with some of the most complex and unpredictable national security challenges in American history. The United States is embroiled in armed conflict with stateless enemies who will resort to unprecedented tactics to achieve their extreme goals. With the fate of our society, our people, and our way of life at stake, the dynamic of our alliances has changed. Anxiety and paranoia are rampant. In the 21st century, America arguably can never be overprotected.

Like a well-tempered machine, American economic foreign policy is conditioned by the rise and fall of national security events. The juxtaposition of our booming economy in the 1990s and guarded economic stance after September 11, 2001, reflects this. To respond to threats and implement these adaptations as quickly as necessary, federal law has developed to provide our government with the tools it needs to act on a moment's notice. The economic weapon is among the most powerful asset that the federal government possesses in protecting national security.² In practice, the President has the power to terminate business transactions, par-

* J.D., expected May 2007, University of Miami School of Law; B.A., *summa cum laude*, 2004, Cornell University. I dedicate this article to my late grandmother, Connie Howard, to whom I will always look for faith, guidance, and perseverance. I would also like to thank my parents, Eleftherios and Lisa, for the incomparable examples they set for me, my siblings, Paul and Matina, for their love and support, my grandfather, John Howard, who regularly challenges me to think differently, and my aunt, Johnette Howard, who long ago inspired me to write. Additionally, I am grateful to Professor David Abraham at the University of Miami School of Law, without whose insight and assistance this article would not have been possible.

1. U.S. CONST. pmbl.

2. Joseph Kahn & Judith Miller, *A Nation Challenged: The Assets; U.S. Freezes More Accounts; Saudi and Pakistani Assets Cited for Ties to Bin Laden*, N.Y. TIMES, Oct. 13, 2001, at A1. In our current War on Terror, for example, the federal govern-

ticularly mergers and takeovers, that he believes are a threat to national security.³ Greater scrutiny is accorded to economic transactions involving strategic assets: the federal government has enacted laws to protect American farmland, airlines, telecommunications, and defense-related corporations from adverse foreign investment. The net result of this history is a legal infrastructure that arms our government with the tools necessary to protect our national security interests and to secure our nation's strategic assets.

A hasty response to unique national security challenges would require the United States to take an isolationist stance towards foreign investment in order to best protect its national security. But the disposition of today's world economy makes such a course alteration impossible. Our world is globalized and interconnected. Furthermore, America is economically interdependent on foreign nations like never before. Our reliance on foreign natural resources, manufacturing, and consumerism (as evidenced by our massive trade deficit with China, for example) makes us a central player in global economics.⁴ Consequently, the American economy is inextricably and necessarily involved in global economics.

This article will address the natural security implications of international economic transactions. In considering the risks of globalization to our national security, this article contextualizes strategic assets. Additionally, this article discusses the legislative history and case law relating to the approach our law has taken vis-à-vis foreign ownership in order to illuminate our current foreign investment posture. Furthermore, this article analyzes, in particular, the July 2005 offer the Chinese National Offshore Oil Corporation (CNOOC) made to purchase Unocal, an American oil company. Finally, in view of the foregoing, this article takes a fresh, globalization-infused look at the strength of in-place economic legislation and its ability to protect America against emerging national security challenges in the future.

I. GLOBALIZATION

Globalization is the process by and through which individual national economies create economic webs with other countries.⁵ Globalization integrates markets, transportation systems, and communications systems, makes national boundaries immaterial, and is typically "accompanied by a strongly homogenized and homogenizing language, symbol-set, and culture."⁶ Globalization is driven by a variety of diverse factors, like geogra-

ment, in a concerted effort with foreign nations, has successfully frozen billions of dollars belonging to or that would otherwise be funneled to terrorists. *Id.*

3. 50 U.S.C. app. § 2170 (2006).

4. Edmund L. Andrews, *U.S. Declines a Chance to Criticize Yuan Policy*, N.Y. TIMES, Nov. 29, 2005, at C1.

5. See, e.g., Doris Estelle Long, "Globalization": A Future Trend or a Satisfying Mirage?, 49 J. COPYRIGHT SOC'Y U.S.A. 313 (2001).

6. Wayne N. Renke, *Special Issue Globalization and the Law: Book Review*, 41 ALBERTA L. REV. 771, 771 (2003) (reviewing ALAN M. DERSHOWITZ, WHY TERROR-

phy and technology, and is underpinned by the promise of increased economic output at the lowest possible cost via more expedient trade mechanisms.⁷ Fast communication and commodities delivery makes globalization not only possible, but also cost effective. American companies save significant amounts of money by manufacturing goods abroad and having them shipped back to the United States at a fraction of the cost to manufacture them at home.

In many respects, globalization's impact on the world is overwhelmingly positive. For example, globalization "enlarg[es] the world economy, promot[es] technological innovations, foster[s] universal political participation, and enhanc[es] international cooperation."⁸ Globalization also makes our economy more sophisticated and robust by diverting human capital into high-tech sectors and away from lower-skilled jobs.⁹ Consequently, average American workers are able to participate in and benefit from globalization's technological innovation. Increased global cooperation and access to global resource markets also allow for accelerated innovation and technological development while keeping costs low.

On the other hand, globalization also has many drawbacks. For one thing, globalization increases international pressure to compete,¹⁰ which fuels companies' quest for more and more lucrative arbitrage.¹¹ For example, globalization can have a negative impact on the enforcement of global fair labor practices, in essence "destroy[ing] employment guarantees of adequate wages and working conditions" at home and abroad.¹² As a result, third-world countries become increasingly marginalized at the hands of first-world economic gain. At home, globalization also devalues the American workforce by threatening low-wage workers and facilitating the disparity between low-wage and high-wage labor.¹³ Though the American economy may become more robust due to globalization, "'wage levels are being lowered rather than raised,' and higher skills have not necessarily led to higher wages."¹⁴ Consequently, globalization pre-

ISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE (2002)).

7. Lucy B. Bednarek, *The Gender Wage Gap: Searching for Equality in a Global Economy*, 6 IND. J. GLOBAL LEGAL STUD. 213, 217 (1998). "The significance of globalization, then, rests in the way the global economy alters the production of goods and assets around the world." *Id.*
8. Arthur C. Helton & Dessie P. Zagorcheva, *Globalization, Terrorism, and the Movements of People*, 36 INT'L LAW. 91, 92 (2002).
9. See, e.g., Lan Cao, *Corporate and Product Identity in the Postnational Economy: Rethinking U.S. Trade Laws*, 90 CAL. L. REV. 401, 422 (2002).
10. Bednarek, *supra* note 7, at 216.
11. *Id.* "Arbitrage is 'the practice of buying a commodity in one local market where it is cheap, then selling it in a neighboring market where the price is higher and profiting from the fractional difference.'" *Id.*
12. *Id.*
13. *Id.* at 219.
14. *Id.* at 219-20. Globalization consequently creates an increased disparity between the rich and the poor by perpetuating poverty and widening material inequalities. Medium to high-skilled workers have been replaced by cheap, unskilled labor, and the educationally and skilled elite drift farther and farther away. As global-

vents low-wage workers from "escap[ing] from the poverty to which the globalizing economy relegates them."¹⁵ In sum, by forcing America to export jobs for economic gain, millions of citizens have lost steady work (due to lack of education, skills, and opportunities) at home¹⁶ and a race to the bottom has been ignited abroad.¹⁷

Globalization's potential impact on national security is perhaps one of its most striking drawbacks. The hallmarks of globalization—increased trade and an easier flow of individuals and capital—also bring increased opportunities for crime, such as "smuggling, drug and arms dealing, money laundering, and computer/Internet crimes."¹⁸ Perhaps somewhat more notably, "globalization can [also] facilitate the ability of drug traffickers, terrorist, and other criminal organizations to operate in relatively unregulated environments."¹⁹ The same benefits of globalization that economies have come to enjoy have also made it possible for individuals and small groups to build tremendous fortunes.²⁰ Globalization even has the potential to facilitate terrorism and impede anti-terrorism efforts "by making the movement of people and funds much easier."²¹ In order to prevent terrorism while also maintaining globalization's benefits, America and the world economy at large must be careful to balance national security concerns with trade liberalization in order to strike the best fit compromise between the two.

Whatever the benefits of globalization, it is clear that no national security analysis can take place outside the context of the globalized world economy. The fact that globalization opens our economy to malicious foreign investment strikes at the heart of any foreign direct investment (FDI) review. To be sure, globalization augments the channels by which illegitimate small-scale foreign investment may occur, but it can also facilitate large-scale mergers and acquisitions. The risks of these transactions are potentially significant. Foreign ownership of an American corporation provides a presence for that parent corporation's country in the United States. The consequences of such ownership are troublesome if the purchasing country's interests are adverse to America. Without the

ization depresses wages in the United States, it forms an internationalized labor market for low-wage manual and service workers.

Id. at 220.

15. *Id.*

16. *Id.*

17. *Id.* at 217. "The dynamics of globalization ultimately create a new international labor pool into which companies delve for a cheap work force." *Id.*

18. Renke, *supra* note 6, at 771.

19. Helton & Zagorcheva, *supra* note 8, at 92-93.

20. *Id.* at 93.

21. *Id.*

Several trends associated with globalization—the greater ease of moving people, resources, and information across borders, the greater transnational reach of institutional structures—thus have sustained or worsened international terrorism even as other trends, such as the precipitous decline of Marxist terrorism at the end of the Cold War, have tended to lessen it.

Id.

effective government controls necessary to review transactions, stymie malicious foreign investment, and maintain America's safety, America will face dire national security consequences.

With respect to globalization itself, the challenge "is to take advantage of globalization's opportunities while minimizing its risks and disadvantages."²² To do so, legislative efforts should be concentrated on ensuring the enforcement of fair labor practices at home and abroad and on encouraging the restriction of foreign investment pending thorough review. We must focus on ensuring that the temptation of immediate or quick economic gain does not trump our long-term perception of national security goals. In particular, we must maintain stringent control over our national strategic assets by enacting a clear legal infrastructure that encourages their preservation and stabilizes globalization's impact on foreign access to our most important resources, while also encouraging an open society and liberal trade.

II. STRATEGIC ASSETS, NATIONAL SECURITY, AND INTERNATIONAL DEPENDENCE ON OIL

The ways that strategic assets and the role these assets play in national security are defined depend on the context that these two interrelated ideas are placed. Strategic assets are generally any tangible or intangible asset or concern of significant value in a given industry, state, or nation. Intelligence gathering and analysis,²³ the ability to use weapons systems more effectively,²⁴ pharmaceutical, biotech, and genomic firms,²⁵ bioweapons,²⁶ environmental knowledge,²⁷ Pakistani nuclear weapons and missiles,²⁸ and even the U.S. Constitution²⁹ have all been described as strategic assets. Uniting these diverse interests is an apparent tactical advantage that each holds under a particular set of circumstances.³⁰ In

22. *Id.* at 101.

