

“WE WOULDN’T TRANSFER TITLE TO THE DEVIL”:
 CONSEQUENCES OF THE CONGRESSIONAL
 POLITICIZATION OF FOREIGN DIRECT
 INVESTMENT ON NATIONAL
 SECURITY GROUNDS

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I. INTRODUCTION

There is no question that the United States relies heavily on foreign direct investment (“FDI”) for its economic health.¹ FDI has played an important role in much of the history of the United States, often proving to be a source of growth and economic vitality.² In recent years, however, the specter of foreign terrorism has colored American perceptions of FDI and its potential connections with untrustworthy governments. This fear, as well as the rising power of strategic competitors (in particular, the People’s Republic of China³), has prompted many pundits and politicians to question the wisdom of the United States’s historically open investment policy. There is a sense that FDI may serve as a tool for foreign governments to gain footholds in vital industries, to siphon off valuable or sensitive American technologies, or simply to provide a means for sabotage.⁴

To combat this threat, the United States government created a FDI review process under the Exon-Florio Amendment of the Omnibus Trade and Competitiveness Act of 1988 (“Exon-Florio”).⁵ Exon-Florio and its primary regulatory apparatus, the Commission on Foreign Investment in the United States (“CFIUS”), has served for over two decades to identify problem transactions, mitigate their effects on national security, and provide the president with a means to intervene in FDI transactions. Unfortunately, Exon-Florio and CFIUS are imperfect tools. As recently illustrated by the downfall of two proposed transactions, CNOOC-Unocal and Dubai Ports

1. See generally EDWARD M. GRAHAM & DAVID M. MARCHICK, U.S. NATIONAL SECURITY & FOREIGN DIRECT INVESTMENT 75-94 (2006) (discussing the effects of foreign investment on the United States economy, workers, research and development, economic growth, and spillovers).

2. *Id.* at 1 (noting that foreign direct investment has constituted a “vital and beneficial part of the U.S. economy” for nearly a century).

3. See generally *id.* at 96-101 (discussing China as “A New Player in FDI”).

4. See generally Jason Cox, Note, *Regulation of Foreign Direct Investment After the Dubai Ports Controversy: Has the U.S. Government Finally Figured Out How to Balance Foreign Threats to National Security Without Alienating Foreign Companies?*, 34 J. CORP. L. 293, 298-300 (2008) (discussing “Perceived Threats to National Security”).

5. Omnibus Trade & Competitiveness Act of 1988, 100 Pub. L. No. 418, § 5021, 102 Stat. 1107, 1425-26 (1988) (amending Title VII of the Defense Production Act of 1950, 50 U.S.C. app. §§ 2158-2169 (1982), by adding Section 721, 50 U.S.C. app. § 2170 (1988)).

World-P&O Steam Navigation, the Exon-Florio review process is far too susceptible to outside political forces in the form of overzealous congressional interference with CFIUS and its mission. Rather than address national security concerns, unrestricted political interference based on political gamesmanship and economic protectionism⁶ can result in a chilling effect on future investment opportunities. Political interference may ultimately be unavoidable, but the current system could be reformed so that it decreases the likelihood that Congress will interfere in FDI under the pretext of national security.

This paper will consist of four parts. In Part I, I will chart the development of Exon-Florio and CFIUS from its earliest days in the late 1980s and 1990s, through its expansion under the Byrd Amendment, up until the terrorist attacks of September 11, 2001. In Part II, I will explore the two deals that exemplify how politicization can interfere with the appropriate review of problem transactions: (i) CNOOC-Unocal and (ii) Dubai Ports World-P&O. In Part III, I will explore how a politicized review process is inherently unworkable (i) as a matter of institutional competence and (ii) in how it exposes the review process to third-party abuse. In addition, I will explore how Congress responded to CNOOC and DP World with the passage of the Foreign Investment and National Security Act of 2007 ("FINSA").⁷

Finally, in Part IV, I will propose two potential reforms that would address many congressional concerns (namely, lack of transparency and improper scope) and that potentially could reduce the likelihood of congressional interference in the Exon-Florio process. First, CFIUS should publicize the process of reaching mitigation agreements, a process that was only recently codified in FINSA. By creating a more formalized mitigation process and keeping past agreements accessible to the public in a database, foreign entities can obtain a better idea of what CFIUS (and, by extension, the President) is concerned with, depending on country of origin and area of investment. More importantly, formalization and publication would help allay Congress's fears that problem deals are slip-