23. David E. Pozen, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L.J. 628, 651 (2005).

24. Erwin Dahinden, *The Future of Arms Control Law: Towards a New Regulatory Approach and New Regulatory Techniques*, 10 J. CONFLICT & SECURITY L. 263, 268 (2005).

25. Simone A. Rose, *On Purple Pills, Stem Cells, and Other Market Failures: A Case for a Limited Compulsory Licensing Scheme for Patent Property*, 48 HOW. L.J. 579, 587 (2005).

26. Timothy K. Gilman, *Search, Sentence, and (Don't) Sell: Combating the Threat of Biological Weapons Through Inspections, Criminalization, and Restrictions on Equipment*, 12 J. TRANSNAT'L L. & POL'Y. 217, 229-31 (2003).

27. Daniel C. Esty, *Environmental Protection in the Information Age*, 79 N.Y.U. L. REV. 115, 207 (2004).

28. Terence N. Cushing, *Pakistan's General Pervez Musharraf: Deceitful Dictator or Father of Democracy?*, 21 PENN. ST. INT'L L. REV. 621, 635 (2003).

29. Mary L. Dudziak, *The Court and Social Context in Civil Rights History*, 72 U. CHI. L. REV. 429, 448 (2005). "During times of crisis, the United States has invoked the Constitution to assure other nations that all is right in America." *Id.*

30. This is specifically what the word strategic implies: a calculated, tactical advantage in a given circumstance, typically provided by owning or controlling the right resources at the right time.

many cases, such as the bioweapons and the Pakistani nuclear weapons referenced above, these strategic assets are not always characterized as such because of the benefits of their use, but rather because of their symbolic, implied ability to exert influence. Thus, strategic assets provide an advantage both because of the raw force and power of their usage³¹ and the implicit persuasive power that they hold.

Strategic assets obviously do not have to be manmade. It is not untenable, for example, that Saudi Arabia's oil reserves—the largest cache of any nation by far³²—provide it with an asset whose strategic value, though somewhat limited by international agreements and organizational memberships, is appreciable. If, for example, all worldwide oil supplies were exhausted, and the world had to rely on Saudi Arabia for oil, the strategic value of its oil would increase. Nonetheless, treating oil as a strategic asset is a new concept because, as economists and industry specialists point out, "owning oil is not vital to national security as long as there is a sufficient supply of oil on the global market."³³ In other words, in the absence of crisis, oil will remain a non-strategic asset, these experts contend, because it is abundant and readily available on global markets.

As demonstrated in the Saudi Arabia example, however, shortages—or even market fluctuations—could essentially convert oil into a strategic asset.³⁴ Worldwide demand for oil has been recognized to be at its highest levels in history while worldwide excess capacity of oil production has been recognized to be at its lowest point in history. Consequently, even in the absence of an official shortage, oil is arguably a strategic asset, particularly to an oil dependent nation like the United States.³⁵ Under prevailing circumstances, then, oil has assumed a greater strategic value than previously considered. As a strategic asset, all nations, regardless of their oil reserves, must be conscientious of their access to and control of oil reserves in order to maintain the stability of the global economy and individual national security.

31. Dudziak, *supra* note 29, at 472. The Constitution was a strategic asset, for example, because it maintained the rule of law during crisis, thus providing an advantage over less legally developed countries and demonstrating the stability of American society. *Id.*

32. *Rank Order – Oil – Proved Reserves*, CIA WORLD FACTBOOK, Mar. 15, 2007, <https://www.cia.gov/cia/publications/factbook/rankorder/2178rank.html>.

33. Peggy J. Crawford & Terry Young, *Fair Trade or Strategic Concern: The Unocal War*, GRAZIADIO BUS. REPORT, <http://gbr.pepperdine.edu/053/hottopic2.html> (last visited Apr. 3, 2007).

34. Mark E. Rosen, *Restrictions on Foreign Direct Investment in U.S. Defense and High Technology Firms: Who's Minding the Store?*, 4 U.S.A.F.A. J. LEG. STUD. 75, 88 (1993). Other crises have indirectly made oil a strategic asset, too. When President George H.W. Bush announced to the nation on August 8, 1990, for example, that he was deploying troops in the Gulf War, he explained: "[t]he stakes are high. Iraq is already a rich and powerful country that possesses the world's second largest reserves of oil and over a million men under arms. . . . Our country now imports nearly half the oil it consumes and could face a major threat to its economic independence." *Id.* at 88.

35. H. R. Res. 344, 109th Cong. (2005).

In deciding what strategic assets it can reasonably afford to sacrifice, an individual nation must not only consider the asset's value to it, but also the strategic value of that asset to the purchasing country. If an asset does in fact hold strategic value, then it necessarily is important to the country holding that asset.³⁶ In many cases—perhaps in every strategic asset example listed above—strategic assets have national security implications because of their tactical value. In weighing the sale of a strategic asset, then, a country must consider the extent and severity of the sale's national security implications. Nuclear weapons, for example, have obvious national security implications, particularly with respect to a country's military might. Pakistan, for example, is able to wield greater influence—both regionally and globally—because it has nuclear weapons. If Pakistan were to sell these nuclear weapons, whether to India, its regional rival, or to the United States, its ally, not only would Pakistan's influence be severely limited, but its national security may also be in jeopardy.

The interplay of national security and strategic assets in the United States is necessarily much more complicated than this simplistic example. America's rise to economic preeminence on the global stage since the beginning of the Cold War has noticeably contributed to its increased security risks. This rise in status has gone hand-in-hand with the increasing speed with which the world economy has been overtaken by the influence of globalization. While today America is challenged to maintain a balance between security and productivity, we must be cognizant of the historical events that have created our national security situation and the response that our government has taken towards them. International dependence on oil has made it a jewel in the crown of American strategic assets, and it is imperative to contextualize the protections we historically afforded to other strategic assets—while also considering other pressures, such as policy and politics³⁷—in order to understand our legal approach to oil. Since America realistically cannot defend its assets through warfare as a first resort, we must look to legal mechanisms to protect our interests.

III. PROTECTING AMERICAN NATIONAL SECURITY BY CONTROLLING FOREIGN ECONOMIC INVESTMENT

A. THE EXON-FLORIO AMENDMENT

The Exon-Florio Amendment (Exon-Florio) lies at the center of the U.S. government's foreign economic investment controls. As an amendment to the Defense Production Act of 1950, Exon-Florio was enacted in

36. I use holding broadly as a geographic term to refer to the country in which an asset is located. Accordingly, legal ownership is not required.

37. Rosen, *supra* note 34, at 88. Since the Truman Doctrine, for example, the United States, through its national security policy, has operated "under the simple premise that national security is inextricably linked to world order." *Id.* In order to meet its defense worldwide challenges—a crucial requirement for America's national security—America must have "assured access to strategic materials/protection of vital industries." *Id.*

1988 as part of the Omnibus Trade and Competitiveness Act “as a national security filter on FDI”.³⁸ To effectuate this purpose, Exon-Florio gives the President specific powers to review transactions “that could affect the national security of the United States.”³⁹ Operating within the context of the United States’ traditionally open investment policy and the increasingly liberalized global economy, “[t]he intent of Exon-Florio is not to discourage FDI generally, but to provide a mechanism to review and, if the President finds necessary, to restrict FDI that threatens the national security.”⁴⁰

Though some contend that “Exon-Florio negates a longstanding U.S. policy of welcoming and protecting FDI[,]”⁴¹ Exon-Florio was borne out of circumstantial necessity. In 1986, Fujitsu, a Japan-based electronics corporation, made a purchase offer for the Fairchild Semiconductor Corporation.⁴² Because Fairchild was widely viewed as Silicon Valley’s mother company, U.S. concern over the transaction was widespread.⁴³ After inconclusive investigations by the Council on Foreign Investment in the United States (CFIUS) and a Hart-Scott-Rodino antitrust review, it became clear that “no legal authority existed for preventing the transaction.”⁴⁴ The Reagan Administration was therefore compelled to conclude “that it was ‘powerless to take any action[,]’”⁴⁵ thus forming the impetus that motivated the enactment of Exon-Florio.⁴⁶

Exon-Florio allows the President or his designee to “make an investigation to determine the effects on national security of mergers, acquisi-

38. *Id.* at 76.

39. 50 U.S.C. app. § 2170(b).

40. U.S. Dep’t of the Treasury: Committee on Foreign Investments in the United States (CFIUS), <http://www.treas.gov/offices/international-affairs/exon-florio> (last visited Mar. 20, 2006) [hereinafter CFIUS].

41. Rosen, *supra* note 34, at 77.

42. Jose E. Alvarez, *Political Protectionism and United States International Investments Obligations in Conflict: The Hazards of Exon-Florio*, 30 VA. J. INT’L L. 1, 56 (1989).

43. 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) (citations omitted). Specific opposition to the Fujitsu-Fairchild deal was grounded in two concerns: control of the semiconductor industry was vital “to the future development of high-tech weaponry, as well as the computer chip market,” and the transaction would “create American dependence on Japanese suppliers for the production of, and access to, a vital dual-use technology.” *Id.*

44. *Id.* at 203.

45. *Id.* Prior to Exon-Florio’s enactment, “the President possessed the authority to investigate, regulate and prevent foreign acquisitions of U.S. companies under [the International Economic Emergency Powers Act, 50 U.S.C. §1701 (1977) (IEEPA)].” *Id.* Invoking IEEPA, however, is not a politically attractive choice, as it requires the President to make a “declaration of a national emergency after a presidential finding of an ‘unusual or extraordinary threat’ to national security.” *Id.* Making such a declaration is particularly unsavory because it is “virtually the equivalent of a declaration of hostilities against the government of the acquirer company.” *Id.* (citations omitted).

46. Rosen, *supra* note 34, at 79. The enactment of Exon-Florio was foreshadowed by several other events. In President Reagan’s 1987 State of the Union address, for example, he “promise[d] that the U.S. would not longer be ‘trade patsies.’” *Id.*

tions, and takeovers proposed . . . by or with foreign persons which could result in foreign control of persons engaged in interstate commerce in the United States.”⁴⁷ Given the time-intensive nature of business transactions and the speed that international markets change, Exon-Florio gives consideration to the parties’ time constraints. In fact, the investigation prescribed under Exon-Florio must begin no later than thirty days after the President is notified of the merger, and it cannot take more than forty-five days to complete it after the President has determined that such investigation is necessary.⁴⁸ Under the terms of Exon-Florio, such an investigation is mandatory if the “merger, acquisition, or takeover . . . could affect the national security of the United States.”⁴⁹

Within fifteen days after this investigation is complete, the President has the power to block the proposed transaction⁵⁰ given a finding 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, other than . . . the International Emergency Economic Power Act . . . , do not . . . provide adequate and appropriate authority . . . to protect the national security.⁵¹

The President’s power to block a transaction, made after a decision in accordance with these findings, is insulated from judicial review by Exon-Florio.⁵² In making such a finding, the President may consider the following factors:

- (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,
- (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,
- (4) the potential effects of the proposed or pending transaction on sales of military goods, equipment, or technology to any country . . . identified . . . as a country that supports terrorism . . . [or] as a coun-

47. 50 U.S.C. app. § 2170(a).

48. *Id.*

49. *Id.* app. § 2170(b).

50. *Id.* app. § 2170(d).

[T]he President may take such action for such time as the President considers appropriate 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. . . . The President may direct the Attorney General to seek appropriate relief, including divestment relief, in the district courts of the United States.

Id.

51. *Id.* app. § 2170(e).

52. *Id.*

try of concern regarding missile proliferation; or . . . as a country of concern regarding the proliferation of chemical and biological weapons . . . and

(5) the potential effects of the proposed or pending transaction on United States international technological leadership in areas affecting United States national security.⁵³

Additionally, the President must submit a written report listing the reasons in support of the decision to block the transaction.⁵⁴ In particular, the President must provide a thorough explanation of his findings regarding the factors in that report.⁵⁵

The 1993 Defense Authorization Act modified Exon-Florio by making additions more commonly known as the Byrd Amendment. These modifications were largely encouraged by Congress's "dissatisfaction with the review process track record after four years."⁵⁶ In particular, the Byrd Amendment made three changes to Exon-Florio. First, it "required a separate review process focused on national origin[.]" which used a lower threshold requirement and more ambiguous wording in order to permit greater inclusiveness in conducting reviews.⁵⁷ Secondly, the Byrd Amendment, by requiring evaluation of the potential effects of a transaction, "expanded the scope of national security factors for consideration, laying the foundation for the consideration of third-party transactions."⁵⁸ Finally, the Byrd Amendment requires an immediate report to Congress whether or not action is taken following an investigation, as well as a Quadrennial Report detailing any credible evidence of either industrial espionage or a coordinated attempt by either foreign countries or companies to usurp American control over leading sectors of technology.⁵⁹

In sum, the Byrd Amendment reflects Congress's attempt to strengthen Exon-Florio and broaden its reach while bringing its utility to the forefront of the President's toolbox in dealing with international business transactions.

53. *Id.* app. § 2170(f).

54. *Id.* app. § 2170(g).

55. *Id.*

56. Fenton, *supra* note 43, at 206.

57. *Id.* at 207. Exon-Florio originally applied to transactions that "threaten[ed] to impair the national security[.]" the Byrd Amendment changed this to the "could affect the national security" standard. *Id.* Additionally, the Department of Treasury not only made clear its intent to apply a broad construction of the term "foreign government" to include "any government or body exercising governmental function," but did not define when a corporation is "controlled by or acting on behalf of" a foreign government. The Department of Treasury was careful, however, to emphasize Exon-Florio's application to supra-national entities, such as the European Union.

Id. at 208 (citations omitted).

58. *Id.* This particular modification may have been substantially motivated by the LTV-Thompson case, discussed *infra*. *Id.*

59. *Id.* at 209. This addition may have been Congress's attempt to apply greater political pressure for more stringent enforcement of Exon-Florio by the President. *Id.*

Several critical terms in Exon-Florio are not defined anywhere in the statute. Most strikingly, "national security," which appears eight times in the statute, was intentionally undefined because Congress intended "the term 'to be interpreted broadly without limitation to a particular industry.'"⁶⁰ The 1988 Trade Act Conference Report recognized this omission,⁶¹ which, in effect, affords the President broad discretion and flexibility in deciding where and when to apply Exon-Florio. Interestingly, the Department of Treasury, which is responsible for Exon-Florio's implementation, "rejected proposals that would have provided a clearer definition of the term 'national security.' Instead, the Department of Treasury purposely omitted any definition, citing congressional intent as expressed in the Conference Report."⁶²

1. CFIUS

Under Exon-Florio, the President may appoint a designee to carry out his responsibilities as enumerated under Exon-Florio.⁶³ On October 26, 1988, President Reagan delegated to the Secretary of the Treasury the power vested in the President under Exon-Florio "relative to 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."⁶⁴ Additionally, President Reagan provided that "[t]he Secretary of the Treasury shall consult with [CFIUS] . . . to take such actions or make such recommendations as requested by the Secretary of the Treasury."⁶⁵

CFIUS, the primary vehicle through which Exon-Florio was implemented, predates Exon-Florio and was created through an Executive Order by President Ford in 1975.⁶⁶ President Ford's Order designated the Secretary of the Treasury as the head of CFIUS and stated that its purpose was to "have primary continuing responsibility within the Executive Branch for monitoring the impact of foreign investment in the United States."⁶⁷ Since 1975, membership of CFIUS has been expanded three times, bringing its membership total to twelve.⁶⁸ Today, the Department

60. Rosen, *supra* note 34, at 79.

61. Fenton, *supra* note 43, at 205 (citation omitted).

62. *Id.* at 205-06 (citations omitted).

63. 50 U.S.C. app. § 2170(a).

64. Interim Directive Regarding Disposition of Certain Mergers, Acquisitions, and Takeovers, 53 Fed. Reg. 43,999 (Oct. 26, 1988).

65. *Id.*

66. Exec. Order No. 11,858, 40 Fed. Reg. 20,263 (May 7, 1975).

67. *Id.* § 1(b).

68. Originally, CFIUS' membership was comprised of the Secretaries of State, the Treasury, Defense, Commerce, the Assistant to the President for Economic Affairs, and the Executive Director of the Council on International Economic Policy. *Id.* § 1(a). In 1980, President Carter modified President Ford's Executive Order by replacing the Assistant to the President for Economic Affairs with the United States Trade Representative and the Executive Director of the Council on International Economic Policy with the Chairman of the Council of Economic Advisers. Exec. Order No. 12,188, 45 Fed. Reg. 989, § 1-105(f) (Jan. 2, 1980). In 1988, President Reagan added the Attorney General and the Director of the Office of Man-

of the Treasury's official statement is that "CFIUS seeks to serve U.S. investment policy through thorough reviews that protect national security while maintaining the credibility of our open investment policy and preserving the confidence of foreign investors here and of U.S. investors abroad that they will not be subject to retaliatory discrimination."⁶⁹

2. *CFIUS in Operation*

In practice, CFIUS receives notice of proposed foreign acquisitions of U.S. companies, distributes those notices to CFIUS member agencies, and coordinates reviews.⁷⁰ After receiving a notice, CFIUS has thirty days to decide whether to conduct a review.⁷¹ CFIUS must submit a report to the President in the event that it undertakes and completes an extended forty-five day review, referred to as an investigation.⁷² As prescribed by Exon-Florio, the review process focuses on whether the proposed transaction adversely affects national security.⁷³ Ordinarily, the review process functions through a system of voluntary filings where foreign entities interested in purchasing American companies notify CFIUS of this interest before the transaction is completed.⁷⁴ By voluntarily submitting to review, foreign entities are able to obtain CFIUS clearance. CFIUS clearance is analogous to a declaratory judgment because receiving clearance practically means that there is minimal risk that the President will order divestiture at a later date.⁷⁵ A foreign entity is not prejudiced for failure to notify, but in such cases, CFIUS members can refer transactions that might affect national security to the review process.⁷⁶

In spite of its apparently sweeping, inclusive power, Exon-Florio, as implemented through CFIUS, has been applied only sparingly. In the time between Exon-Florio's enactment in 1988 and 1999, CFIUS only investigated 17 out of approximately 1300 voluntary reports.⁷⁷ This statistic is particularly shocking in view of the 1988 Trade Act Conference Report, which specifically identified Exon-Florio's flexibility in order to afford the President broad discretion and to encourage Exon-Florio's usage.⁷⁸

agement and Budget to CFIUS. Exec. Order No. 12,661, 54 Fed. Reg. 779, § 3-201(F) (Dec. 27, 1988). In 1993, President Clinton added the Director of the Office of Science and Technology Policy, the Assistant to the President for National Security Affairs, and the Assistant to the President for Economic Policy. Exec. Order No. 12,860, 58 Fed. Reg. 47,201 (Sept. 3, 1993). In 2003, President Bush added the Secretary of Homeland Security to CFIUS. Exec. Order No. 13,286, 68 Fed. Reg. 10,619, § 57(a) (Feb. 28, 2003).

69. See CFIUS, *supra* note 40.

70. *Id.*

71. *Id.*

72. *Id.*

73. See 50 U.S.C. app. § 2170.

74. Fenton, *supra* note 43, at 209 (citation omitted).

75. *Id.* at 209-10 (citation omitted).

76. *Id.* at 210 (citation omitted).

77. *Id.* (citation omitted).

78. *Id.* at 205-06 (citations omitted).

Of those seventeen investigations, seven transaction proposals were voluntarily withdrawn.⁷⁹ Out of the ten remaining cases, a President only exercised his power to cancel a transaction under Exon-Florio one time: President George H.W. Bush ordered the China National Aero-Technology Import and Export Corporation to sell its interest in Mamco Manufacturing Inc. in 1990.⁸⁰

Given its track record, some have declared that Exon-Florio is ineffective and nothing but “a paper dragon.”⁸¹ These critics argue that CFIUS, rather than concerning itself with national security, is more opportunistic and only “interested in protecting inbound investment flows.”⁸² Furthermore, CFIUS has carried out “its duties in a ‘nonchalant’ and ‘cavalier’ fashion because of its focus upon specific transactions only, rather than on the synergistic and cumulative effect that multiple transactions will have on the [nation’s] defense industrial base.”⁸³

Other critics are concerned by Exon-Florio’s failure to define its key terms.⁸⁴ These opponents envision specific scenarios where Exon-Florio could be applied abusively. In one case, for example, Exon-Florio “could be utilized as a shield to protect domestic industry in the context of broad and aggressive industrial policy.”⁸⁵ Such an application would effectively negate the United States’ traditional free trade disposition by preferentially protecting domestic industry while also reflecting an attempt to disengage the United States from the forefront of the globalized world economy. Exon-Florio could also be used as retribution in order to effectuate change in trade practices abroad.⁸⁶ While these retaliatory abuses

79. *Id.* at 210.

80. Evelyn Iritani, *Chinese Bid for Unocal Stirs Up Issues*, L.A. TIMES, June 25, 2005, at C1. This case is somewhat anomalous because of its glaring national security implications. Mamco Manufacturing Inc. produced metal components for American commercial aircraft. China National Aero-Technology Import and Export Corporation, on the other hand, was owned by China’s Ministry of Aerospace Technology and was a close affiliate of the People’s Liberation Army. Such a transaction “risk[ed] providing China unique access to U.S. aerospace companies and products restricted under export controls.” Fenton, *supra* note 43, at 210 (citations omitted).

81. Rosen, *supra* note 34, at 81.

82. *Id.*

83. *Id.* Considering the nature of today’s globalized economy, it makes sense that “the only appropriate focus is to examine all of the reasonably foreseeable effects of an FDI transaction.” *Id.* at 82.

84. One critic even concluded that “the ‘vague parameters and elastic provisions create a potent protectionist weapon that virtually invites abuse.’” Fenton, *supra* note 43, at 211 (citation omitted).

85. *Id.* (citation omitted).