6. See *infra* Parts III(a)-(b).

7. Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, 121 Stat. 246 (amending Section 721 of the Defense Production Act of 1950, 50 U.S.C. app. § 2170 (2006)).

ping by CFIUS's limited resources by creating a more transparent process that is subject to greater oversight. Second, I will argue that implementation of the "national infrastructure" language in FINSA remains overly vague and that CFIUS's review process should include an analysis of regulatory parity with foreign nations who seek to invest within our borders. By doing so, CFIUS can address criticisms that it is myopic by viewing transactions within the broader framework of bilateral relationships between the United States and investing states. Moreover, regulatory parity provides a workable and legitimate method of dealing with national security concerns regarding problem states such as China, without resorting to crude protectionist arguments.

II. EXON-FLORIO AND THE RISE OF CFIUS

A. *Foreign Investment in the United States in the 20th Century*

In simple terms, foreign direct investment involves business or state entities from one country exercising direct control over an entity of another country.⁸ In most cases, FDI is an important source of economic gain for the invested-in state in the relationship.⁹ Not only does FDI induce trade, but many have suggested that it can also introduce technological advancement, capital influx, improved managerial skills, and, in some cases, local employment.¹⁰ Some have even argued that FDI can have a positive impact on international relations, suggesting that foreign investors will lobby their home govern-

8. GRAHAM & MARCHICK, *supra* note 1, at 2. For this paper, my concern is primarily with foreign *direct* investment (FDI) rather than *passive* investment. The latter is more commonly associated with investment in real estate or non-controlling shares of stock. Passive investment is further distinguished from direct investment in that the foreign entity in passive investment normally does not have managerial or control rights in the domestic target corporation.

9. See, e.g., Joseph E. Reece, *Buyer Beware: The United States No Longer Wants Foreign Capital to Fund Corporate Acquisitions*, 18 DENV. J. INT'L L. & POL'Y 279, 279, 303 (1990) (arguing that foreign investment should be considered as a valuable asset); GRAHAM & MARCHICK, *supra* note 1, at 75-94 (Chapter 3 on "The Economic Effects of Foreign Investment in the United States").

10. Michael A. Geist, *Toward a General Agreement on the Regulation of Foreign Direct Investment*, 26 LAW & POL'Y INT'L BUS. 673, 678-79 (1995).

ments to adopt policies that protect their investments abroad (i.e., policies that benefit the target country).¹¹

As the world's preeminent economic and political superpower, the United States has been called the "single most important market for foreign investors,"¹² and its experience with FDI has yielded predictably fruitful results.¹³ FDI in the United States has been not only a beneficial side effect of its economic growth but also an *essential* contributor to American economic well-being.¹⁴ Historically, therefore, the United States has encouraged FDI¹⁵ with relatively expansive and liberal investment policies.¹⁶ Indeed, the United States has, until relatively recently, lacked an FDI review process.¹⁷

Yet the United States's attitude towards FDI has not always been so rosy, particularly when that foreign investment has implicated American national security. Far from being a new phenomenon, the tension between FDI and national security has reared its head multiple times throughout the 20th century. During the First World War, for example, the U.S. government identified and seized assets that had been subject to heavy German investment in the years leading up to the war, specifically targeting the nascent chemical industry as an area

11. *Id.* at 679 (suggesting that this form of lobbying is even more effective than when the invested-in country lobbies on its own behalf).

12. *Id.* at 688.

13. *See, e.g.,* GRAHAM & MARCHICK, *supra* note 1, at 1 ("[FDI] has been a vital and beneficial part of the U.S. economy.").

14. *See id.* at 75-77 (noting that because the United States lacks sufficient domestic savings, it must rely on FDI or else risk "interest rates rising significantly, with the likely consequence of curtailing investment, growth, and productivity").

15. Reece, *supra* note 9, at 282. Reece notes that the first Secretary of the Treasury, Alexander Hamilton, welcomed foreign investment as a "valuable addition" to the nascent American economy. *Id.*

16. Geist, *supra* note 10, at 688. This tradition of being investment-friendly stretches back to the country's earliest years. Reece writes that Thomas Jefferson was only able to carry out the Louisiana Purchase with British, French, and Dutch loans, and that nearly two-thirds of all new investment in the American rail system in the 1800s came from foreign coffers. Reece, *supra* note 9, at 282-83.

17. Geist, *supra* note 10, at 688 (noting that the United States does not have a "single FDI code").

particularly important to American war strategies.¹⁸ This initial bout of restrictions bled into the interwar years, with the government restricting investment in sectors like telecommunications, transportation, and energy, primarily because it viewed such sectors as important to the country's security.¹⁹ Between 1918 and 1940, Congress passed a raft of legislation that was at least partially intended to keep sensitive sectors of the American economic machine in the hands of American citizens.²⁰

For most of the interwar years, this hodgepodge of economic regulation against foreign investment remained the basis of the American response to problematic FDI.²¹ Without a uniform standard, the government looked to other, existing legislation to address individual problem areas. During the Second World War, for example, the government turned to the antitrust scheme to deal with German investments.²² With the end of the war, concerns over FDI and national security dissipated. While foreign investment in the United States would grow during the first few decades of the postwar period, particularly as Europe and Japan rebuilt their devastated economies,²³ FDI in the postwar decades remained small when compared to the size of the U.S. economy as a whole.²⁴

In the 1970s, FDI in America experienced a major growth spurt.²⁵ OPEC had become a major player in the global mar-

18. GRAHAM & MARCHICK, *supra* note 1, at 5-6. Significantly, FDI did not pick up at prewar levels after the seizures, in part because foreign investors no longer viewed the United States as a safe investment. *Id.* at 8.

19. *Id.* at 11.

20. *See, e.g., id.* at 9-14 (describing the Radio Act (telecommunications), the Air Commerce Act (airlines), the Jones Act (coastal shipping), and others).

21. *See* Reece, *supra* note 9, at 284 (noting that "regulation of [FDI] was essentially ignored from the early 1900s through World War II," except for some regulations of sensitive economic sectors related to national security).

22. GRAHAM & MARCHICK, *supra* note 1, at 17. Once again, the targets were German subsidiaries in the United States, though evidence remains obscure as to whether German business influences caused any negative impact on the American economy during the war. *See id.* at 17-18 (detailing the evidence for and against German interference, particularly regarding the German rubber producer I. G. Farben).

23. *See id.* at 18-19.

24. *Id.* at 19 ("In 1977 the ratio of the stock of FDI to the net worth of U.S. nonfinancial corporations was about 2.6 percent").

25. Reece, *supra* note 9, at 285.

ket and its oil embargo opened up significant surplus dollars for investment by OPEC nations.²⁶ In addition, the decade witnessed the "stagflation" phenomenon, leading to a devalued American dollar and making the U.S. economy even more attractive to investment with foreign currency.²⁷ Alarmed at the influx of foreign currency, Congress responded with a series of legislative hearings and studies on the issue of foreign investment.²⁸ These studies concluded that the United States "lacked a coherent mechanism" to deal with the growing tide of FDI²⁹ and prompted President Gerald Ford to create the Committee on Foreign Investment in the United States ("CFIUS") on May 7, 1975.³⁰ At its creation, CFIUS was responsible for "monitoring the impact of foreign investment . . . and for coordinating the implementation of United States policy on such investment."³¹ What this "monitoring" and "coordinating" actually meant, however, would remain unclear until the end of the 1980s.

B. *The 1980s and the Exon-Florio Amendment*

In the 1980s the world witnessed unprecedented growth in FDI. As reported to the United Nations Conference on Trade and Development, which tracks global FDI, foreign investment grew at nearly a 12 percent annual compound rate between 1985 and the mid-2000s, or from \$1 trillion in 1985 to \$9 trillion by the end of 2004.³² In the 1980s alone, foreign investment even outpaced trade growth.³³ From a U.S. perspective, between 1980 and 1988 FDI in the United States more than tripled from \$90 billion to \$304.2 billion.³⁴ Yet raw

26. *Id.*

27. *See id.*

28. *See id.* at 285-86 (noting a series of legislative hearings and studies meant to study foreign investment, which Reece suggests had little immediate impact but was important in "laying the groundwork" for Exon-Florio).