86. *Id.* at 212. Exon-Florio “could be deployed to open foreign markets or remedy anti-competitive behavior where a foreign investor’s home state engages in unfair trade practices, or maintains an atmosphere unfavorable to American investors. Exon-Florio could also be utilized as a retaliatory instrument designed to remedy unfair practices perpetrated by the [foreign] company.” *Id.* at 212. Curiously, members of the House Armed Services Committee panel participating in the hearing on the CNOOC-Unocal deal made similar complaints about the unfair trade practices and lack of reciprocal openness in the Chinese economy. See *infra* notes 176, 179.

are not in the spirit of traditional American economic cooperation and openness, it is important to bear in mind that the express purpose of Exon-Florio is to protect national security, and, as such, a minimal contraction of our liberalized economy to effectuate that purpose is perhaps an acceptable casualty in the era of globalization.

Technical criticisms regarding Exon-Florio have also circulated. Within Exon-Florio's legal framework, for example, there appears to be some reticence regarding initiation of the review process because of the correct, yet dangerous, "*assumption* that existing emergency laws can be effectively used to" meet Exon-Florio's objectives.⁸⁷ Some commentators have also complained about the President's delinquency in satisfying Exon-Florio's requirement for a quadrennial report,⁸⁸ which may shed light on the reasons why Presidents have used Exon-Florio sparingly. Finally, and quite importantly, many critics have argued that serious flaws exist in Exon-Florio because it fails to provide CFIUS with the transparency necessary for effective oversight.⁸⁹ Because reports are only generated when a presidential decision regarding a transaction is involved, only two such reports have ever been sent to Congress since 1997.⁹⁰ In order to have effective oversight, CFIUS review process must become more transparent and more accountable.

3. *Are Exon-Florio and CFIUS Worthwhile?*

Given that only one divestiture has taken place in the era of Exon-Florio and that the official records detailing CFIUS' activities have been sparse, it is difficult to assess the actual benefits of Exon-Florio. On the other hand, it should be noted that CFIUS' impact on national security is practically impossible to question because many foreign entities withdraw their transaction proposals before formal review commences or the matter is referred to the President for a decision.⁹¹ Thus, it can be argued that "Exon-Florio's value lies in its function as a deterrent and the opportunity created by the review process for the federal government to restructure a transaction."⁹² In this respect, the influence of the review process as a deterrent is powerful, yet subtle. In response to criticism of

87. Rosen, *supra* note 34, at 82.

88. "After a first report was delivered in 1993, the Executive has neglected to fulfill its legal requirement, and the last report is 9 years overdue." *National Security Implications of the Possible Merger between the China National Offshore Oil Corporation with Unocal Corporation: Hearing Before the H. Comm. on Armed Servs.*, 109th Cong. 7 (2005) (statement of Hon. C. Richard D'Amato, Chairman, U.S.-China Economic and Security Review Commission on House Armed Services) [hereinafter D'Amato].

89. *Id.* at 6.

90. *A Review of the CFIUS Process for Implementing the Exon-Florio Amendments: Hearing Before the S. Banking, Housing, and Urban Affairs Comm.*, 109th Cong. 2 (2005) (statement of Katherine Schinasi, Managing Director, Acquisition and Sourcing Management, U.S. Government Accountability Office).

91. Fenton, *supra* note 43, at 213 (citation omitted).

92. *Id.* at 212-13 (citation omitted).

CFIUS' meager track record as evidence of its ineffectiveness, the Treasury Department has said:

CFIUS' impact goes far beyond sample statistics. CFIUS enhances the national security when it identifies specific problems which could threaten U.S. security and helps resolve these problems while still allowing U.S. business[es] to received [sic] the capital they need. Blocking a transaction is a crude tool and serves no purpose when more subtle remedies are available . . . Viewed from this perspective, CFIUS has been very successful.⁹³

Assuming the accuracy of this statement, Exon-Florio and CFIUS have been effective players in the protection of American national security. Given that out of 1300 voluntary submissions between 1988 and 1999, only 17 required CFIUS to conduct an investigation,⁹⁴ one can assume that the remaining 1283 transactions were either safe enough to proceed or were voluntarily withdrawn. In either case, it appears that the national security was protected.

But of the seventeen cases that CFIUS did review, only ten went to the President, and the President only blocked one transaction.⁹⁵ As a result, the remaining nine cases were questionable enough to require CFIUS review (a very serious process), but not so dubious as to motivate the purchasing company to withdraw or the President to block the transaction. While it is impossible to know the specific nature of the CFIUS review in those nine cases, this aspect of the statistical mixture raises specific issues about Exon-Florio's quality because of the broad discretion it affords the President. Insulated from judicial review, the President is able—as exemplified by these nine instances—to approve a transaction that CFIUS had decided to be uncertain enough to require investigation. Without specific statutory controls and requirements, as those that exist in various industries, the President is able to trump a CFIUS investigation and make his own determination.

B. INDUSTRY-SPECIFIC CONTROLS

1. *Airlines*

The airline industry in the United States is a strategic asset because of the potential national security implications of dangerous or intentionally destructive airplane flights, which was tragically reinforced by the events of September 11, 2001. The airline industry also garners significant protection because the airline industry is a symbolic national asset.⁹⁶ Accordingly, foreign involvement in the American airline industry is subject to stringent regulation that began in its current form with the Federal

93. *Id.* at 213 (citation omitted).

94. *Id.* at 210 (citation omitted).

95. *Id.* (citation omitted).

96. Consider, for example, the fact that airline names frequently echo patriotic or geographical themes, such as American Airlines, United Airlines, US Airways, and Alaska Airlines.

Aviation Act of 1958 (Aviation Act).⁹⁷ Under the Aviation Act, only U.S. citizens⁹⁸ may offer domestic air service within the United States.⁹⁹ More specifically, “[d]omestic airline operations are limited to aircraft registered in the United States, for which only a U.S. citizen or a corporation organized in the United States with aircraft based and used primarily in the United States may register.”¹⁰⁰ Foreign carriers may navigate in the United States only if several statutory conditions are met.¹⁰¹

2. *Farmland*

Historically, American farmland has also been the subject of legislative protectionism because of the perceived symbolic and strategic value of land. In fact, by 1979, “[f]oreign ownership of farmland ha[d] been restricted in 20 states, and . . . the U.S. Congress [had] approved legislation that would require foreign investors to report all purchases or long-term leases of American farmland to the Secretary of Agriculture.”¹⁰² American attention to the perceived problem of foreign ownership of farmland was not a new concern in 1979. As was the case in other industries,¹⁰³ the perceived strategic and symbolic value of American farmland began much earlier—in 1887 with the Alien Land Act.¹⁰⁴ In 1979, however, it was reported that the objections to foreign ownership of U.S. farmland were largely unfounded and emotional.¹⁰⁵ In fact, foreign ownership at the time accounted for only less than 1 percent of total U.S. farmland ownership.¹⁰⁶ Furthermore, it was reported in 1979 that the impact of foreign ownership on farming operations was minimal and that foreign investment increased U.S. wealth and the foreign exchange value of the dollar.¹⁰⁷ Eventually, as has happened in other instances where the

97. Other prior legislation—the Air Commerce Act of 1926 and the Civil Aeronautics Act of 1938—had different limits and restrictions on the airline industry. *See, e.g.*, Christopher Furlan, *Foreign Ownership and Control Restrictions in United States Airlines: Barrier to Mergers and Restructurings* (Apr. 25, 2005) (unpublished comment, on file with the Law & Business Review of the Americas).

98. An airline counts as an American citizen if 75 percent of the airline’s voting interest is owned or controlled by U.S. citizens. 49 U.S.C. § 40102(a)(15) (1997 & Supp. 2006).

99. 49 U.S.C. § 40103(a)(2) (1997).

100. 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, 445 (1994) (citations omitted).

101. The most notable conditions include reciprocal licensing of U.S. aircraft in the country of registry, a finding that the authorization is in the public interest, and a finding that the authorization is consistent with international agreements. 49 U.S.C.A. § 41703 (1997 & Supp. 2006).

102. Clifton B. Luttrell, *The “Danger” from Foreign Ownership of U.S. Farmland*, FED. RES. BANK OF ST. LOUIS, Jan. 1979, at 2.

103. *See* discussion of airline industry, *supra* Part B1, and the telecommunications and defense industries, *infra* Part B3.

104. The Alien Land Act of 1887 was enacted in response to “the fear that American farmers would become servants of distant masters uncomprehending the rights and needs of Americans.” Luttrell, *supra* note 102, at 3 (citations omitted).

105. *Id.* at 2.

106. *Id.*

107. *Id.* at 8.

threat of foreign investment was purely symbolic, concerns over foreign ownership of U.S. farmland subsided.¹⁰⁸

3. *Telecommunications*

Foreign investment and involvement in the telecommunications industry is also specifically controlled by statute. This regulation began with the Communications Act of 1934, which established numerical caps for foreign ownership in the telecommunications industry.¹⁰⁹ The Communications Act of 1934 was superseded by the Telecommunications Act of 1996 (1996 Act), which “removed some of the restrictions on foreign ownership, but [retained] the old specter of fear” of foreign involvement in American media.¹¹⁰ In particular, the 1996 Act prescribes that:

No broadcast or common carrier . . . license shall be granted to or held by—

- (1) any alien or the representative of any alien;
- (2) any corporation organized under the laws of any foreign government;
- (3) any corporation of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof or by any corporation organized under the laws of a foreign country;
- (4) any corporation directly or indirectly controlled by any other corporation of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.¹¹¹

The 1996 Act’s categorical prohibition against foreign ownership and strict regulation of corporate involvement reflects “the intent of Congress to inject a national security consideration into the international telecom-

108. Japanese ownership of American real estate was once a concern in the United States. In 1988, for example, Japanese investors had purchased \$16.5 billion in U.S. real estate. Arnold L. Redman & N.S. Gullett, *An Empirical Study of the Impact of Foreign Ownership on the Values of U.S. Commercial Properties*, 11 J. FIN. & STRATEGIC DECISIONS 53 (1998). In 1989, Mitsubishi, a Japanese corporation, purchased a controlling interest in Rockefeller Center in New York City. At the time, Japanese investors also owned significant other properties in the United States, including half the office space in Los Angeles, California. Charles Bremner & Joe Joseph, *Japanese Money Muscles in on Manhattan Skyline*, TIMES (U.K.), Nov. 1, 1989. By 1995, Japan had lost control of Rockefeller Center and several other notable U.S. properties, and Japanese investors lost a considerable amount of money in the process. See, e.g., Beth Belton, *Rockefeller Center: Japan’s Lost ‘Trophy’*, USA TODAY, Sept. 13, 1995, at 1A.

109. See Kathleen A. Lacey et al., *International Telecommunications Mergers: U.S. National Security Threats Inherent in Foreign Government Ownership of Controlling Interests*, 4 TUL. J. TECH. & INTELL. PROP. 29, 41 (2002).

110. *Id.* at 44.