29. Deborah M. Mostaghel, *Dubai Ports World under Exon-Florio: A Threat to National Security or a Tempest in a Seaport?*, 70 ALBANY L. REV. 583, 589 (2007).

30. Exec. Order No. 11,858, 3A C.F.R. 159 (1975); Mostaghel, *supra* note 29, at 589.

31. 3A C.F.R. at 160.

32. GRAHAM & MARCHICK, *supra* note 1, at 21-22.

33. Geist, *supra* note 10, at 673.

34. Thomas W. Soseman, Comment, *International Law – The Exon-Florio Amendment to the 1988 Trade Bill: A Guardian of National Security or a Protectionist Weapon?*, 15 J. CORP. L. 597, 597 (1990).

numbers tell only part of the story. The growth of FDI, both globally and in the United States, contributed to a never-before-seen level of international economic integration in areas ranging from the debt market to the mergers and acquisitions market.³⁵ In other words, while the raw flow of money increased tremendously, so too did the impact of this flow in the form of growing assimilation between foreign and domestic firms.³⁶

The congressional reaction to the FDI craze of the 1980s was equally unprecedented. Two high-profile, controversial bids by foreign firms in the mid-1980s finally spurred Congress to pass its first law dedicated to addressing the tensions between national security and open investment. Though both deals ultimately collapsed, their impact on FDI in the United States was profound. The first deal was corporate raider (and British citizen) Sir James Goldsmith's attempted takeover of Goodyear Tire and Rubber, an American firm with important ties to the defense and technology sectors.³⁷ Goodyear, for its part, put up a spirited defense that would convince Goldsmith to abandon his bid, but at the cost of Goodyear borrowing heavily and paying Goldsmith \$90 million in greenmail.³⁸ Additionally, Goodyear's home state, Ohio, passed an anti-takeover statute designed to prevent Goldsmith from completing his hostile takeover.³⁹

The second deal was the Japanese firm Fujitsu Ltd.'s attempted takeover of Fairchild Semiconductor Corporation, a manufacturer of computer chips and other sensitive technology, in 1986.⁴⁰ In contrast to the relatively private demise of Goldsmith's plan, the Fujitsu deal endured a much more pub-

35. GRAHAM & MARCHICK, *supra* note 1, at 21. See also Reece, *supra* note 9, at 279-81 (noting "increasing internationalization" of the debt market and of mergers and acquisitions).

36. Indeed, the boom in FDI can be attributed to a number of factors, not the least of which was the growth of large multinational corporations. GRAHAM & MARCHICK, *supra* note 1, at 21.

37. Soseman, *supra* note 34, at 599 (noting that "Goodyear had numerous contracts with the Pentagon").

38. Mostaghel, *supra* note 29, at 590. "Greenmail" refers to "the act or practice of buying enough stock in a company to threaten a hostile takeover and then selling the stock back to the corporation at an inflated price." BLACK'S LAW DICTIONARY (8th ed. 2004).

39. Soseman, *supra* note 34, at 600.

40. GRAHAM & MARCHICK, *supra* note 1, at 41.

lic funeral. This was due in part to the fact that Fujitsu-Fairchild tapped into American fears of Japanese expansion into beloved American landmarks and major defense contractors.⁴¹ Some went so far as to call the deal the moral equivalent of "selling Mount Vernon to the Redcoats."⁴² In response, President Reagan ordered both a Hart-Scott-Rodino antitrust review and a review by CFIUS of the Fujitsu transaction.⁴³ Fujitsu, realizing that the overwhelmingly negative political sentiment was insurmountable, withdrew its bid.⁴⁴

For many within Congress, the two deals highlighted that the existing framework for FDI review was woefully lacking. The few powers the president had to intervene were limited to primarily trade and tariff issues rather than FDI.⁴⁵ The closest thing to a national FDI regulatory body was CFIUS, which had been given the authority to "review" investments that "might have major implications for United States national interests."⁴⁶ As the Fairchild and Goodyear deals illustrated so clearly, however, CFIUS could do little else beyond this "review." CFIUS was a "purely advisory body to the president[;] it was not empowered to pass regulations or take substantive action short of recommending that the president invoke the [International Emergency Economic Powers Act]."⁴⁷ President Reagan, however, had little desire to invoke such a draconian law in rela-

41. *See id.* at 41 (noting industry observers' comparison of the takeover bid to the sale of a national monument); Soseman, *supra* note 34, at 599 (noting concerns that "Fujitsu could not be trusted to protect classified technology").