111. 47 U.S.C. § 310(b) (1996).

munication business transaction.”¹¹² While Congress has provided broad discretion to the Federal Communications Commission (FCC) (similar to the flexibility provided to the President by Exon-Florio) to allow some foreign involvement (unless the FCC finds that the public interest will be served by refusing to allow that involvement), the 1996 Act is highly particularized and structured. Rather than providing factors to consider as in Exon-Florio, the 1996 Act flatly prohibits foreign nationals and foreign companies from participating in certain categories of the American telecommunications industry. Given the traditionally liberalized disposition of the American economy and the increasingly globalized world in which we live, it has been argued that these restrictions are anachronistic, counterproductive, and hypocritical.¹¹³ In spite of the restrictiveness of these requirements, Congress has felt that it was necessary to maintain them in order to continue “[t]he FCC’s delegated responsibility to foster a robust forum for national debate[, which is] . . . essential to the vibrancy of our deliberative democracy.”¹¹⁴

a. 1996 Act in Action: Rupert Murdoch and Fox News

Notwithstanding the rigidity of the 1996 Act, specific cases have shown that the FCC has broad discretion in applying its regulations. Media mogul Rupert Murdoch, the Chairman and Managing Director of News Corp., an Australian company and parent of Twentieth Century Holdings (the parent of conservative news outlet Fox) was the subject of FCC regulatory scrutiny in the 1990s.¹¹⁵ In 1985, Murdoch’s purchase of Metromedia’s television stations in the United States required him to become a naturalized American citizen because of FCC rules.¹¹⁶ In 1995, the NAACP and, for a time, NBC, asked the FCC to investigate the issue of Murdoch’s citizenship to determine whether Murdoch was the legal owner of his Fox news stations in the United States or whether Australia-based News Corp. controlled the Fox stations.¹¹⁷ That same year, the FCC found no problems with Murdoch’s ownership of telecommunications holdings in the United States,¹¹⁸ despite the fact that News Corp.

112. Lacey et al., *supra* note 109, at 45.

113. *Id.* at 44-45.

114. *Prometheus Radio Project v. FCC*, 373 F.3d 372, 435 (3rd Cir. 2004); *see* Lacey et al., *supra*, note 109, at 44-45.

115. Wikipedia: Rupert Murdoch, http://en.wikipedia.org/wiki/Rupert_Murdoch (last visited Mar. 20, 2006).

116. At the time, “many felt that he received inordinately preferential treatment by the Reagan administration in expediting the citizenship process.” Museum of Broadcast Communications: Rupert K. Murdoch, <http://www.museum.tv/archives/etv/M/htmlM/murdochrupe/murdochrupe.htm> (last visited Mar. 20, 2006).

117. *Id.*

118. Gloria Tristani, Comm’r FCC, Dissenting Statement: Transfer of Control of Broadcast Licenses Held by Subsidiaries of Chris-Craft Industries, Inc., to Fox Television Stations, Inc. (July 24, 2001), *available at* <http://www.fcc.gov/Speeches/Tristani/Statements/2001/stgt149.html>, 2001 WL 838739.

News Corp . . . should be permitted . . . to own U.S. television stations because: (1) Rupert Murdoch himself was an American citizen and would, through Fox Television (FTS), his majority-owned company, con-

owned more than 99 percent of Twentieth Century Holdings.¹¹⁹ Furthermore, the FCC found that it would not be in the public interest for Fox to alter its ownership structure to comply with 47 U.S.C. § 310(b)(4).¹²⁰ The ability of the FCC to exercise tremendous flexibility in allowing Murdoch's continued ownership demonstrates the robust practicality of the 1996 Act, which, while providing apparently flat prohibitions against certain types of ownership, allows the FCC to make decisions with the public interest in mind.

b. *In re Global Crossing*

In addition to FCC regulation, CFIUS has also been involved in investigating telecommunications transactions. In a case involving a bankrupt American broadcast corporation, a court gave consideration to the fact that CFIUS had not yet given the necessary approval for two foreign corporations—one Chinese and one Singaporean—to purchase the American corporation.¹²¹ In describing one of the purchasers, Hutchinson, the court said that “Hutchinson is a Hong Kong entity, and Hong Kong is now under the political control of . . . China, [which] plainly ma[kes] securing approval from CFIUS, which focuses in significant part on national security concerns, difficult or impossible.”¹²² In contrast, the court optimistically reported that Singapore Technologies Telemedia (STT), which is owned and controlled by Singapore, might have had a better chance with CFIUS because Singapore and the United States have “quite a good relationship, and the natural security concerns, if any” will be settled by CFIUS.¹²³ As is the case in many similar transactions, and as discussed

trol the stations; and (2) because the tax consequences of not allowing News Corp to own the stations would be significant.

Id.

119. Press Release, FCC, FCC Allows Fox Television to Retain Ownership Structure; Renewal of WNYW-TV, New York City, Granted (July 28, 1995), *available at* http://www.fcc.gov/Bureaus/Mass_Media/News_Releases/nrmm5086.txt. News Corp's ownership interest clearly exceeded the 25 percent statutory benchmark prescribed by 47 U.S.C. § 310(b). “At that time the Commission conditionally granted FTS a renewal of the WNYW-TV license and gave FTS two options: (1) to bring its ownership structure into compliance with the benchmark; or (2) to demonstrate why its ownership structure served the public interest.” *Id.*

120. *Id.*

The FCC has allowed Fox Television Stations, Inc. (“FTS”) to retain its current ownership structure, finding that it would not serve the public interest to require FTS to restructure in order to comply with the 25 percent foreign ownership benchmark established in Section 310(b) of the Communications Act. The Commission therefore removed a previously imposed condition on the renewal of FTS's license to operate station WNYW-TV, New York, NY, and said that FTS, as presently structured, may acquire additional broadcast stations, up to the allowable maximum set forth in the ownership rules.

Id.

121. In fact, the court considered CFIUS and FCC review to be the most significant regulatory reviews facing this proposed transaction. *In re Global Crossing Ltd.*, 295 B.R. 726, 734 (S.D.N.Y. 2003).

122. *Id.* at 732.

123. *Id.*

below vis-à-vis CFIUS' track record, takeovers that appear to present significant challenges oftentimes force the questionable purchaser out of the deal. In *In re Global Crossing*, for example, "the Board was aware that CFIUS approval . . . would be very difficult so long as Hutchinson was one of the Investors[.] . . . [Eventually,] Hutchinson . . . indicated that it would withdraw from the Purchase Agreement, and that STT would step into its place."¹²⁴ In this respect, CFIUS' power to deter succeeded, and, consequently, no presidential intervention was necessary to protect national security.

4. *Defense*

The defense industry includes an array of resources considered to be strategic assets because of the significant power—in both actual force and symbolism—that these particular assets hold. In many respects, a country's military might is both its first line and its last line of defense in ensuring national security. By acting as a symbolic force, the preeminence of the American military is able to deter invasion and attacks from weaker entities. Because the American military has access to and controls some of the most powerful and advanced weaponry, it is available to defend the nation in the event of armed conflict. If adverse foreign corporations are able to purchase American defense contractors, those foreign corporations would potentially have access to sensitive information in glaring violation of our national security interests.

Consequently, Congress has acted to restrict transactions involving defense contractors that would affect our national security. For example, as discussed earlier, Exon-Florio itself appeared as an amendment to the Defense Production Act of 1950 and was used by President George H.W. Bush in 1990 to prevent a Chinese company from owning an interest in an American aerospace company.¹²⁵ Additionally, the Defense Industrial Security Program has expounded "indirect restrictions on foreign investment in the U.S. defense industry through limits on access to sensitive government projects."¹²⁶ If an acquired company loses its previously-held security clearance because of its foreign acquisition, then the acquisition may be "untenable and force divestment."¹²⁷ This indirect approach has been quite successful in preventing foreign acquisitions because foreign companies "generally have difficulty obtaining the security clearance necessary."¹²⁸ In the event that a U.S. company is subject to foreign ownership, control, or investment and an acquisition is allowed to proceed, the U.S. company's "board . . . may be required to issue a resolution certifying that the foreign interests will have no access to the classified information."¹²⁹

124. *Id.* at 735.

125. *See supra* Section III.B.1.

126. *Corr, supra* note 100, at 435.

127. *Id.* at 436.

128. *Id.*

129. *Id.* at 438.

Restrictions on defense-related transactions have been applied even if the purchasing company's country of origin is friendly to the United States because of concern that the purchasing company, through its dealings with third parties in adverse nations, will pursue third party transactions that will negatively impact the U.S.' national security. In 1992, Thomson, a corporation entirely owned by the French government, offered to buy the Missile Division of LTV Aerospace & Defense (LTVAD). LTVAD manufactured military and commercial aerospace and other defense products primarily for the U.S. government.¹³⁰ With the intent to buy LTVAD, Thomson formed a Delaware-based subsidiary for the primary purpose of purchasing the missile division.¹³¹ At the time, however, "as much as 70% of the Missiles Division's revenues came from [government] contracts requiring access to classified information."¹³² This requirement presented a major obstacle to the transaction, even though Thomson could have "minimize[d] the effect of [foreign ownership, control, or investment] . . . through a Special Security Agreement (SSA)."¹³³

Like Hutchinson, the transaction underwent the CFIUS review process in order to determine that the link between LTV's government contracts and French ownership under Thomson would not compromise national security.¹³⁴ As part of its review process, "CFIUS submitted questionnaires to be answered by Thomson and LTV concerning the security implications of the acquisition."¹³⁵ Thomson failed to obtain an SSA, and, subsequently, also failed to satisfy the Department of Defense's request that it proceed with a proxy agreement or voting trust.¹³⁶ Consequently, Thomson was forced to withdraw its application from CFIUS, and the matter never reached the President for his approval.¹³⁷ Like other transactions practically doomed from the start, the Thomson-LTV deal collapsed because the risks of having a French-owned company supply the U.S. military were too great, particularly with respect to the potential for third party transactions and exportations.¹³⁸

C. FOREIGN OWNERSHIP RESTRICTIONS ABROAD

The restrictions the United States places on foreign ownership are not unique among other developed nations. Like the United States, the Eu-

130. *In re Chateaugay Corp.*, 198 B.R. 848, 849-50 (S.D.N.Y. 1996).

131. *Id.* at 850.

132. *Id.* at 851.

133. *Id.* ("Under regulations promulgated by the [Department of Defense], every company performing work on government contracts must receive Facility Security clearance. To obtain such clearance, foreign-owned companies such as Thomson are required to take steps to insulate foreign ownership, control or influence").

134. *Id.* at 853.

135. *Id.*

136. *Id.*

137. *Id.* at 854.

138. *Id.* Even though the bankruptcy court approved the purchase of the LTV by another company, Thomson appealed, arguing, *inter alia*, that LTV had "failed to provide it adequate assistance in obtaining" CFIUS approval. *Id.* at 857.

ropean Union and Japan require majority domestic ownership in the airline and telecommunications industries, respectively.¹³⁹ The bulk of global FDI restrictions are actually in non-manufacturing sectors, with "electricity, transport and telecommunications [being] the most constrained industries, followed by finance."¹⁴⁰ Iceland has a complete ban of foreign ownership in its fishing and energy industries, while Mexico has similar restrictions in its oil sector.¹⁴¹ In fact, the United States is below average in terms of FDI restrictions when compared to other developed nations.¹⁴²

Many other English-speaking nations appear to have greater restrictions on FDI than the United States.¹⁴³ It is noteworthy, however, that there has been a substantial liberalization of FDI in most developed countries since 1980.¹⁴⁴ Australia, for example, "maintains restrictions on investment in sensitive sectors, including urban land, banking, aviation, airports, shipping, broadcasting, newspapers and telecommunications."¹⁴⁵ In telecommunications, in particular, Australia has enacted specific legislation limiting the total foreign ownership of its dominant carrier.¹⁴⁶ Furthermore, Australian law requires that the chairman and a majority of the board of directors of the dominant carrier must be Australian citizens.¹⁴⁷ Among telecommunications sectors in English-speaking nations, Australia's restrictions are the most stringent.¹⁴⁸

139. *Foreign Direct Investment Restrictions in OECD Countries*, OECD ECON. OUTLOOK No. 73, June 2003, ch. 7, at 2, available at <http://www.oecd.org/dataoecd/24/35/2956455.pdf> [hereinafter FDI].

140. *Id.* at 5.

141. *Id.* at 2.

142. *Id.* at 4. "The countries with the highest levels of overall restrictions are Iceland, Canada, Turkey, Mexico, Australia, Austria, Korea and Japan. The United States is slightly below the OECD mean." *Id.*

143. *Id.* at 5. According to the OECD, Canada, New Zealand, and Australia have more restrictions on FDI than the United States. Contrastingly, the United Kingdom has fewer such restrictions. *Id.*

144. *Id.* at 6. The United States and Japan are exceptions to the liberalizing trend. *Id.*

145. Jeffrey Robertson, *Foreign Ownership in the Telecommunications Sector*, RESEARCH NOTE No. 34 (AUSTL.), Mar. 7, 2005, <http://www.aph.gov.au/library/pubs/RN/2004-05/05rn34.htm>. "Under the *Foreign Acquisitions and Takeovers Act 1975*, the Treasurer makes the final decision and may prevent investment deemed to be 'contrary to the national interest.'" *Id.*

146. *Id.* Foreign shareholding of Telstra, Australia's dominant telecommunications carrier, is limited by the Telstra Corporation Act 1991 to 35 percent of listed capital. No foreign person or association may own more than 5 percent of listed share capital. *Id.*

147. *Id.*

148. *Id.* By comparison, Canada limits foreign ownership to 20 percent of voting shares and requires 80 percent of the board of directors to be Canadian citizens. Telecom New Zealand limits foreign ownership to 10 percent of voting shares without prior approval. The United Kingdom and the United States have no legislation specifically restricting foreign ownership on a percentage basis. *Id.*

IV. GLOBALIZATION, OIL, AND NATIONAL SECURITY AT A CROSSROADS: CNOOC-UNOCAL

In late June 2005, CNOOC made an offer to purchase Unocal, an American oil company, in an acquisition attempt CNOOC code-named "Operation Treasure Ship."¹⁴⁹ To understand the American uproar against the deal that began the day CNOOC made its offer, it is important to first understand the would-be purchaser.¹⁵⁰ CNOOC was created by the Chinese government "in 1982 to be a joint venture partner with foreign oil companies exploring for offshore oil reserves."¹⁵¹ CNOOC "is considered to be one of the top 50 state-owned companies, a place of high privilege in the Chinese government hierarchy."¹⁵² Furthermore, Fu Chengyu, CNOOC's Chief Executive Officer, is also the Communist Party Leading Group's secretary, and "the purchase of Unocal was approved by the State Council, China's cabinet, and the governor of the State Central Bank helped assemble the financial purchase package."¹⁵³ Though CNOOC was worth only \$22 billion, it offered \$18.5 billion to acquire Unocal, a clear indicator of the extent of the Chinese government's involvement in the deal.¹⁵⁴

Prior to CNOOC's purchase offer, China had already made its interest in purchasing American companies abundantly clear. In 2002, China Netcom Communications Group purchased the Asian subsidiary of Global Crossing, which was followed by the Lenovo Group's purchase of IBM's personal computer division in December 2004.¹⁵⁵ In 2005, the Haier Group made an offer for Maytag Corporation.¹⁵⁶ Prior to the proposal, China had also made its foray in to the energy sector, with CNOOC purchasing a 17 percent interest in Canada's MEG Energy and Sinopec, another Chinese oil company, buying a 40 percent interest in the Canadian oil sands project.¹⁵⁷ Curiously, CNOOC's board of directors had trouble deciding whether to make a purchase offer, and it was not until a shakeup in the board's membership took place that CNOOC formally made its unsolicited offer.¹⁵⁸

149. David Barboza & Andrew Ross Sorkin, *Chinese Company Drops Bid to Buy U.S. Oil Concern*, N.Y. TIMES, Aug. 3, 2005, at A1.

150. See *id.*

151. D'Amato, *supra* note 88, at 1.

152. *Id.* at 1-2.

153. *Id.* at 2.

154. *Id.* at 2. According to D'Amato

the loan package for the acquisition is heavily subsidized. Seven billion dollars came from CNOOC's parent, China National Offshore Oil. Of that amount, \$2.5 billion dollars is interest free, and the rest is a 30-year loan at 3 percent [interest]. . . . Six billion more dollars came from a State-owned bank."

Id.

155. Crawford & Young, *supra* note 33.

156. Iritani, *supra* note 80, at C1.

157. Crawford & Young, *supra* note 33.

158. Barboza & Sorkin, *supra* note 149, at A1. "[W]hen Unocal was up for auction, [CNOOC's] independent directors voted against pursuing a bid during a heated board meeting, just 15 hours before the bidding deadline." *Id.*

A. THE CONGRESSIONAL RESPONSE

On June 24, 2005, forty-one members of Congress from both parties sent a letter urging a thorough CFIUS review of the deal to Treasury Secretary John W. Snow.¹⁵⁹ Writing that the “[e]nergy security is a matter of significant and increasing importance for the US,” these members indicated that they were “very concerned about China’s ongoing and proposed acquisition of energy assets around the world, including those in the US.”¹⁶⁰ On June 27, 2005, Joe Barton, the chairman of the House Energy and Commerce Committee sent a letter to President Bush reminding him that “[t]he Chinese are great economic and political rivals, not friendly competitors or allies in democracy.”¹⁶¹ Clearly the stage was being set for the drama that was to unfold.

1. *House Resolution 344*¹⁶²

On June 29, 2005, Representative Richard Pombo of California’s 11th district introduced a bill in the House of Representatives expressing Congress’s national security concerns regarding the deal.¹⁶³ The bill was referred to both the House Committee on Financial Services and the Committee on International Relations.¹⁶⁴ On June 30, 2005, the House suspended the rules and the resolution passed without amendment by an overwhelming vote of 398 to 15, with 20 representatives not voting.¹⁶⁵

First, the resolution recognizes that oil and natural gas are strategic assets, the control of which is “critical to national security and the Nation’s economic prosperity.”¹⁶⁶ In support, the bill cites statistics regarding the world’s current output of oil and natural gas, the increased world consumption of these resources, and the importance of having control of oil and natural gas in the 21st century. Regarding China, the bill mentions the fact that President Bush’s 2002 National Security Strategy concluded that “China remains strongly committed to national one-party rule by the Communist Party.”¹⁶⁷ Finally, the resolution takes note of China’s increased oil consumption in recent years.¹⁶⁸

159. Iritani, *supra* note 80, at C1. In addition to congressional concern, approximately 73 percent of the American public opposed the merger in July 2005. David R. Baker, *The China Connection Lawmakers Lash Out at CNOOC’s Unsolicited Bid for Unocal*, S.F. CHRON., July 14, 2005, at E1.

160. John Chan, *China’s Bid for Unocal Heightens Tension with the US*, WORLD SOCIALIST WEB SITE, July 6, 2005, <http://www.wsws.org/articles/2005/jul2005/chin-j06.shtml>.

161. Letter from Congressman Joe Barton, Rep. 6th Dist. TX, to George W. Bush, U.S. President (June 27, 2005), available at http://energycommerce.house.gov/108/News/06282005_1577.htm.

162. The Senate produced a roughly similar version of this House Resolution. S. Res. 1412, 109th Cong. (2005).

163. H. R. Res. 344.

164. *Id.*

165. H.R. Doc. No. H5592 (2005) (bill status & summary).

166. H. R. Res. 344, at 1.

167. *Id.*

168. *Id.*

Turning towards the deal itself and its national security implications, the resolution first takes notice of the logistics of CNOOC and its offer. For one thing, "China owns approximately 70 percent of CNOOC [and] a significant portion of the CNOOC acquisition is to be financed and heavily subsidized by banks owned by . . . China."¹⁶⁹ Additionally, the resolution declares that the transaction "would result in [Unocal's] strategic assets . . . being preferentially allocated to China by the Chinese government," which would "weaken [U.S.] ability . . . to influence the oil and gas supplies of the Nation through companies that must adhere to United States laws."¹⁷⁰ Consequently, CNOOC would have control of "approximately one-third of all global excess oil production," a disconcerting thought considering that CNOOC never made any "commitment to sell [the resources] it develops to global energy markets instead of shipping it directly to China."¹⁷¹

The resolution also recognizes that not only would the CNOOC-Unocal merger transfer significant natural resources away from the United States and towards China, but it would also open the door for certain dual-use technologies to be exported to China.¹⁷² The dangerous possibility of these dual commercial/military use technologies falling into Chinese hands is alarming given the tenuous nature of Sino-American relations. Additionally, the bill also discusses the fact that Chinese oil companies are "active in parts of the world, such as Sudan and Iran, that are subject to United States sanctions laws."¹⁷³ Consequently, "the national security of the United States [could be] threatened by the export of sensitive, export controlled, and dual-use technologies to such countries."¹⁷⁴

Finally invoking Exon-Florio to underscore the President's authority in this situation and to encourage him to act, the House of Representatives resolved the following with respect to CNOOC's proposed take-over of Unocal:

- (1) the Chinese state-owned China National Offshore Oil Corporation, through control of Unocal Corporation obtained by the proposed acquisition, merger, or takeover of Unocal Corporation, could take action that would threaten to impair the national security of the United States; and
- (2) if Unocal Corporation enters into an agreement of acquisition, merger, or takeover of Unocal Corporation by the China National Offshore Oil Corporation, the President should initiate immediately a thorough review of the proposed acquisition, merger, or takeover.¹⁷⁵

169. *Id.* at 2.

170. *Id.* at 2-3.

171. *Id.*

172. *Id.* at 3.

173. *Id.*

174. *Id.*

175. *Id.* at 5.