42. GRAHAM & MARCHICK, *supra* note 1, at 41.

43. *See* Joseph Mamounas, Note, *Controlling Foreign Ownership of U.S. Strategic Assets: The Challenge of Maintaining National Security in a Globalized and Oil Dependent World*, 13 L. & BUS. REV. AM. 381, 388 (2007).

44. Soseman, *supra* note 34, at 599; GRAHAM & MARCHICK, *supra* note 1, at 41.

45. *See* Mostaghel, *supra* note 29, at 587 (noting that "the acts of the 1930s through the 1950s generally pertained to products imported into the United States").

46. Exec. Order No. 11,858, 3A C.F.R. 159 (1975). Additionally, "as the need [arose]," CFIUS was to "submit recommendations and analyses to the National Security Council and to the Economic Policy Board." *Id.*

47. GRAHAM & MARCHICK, *supra* note 1, at 41. The International Emergency Economic Powers Act or IEEPA allows the president to "seize foreign-owned assets in the United States in a time of a declared national emergency." *Id.* at 20.

tion to either the Fairchild or the Goodyear deals.⁴⁸ He was concerned that interfering in such a manner would “chill foreign investment and hinder efforts to open the Japanese Markets.”⁴⁹

With CFIUS’s impotence seemingly laid bare, Senator James Exon (D-NV) proposed a bill that would give the executive branch broad discretion to limit foreign investment should it be deemed that such investment threatened national security or “essential commerce.”⁵⁰ There was fierce debate over the proposed law, particularly in regards to the inclusion of “essential commerce.”⁵¹ Reagan even threatened to veto an entire iteration of the Omnibus Bill that included an initial version of Exon’s amendment.⁵² When Exon’s bill eventually became law on August 23, 1988,⁵³ as the Exon-Florio Amendment to the Omnibus Trade and Competitiveness Act of 1988,⁵⁴ it contained several differences from Senator Exon’s original vision. Exon’s “essential commerce” language was jettisoned entirely, after Secretary of the Treasury James Baker criticized it.⁵⁵ Similarly, Exon’s “economic factors” (including welfare and employment), which were to have been part of the review calculus, were dropped in the bill’s final language.⁵⁶

48. *See id.* at 41. In the words of one senator, an invocation of the IEEPA would be “virtually the equivalent of a declaration of hostilities against the government of the acquirer company.” *Id.* at 42.

49. *Id.* at 41.

50. Foreign Investment, National Security and Essential Commerce Act of 1987, H.R. 3, 100th Cong. § 905(a) (1987). *See also* Mostaghel, *supra* note 29, at 591 (“The proposed [bill] granted the President discretionary authority to limit various types of foreign investment initiatives should they be perceived to threaten national security or necessary U.S. commerce.”).

51. For a detailed analysis of the debate surrounding the passage of Exon-Florio, see generally GRAHAM & MARCHICK, *supra* note 1, at 43-46.

52. *Id.* at 46 (“[T]he president took the extraordinary step of threatening to veto the entire trade act . . . if it included the amended Exon amendment.”).

53. Soseman, *supra* note 34, at 597.

54. Omnibus Trade & Competitiveness Act of 1988, 100 Pub. L. No. 418, § 5021, 102 Stat. 1107, 1425-26 (1988) (amending Title VII of the Defense Production Act of 1950, 50 U.S.C. app. §§ 2158-2169 (1982), by adding Section 721, 50 U.S.C. app. § 2170 (1988)).

55. GRAHAM & MARCHICK, *supra* note 1, at 43. *See also* Mostaghel, *supra* note 29, at 592 (explaining that the final bill removed the phrase “and essential commerce” from “national security and essential commerce”).

56. *See* GRAHAM & MARCHICK, *supra* note 1, at 44 (discussing Secretary of Commerce Malcome Baldrige’s objection to the consideration of factors

Exon achieved his primary goal, however, as the president now had a means of stepping between a foreign investor and a domestic firm *without* resorting to the bludgeon of declaring a national emergency under the IEEPA.⁵