Needless to say, the Chinese government was highly critical of what it perceived to be the U.S. government's interference in international trade.¹⁷⁶ Demonstrating the contentious nature of the resolution and the underlying transaction, House members shot back a reply reflecting the complicated nature of the dilemma.¹⁷⁷

2. *Armed Services Committee Hearings*

In July 2005, the House Armed Services Committee began its own investigation into the Unocal-CNOOC deal by inviting commentators to submit their opinion of the proposed take-over.¹⁷⁸ In his opening statement, Chairman Duncan Hunter expressed his belief that "[t]he simple fact is that energy is a strategic commodity" affecting national security and that the Unocal-CNOOC deal would help China to increase "its leverage over U.S. interests" in regions affected by the deal.¹⁷⁹ Hunter also considered the fact that "Chinese enterprises do not behave as normal commercial companies on the international market."¹⁸⁰ Accordingly, since the Chairman of CNOOC, Fu Chengyu, is also the Secretary of the Communist Party's Leading Group, Chairman Hunter believed that the deal would pave the way for the Communist Party to use increased energy resources to serve its whimsical wishes to the disadvantage of the United States.¹⁸¹

The commentators' submissions during the Armed Services Committee hearings on the Unocal-CNOOC deal included arguments both in support and against the take-over. The arguments in defense of the transaction tended to lose sight of the broader national security and symbolic

176. *National Security Implications of the Possible Merger Between the China National Offshore Oil Corporations with Unocal Corporation: Hearing Before the H. Comm. on Armed Servs.*, 109th Cong. 2 (2005) (statement of Duncan Hunter, Chairman, House Armed Services Committee). The Chinese Foreign Ministry issued the following statement: "We demand that the U.S. Congress correct its mistaken ways of politicizing economic and trade issues and stop interfering in the normal commercial exchanges between enterprises of the two countries." *Id.*

177. *Id.* at 1. Chairman Hunter of the Armed Services Committee said the following in reply to the Chinese Foreign Ministry's statement:

With all due respect to the Chinese Foreign Ministry, it's not a normal commercial exchange when one of the parties to a deal is owned and operated by a totalitarian communist government that does not answer to the rules of the market. . . . Even when we [Committee members] disagree with one another, we answer to the American people, not the demands of the Chinese Foreign Ministry.

Id.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* Chairman Hunter said the following,

The chairman of the Chinese company, Fu Chengyu, also happens to be the secretary of the leading group of the Communist Party. Can anyone honestly believe that his primary interest lies in protecting the interest of his shareholders and the stability of global energy markets? Of course not. He answers to the politburo in Beijing.

Id.

implications of CNOOC's purchase of Unocal.¹⁸² For example, Jerry Taylor of the Cato Institute virtually guaranteed that America will have sufficient oil supply in the future regardless of whether the deal proceeds.¹⁸³ In support, Taylor wrote that "there are plenty of sellers in world oil markets," and since "Unocal's reserves are not large enough to provide CNOOC with significant market power in the global oil economy" and "China is a net oil importer," America need not worry about access to oil.¹⁸⁴ Taylor concluded by saying that the transaction will not provide China with an "[o]il [w]eapon," and that "[t]here is no reason to worry about the impact that a merger between CNOOC and Unocal might have on domestic energy prices or America's access to oil."¹⁸⁵

As demonstrated in other submissions to the House Armed Services Committee, however, the concern over the Unocal-CNOOC merger was not merely about the United States' future access to oil, though such anxiety is not unfounded. Rather, American concern was also rooted in the unnerving notion that Communist China would control an American corporation that dealt primarily in a strategic nature resource. As Frank J. Gaffney, Jr., the President and Chief Executive Officer of the Center for Security Policy, pointed out, the United States should not allow this transaction to proceed for three reasons:

- 1) The folly of abetting Communist China's effort to acquire *more* of the world's relatively finite energy resources. 2) The contribution this purchase would make to [China's] efforts to dominate the vital supply of rare earth minerals. And 3) the larger and ominous Chinese strategic plan of which this purchase is emblematic.¹⁸⁶

Gaffney believes that "China is mindful of the lessons of the 20th century with respect to energy insecurity. Imperial Japan's thirst for imported oil was a principal catalyst for its war with the United States."¹⁸⁷ Rather than follow in Japan's footsteps, however, China "is engaged in an even-more-ambitious effort to acquire legal title to energy resources."¹⁸⁸ Honorable C. Richard D'Amato, the Chairman of the U.S.-China Economic and Security Review Commission, also expressed concern regarding China's broader strategic plan in his submission to the House Armed

182. *Id.*

183. *Id.*

184. *National Security Implications of the Possible Merger Between the China National Offshore Oil Corporations with Unocal Corporation: Hearing Before the H. Comm. on Armed Servs.*, 109th Cong. 2 (2005) (statement of Jerry Taylor, Director, Natural Resources Studies, Cato Institute), available at <http://www.cato.org/testimony/ct-jt071305.html>.

185. *Id.*

186. *National Security Implications of the Possible Merger Between the China National Offshore Oil Corporations with Unocal Corporation: Hearing Before the H. Comm. on Armed Servs.*, 109th Cong. 1 (2005) (statement of Frank J. Gaffney, Jr., President and CEO, Center for Security Policy), available at <http://www.centerforsecuritypolicy.org/GaffneyChinaTestimony+7122.pdf>.

187. *Id.*

188. *Id.*

Services Committee.¹⁸⁹ In particular, D'Amato takes note of the fact that "Unocal holds reserves extending from the Gulf of Mexico to the Caspian region to Southeast Asia, as well as in Africa, Europe, and South America."¹⁹⁰ As a result of this take-over, "Chinese political influence in [these] regions [will be introduced or increase,] displacing the influence of an American company with American standards."¹⁹¹

D'Amato also raised several interesting issues regarding Chinese oil companies' behavior and role in world politics. For example, Sinopec has purchased a 50 percent stake in a major Iranian oil field and has "signed a \$70 billion deal to buy Iranian oil and gas over the next three decades."¹⁹² Alarming "[a]s a quid pro quo, China [intentionally] complicates international pressure on Iran regarding nuclear weapons development, and has given Iran advanced missile technology."¹⁹³ Additionally, China has arranged for other deals with Sudan and Venezuela, countries whose interests are decidedly adverse to those of the United States.¹⁹⁴ It appears that the transaction with Unocal at issue would be another in a long line of China's mercantilistic sweep of world oil resources that would leave America in the dust.

B. CNOOC-UNOCAL AND PRESIDENTIAL INACTION

Despite Congress's hearty involvement in attempting to block CNOOC's purchase offer, the Bush administration said relatively little about the deal, apart from urging the review process to be conducted in a fair and transparent manner.¹⁹⁵ Notwithstanding the tools at his disposal, President Bush followed his predecessors and reaffirmed a presidential predilection to refrain from referring proposed purchases of U.S. strategic assets for CFIUS review. In this particular instance, the White House's reticence is understandable at first blush given the tenuous nature of Sino-American relations; President Bush's inaction likely reflects the administration's recognition of the importance of maintaining and attempting to improve relations with China.¹⁹⁶ Regardless, the President's lack of involvement left Congress a wide-open field to consider the implications of the deal and the way in which the United States should handle the offer.¹⁹⁷ As discussed, the congressional response reflected America's uneasiness with such a takeover.

189. D'Amato, *supra* note 88, at 3.

190. *Id.*

191. *Id.* at 3.

192. *Id.* at 4.

193. *Id.*

194. *Id.* D'Amato writes that China purchases 50 percent of Sudan's oil exports in exchange for votes against UN Security Council action against Sudan's genocidal practices. Additionally, China plans to develop fifteen oil fields and buy 1.44 billion barrels of oil per year from Venezuela. *Id.*

195. Iritani, *supra* note 80, at C1.

196. *Id.*

197. Jad Mouawad, *Congress Calls for a Review of the Chinese Bid for Unocal*, N.Y. TIMES, July 27, 2005, at C3.

C. THE WORLD AFTER CNOOC-UNOCAL

On August 2, 2005, CNOOC indicated that it would withdraw its offer for Unocal.¹⁹⁸ Surprisingly, CNOOC's failure to acquire Unocal did not appear to deter its prospects in its drive to acquire greater control of the world's oil and other fossil fuel assets. In fact, days after CNOOC dropped its bid for Unocal, oil industry analysts were already suggesting that CNOOC would continue "an aggressive international search for oil and gas supplies."¹⁹⁹ To support China's increased energy needs and its growing economy, these analysts suggested that CNOOC look for opportunities with fewer political implications.²⁰⁰ With strong political support and ready access to so-called cheap money, CNOOC should have little problem in its quest to quench the growing oil thirst of the Chinese economy.²⁰¹

China's oil aspirations aside, the fallout from Congress's involvement in the failure of CNOOC's bid raises concerns for similar American transactions abroad. Though China attempted to downplay the effect of its defeat on Sino-American relations,²⁰² any retribution abroad is not out of the question. Whether in future trade dealings with China or other nations, the United States should anticipate similar treatment from foreign governments when dealing with strategic assets. The reality is that the potential for foreign government interference is arguably greater after CNOOC-Unocal,²⁰³ especially since the United States has been a vocal

198. Barboza & Sorkin, *supra* note 149, at A6. American oil company Chevron ultimately merged with UNOCAL. Hil Anderson, *Unocal Votes to Accept Chevron Offer*, PLATT'S OILGRAM PRICE REP., Aug. 11, 2005, available at 2005 WLNR 13372129.

199. David Lague, *Aggressive Search by Cnooc for New Oil and Gas Seen*, N.Y. TIMES, Aug. 5, 2005, at C4.

200. *Id.*

201. *Id.* Even though analysts agree that another opportunity as lucrative as Unocal is not likely to come to CNOOC any time soon, they suggest that CNOOC turn its sights to two targets: Woodside Petroleum, located in Australia, and the Gorgon natural gas development, which, ironically, is led by Chevron. As an indicator that problems still remain, the Australian government rejected a 2001 takeover bid from Shell Oil Company "because it would have given a foreign company control over the extraction and marketing of a major Australian energy resource." *Id.* Evidently, the United States is not the only country that feels the need to act protectively against the Chinese. *Id.*

202. Keith Bradsher, *China Plays Down Bid's Failure*, N.Y. TIMES, Aug. 5, 2005, at C4. Though the Chinese foreign ministry in June 2005 said, "[w]e demand that the U.S. Congress correct its mistaken ways of politicizing trade and economic issues and stop interfering in the normal commercial exchanges between enterprises of the two countries," two months later, in August 2005, the ministry said, "[e]conomic and trade cooperation between companies from China and the United States are to the benefit of both sides . . . [CNOOC's] bid to merge with Unocal was a normal commercial activity between companies." *Id.*

203. Mouawad, *Congress Calls for a Review of the Chinese Bid for Unocal*, *supra* note 197, at C3. As Senator Byron L. Dorgan, a North Dakota Democrat said, "[d]o you think that Unocal could buy [CNOOC]? Not in a million years. The Chinese government would not allow that." *Id.*

critic of attempts abroad to inhibit foreign investment.²⁰⁴ Although only time can tell what the exact foreign reception will be, it appears that the outlook is not particularly bright.²⁰⁵

American investors' ability to invest in China and vice-versa is also cause for concern after CNOOC-Unocal.²⁰⁶ Chinese investors will likely be deterred from continuing to invest in the United States because of perceived bias and government meddling in the United States. Conversely, American investment in China may also be impacted. FDI in China was far from uncomplicated before CNOOC made its proposal. For one thing, China's legal system is not adequately sophisticated "to sustain growth and bolster the confidence of . . . foreign investors[.]"²⁰⁷ and China flatly denies foreign ownership of Chinese companies, particularly in the energy sector.²⁰⁸ While the CNOOC-Unocal debacle cannot be expected to make this policy any better, it would be duplicitous and imprudent for China to place further restrictions on American investments.

Whatever the outcome abroad, events since CNOOC withdrew its bid show that many of Congress's concerns were not unfounded. CNOOC will continue its aggressive search for oil in parts of the world the United States considers dangerous and controlled by governments or other entities aligned with terrorists. Notwithstanding the analysts' suggestion that CNOOC pursue opportunities in Australia, for example, the Chinese oil

204. "[T]he US Trade Representative has frequently stated that the system of corporate control in Japan has hampered investment by US companies and that regulatory practices in telecommunications in the European Union act as *de facto* FDI restraining measure." FDI, *supra* note 139, at 3. "Until the recent passage of the Australia-United States Free Trade Agreement (AUSFTA), the United States remained opposed to Australia's continued use of the FIRB [Foreign Investment Review Board] screening process and what it termed a 'relatively broad national interest test.'" Robertson, *supra* note 145.

205. Jad Mouawad, *Foiled Bid Stirs Worry for U.S. Oil*, N.Y. TIMES, Aug. 11, 2005, at C1. In August 2005, for example, David L. Goldwyn, a former assistant secretary of energy under President Clinton, said, "[w]hat this misguided policy did was to say the United States will not advocate fair trade when it comes to American assets . . . [and its behavior is] a little hypocritical." *Id.* Those involved in the industry also had similar concerns. The CEO of Exxon Mobil, Lee R. Raymond, said early in the takeover war that Congress would be making a "big mistake" to get involved because such action might incite retribution from foreign governments on American companies abroad. *Id.*

206. *Unocal Won't Be The Last, So Set the Rules Now*, BUSINESSWEEK, July 11, 2005, at 96, available at http://www.businessweek.com/magazine/content/05_28/b3942130.htm. During the height of controversy surrounding the merger proposal, China had "allowed \$48 billion in direct investment by U.S. companies and ha[d] kept U.S. interest rates low thanks to more than \$200 billion in Treasury Depart[ment] debt that it ha[d] amassed in its currency reserves." *Id.*

207. Henry J. Graham, *Foreign Investment Laws of China and the United States: A Comparative Study*, 5 J. TRANSNAT'L L. & POL'Y 253, 269 (1996). This is due, in large part, to the opposition in China to codification of contract and business law. *Id.*

208. Lou Dobbs, *Red Storm Ahead*, CNN.COM, July 15, 2005, <http://www.cnn.com/2005/US/07/15/unocal.china/>.

company has continued its foray into the third world.²⁰⁹ Its most recent deals aside, "CNOOC . . . has spent nearly \$2 billion over the last few years acquiring overseas oil and gas exploration assets in countries like Australia, Indonesia, Vietnam, Thailand, Bangladesh and Azerbaijan."²¹⁰ Had the CNOOC-Unocal merger been consummated, CNOOC outposts in those areas of the world would potentially have had access to sensitive Unocal technologies.

The United States, for its part, has continued to the beat of the same protectionist drum. Dubai Ports World (DP World), a United Arab Emirates/Dubai government-owned ports operator, recently paid \$6.8 billion to purchase P&O, a ports operator based in the United Kingdom, in late 2005.²¹¹ While this transaction may on its surface appear to be outside of American jurisdiction, the catch is that the transaction included ports P&O controlled in the United States.²¹² Early clamoring in the United States over the national security implications of DP World's control of the American ports was reminiscent of the response to CNOOC's bid to purchase Unocal.²¹³ Though there are many differences between the two deals,²¹⁴ congressional reaction was predictable, given the experience with CNOOC.²¹⁵ DP World ultimately consented to a forty-five day review of the deal, but overwhelmingly negative political pressure in the United States forced DP World to agree to sell off the U.S.-based interests it had acquired from P&O.²¹⁶ Yet again, congressional interference managed to scuttle an international merger agreement.

209. David Barboza, *Chinese Energy Giant to Buy Stake in Nigerian Oil Field*, N.Y. TIMES, Jan. 10, 2006, at C5. On January 9, 2006, for example, CNOOC announced that it would purchase a large stake in a Nigerian oil and gas field for \$2.3 billion in cash. As a result of the deal, "[CNOOC] would acquire almost half of an oil field in the Niger Delta, one of the world's largest oil and gas basins." *Id.* Additionally, CNOOC also decided to spend "\$2.28 billion cash to acquire a 45 percent interest in an offshore oil license . . . from South Atlantic Petroleum of Nigeria." *Id.*

210. *Id.*

211. Editorial, *Paranoia About Dubai Ports Deal Is Needless: The Bush Administration Is Right to Defend the Takeover*, FIN. TIMES (LONDON), Feb. 21, 2006, at 16 [hereinafter *Paranoia*].

212. These ports are the ports of Miami, New Orleans, Baltimore, Philadelphia, New York, and New Jersey, all of which are decidedly strategic assets by virtue of their size, function, and location. *Id.*

213. *Id.*

214. Most notably, the fact that the United Arab Emirates is a strategic ally of the United States in the Middle East. *Id.*

215. The House of Representatives and the Senate each introduced their own version of the Foreign Investment Security Act of 2006, a bill specifically created "[t]o require an investigation under the Defense Production Act of 1950 of the acquisition by Dubai Ports World of the Peninsular and Oriental Steam Navigation Company." See S. 2333, 109th Cong. (2nd Sess. 2006); H.R. 4807, 109th Cong. (2nd Sess. 2006).

216. Robert Wright, *SSA Asks Citigroup to Advise on Options*, FIN. TIMES (LONDON), Mar. 18, 2006, at 21.

V. CONCLUSION: DOES AMERICA NEED STRONGER CONTROLS ON FOREIGN INVESTMENT?

FDI in U.S. strategic assets is much akin to a hit or miss game; it is apparently impossible to predict with reasonable certainty the ultimate success of any purchase offer. Statistics discussed above indicate that the President's chief tool for protecting national security by voiding foreign transactions, Exon-Florio, has only really been used once since its enactment.²¹⁷ Yet, recent history reveals that two high-profile deals died even before the review process could be initiated. Other mechanisms rather than the express force of CFIUS review must be at work. Political pressure and the threat of congressional action are two valid guesses. In the CNOOC-Unocal and DP World cases, foreign investors faced significant congressional opposition that was ultimately approved by both the House of Representatives and the Senate individually. In driving these resolutions through the respective houses of Congress, representatives and senators were outspoken about the negative impact of the transactions. In time, the foreign investors involved became nervous and disinterested, and they ultimately withdrew their bids for interest in U.S. strategic assets.

The mere fact that CNOOC and DP World withdrew their bids, however, does not necessarily mean that an appropriate national security review took place.²¹⁸ Nor does it mean that America's best interest was served in either case. From one perspective, the only arguable take-home lesson of either situation is that foreign investors should not underestimate the deterrent influence of the American political machine, not matter how lucrative the deal. In both situations, Congress has placed national security ahead of America's liberal investment disposition—perhaps acceptable given the reality of today. The problem, however, is that without thorough statutory review, the case-by-case approach in each transaction provides little regularity and poor transparency. Without an identifiable set of criteria that generally governs the review of foreign merger or acquisition transactions—which is what Exon-Florio is designed to do—the American public cannot know with any greater certainty whether congressional lawmakers have made the correct decision. In neither case did Congress produce a detailed, itemized report where it reviewed specific aspects of the proposed deal. Rather, congressional leaders haphazardly held press conferences, gave interviews, and introduced legislation, the product of which was a political snowball against which CNOOC and DP World had no hope.

This is a situation that requires action and adherence to strict standards. Oil is an example of a powerful strategic asset on which most oil dependant nations have placed a tremendous premium. Globalization is an inescapable movement in which the American economy is heavily in-

217. See *supra* Section III.B.2.

218. Most notably the fact that the United Arab Emirates is a strategic ally of the United States in the Middle East. *Paranoia*, *supra* note 211, at 16.

volved and upon which it heavily depends. Foreign companies will likely continue to make other purchase offers similar to those in CNOOC-Unocal and DP World; this fact is unavoidable. To effectively deal with these transactions, Congress must follow closely the current mandates of Exon-Florio and also should modify it to create a legal infrastructure modeled on industry-specific controls that provide categorical restrictions on foreign investment while also offering the opportunity for CFIUS to conduct a case-by-case review using a set of specific, identifiable criteria. While congressional leaders are currently working on changes to Exon-Florio to juggle CFIUS' membership or change CFIUS altogether,²¹⁹ these efforts fall short of the transparency and conciseness that is necessary to guarantee effective, balanced review in the future.²²⁰

Perhaps more controversy is necessary to convince Congress to apply its efforts not to political snowballing, but to deliberate and thorough review. Curiously, many analysts believe that if CFIUS had had the opportunity to review the CNOOC-Unocal merger—as CNOOC offered²²¹—CFIUS would have approved the transaction.²²² While this suggests that perhaps Congress made a mistake in its hysteria, the fact remains that without a report conducted in accordance with a set of identifiable criteria, we cannot know with greater certainty if the decision was appropriate. This lack of transparency puts American trade interests and national security concerns at risk by denying the oversight this process needs. CFIUS review is supposed to protect national security, but also protect trade. With appropriate review, we can continue building a safer, yet more open society.

219. David D. Kirkpatrick & Patrick Healy, *Bush Official Calls Reviews for Deals Adequate*, N.Y. TIMES, Mar. 15, 2006, at A24.

220. As history has shown, involving the White House in these reviews is unrealistic because of the highly charged political nature of the transactions. In both CNOOC-Unocal and DP World, President Bush was reluctant to get involved for fear of alienating important trade and strategic allies.

221. Loretta Ng & Wing-Gar Cheng, *Cnooc to Meet 'All Demands' of U.S. Govt to Win Unocal, Fu Says*, BLOOMBERG.COM, June 30, 2005, http://www.bloomberg.com/apps/news?pid=10000087&sid=ahB6Tx3TEMAk&refer=top_world_news.

222. Lovells International Law Firm & Association of Corporate Counsel, *Sino-Foreign Oil and Gas Industry, Legal Risk Comparative Analysis*, November 2005, at 16 (on file with the author).

Comment and Casenotes

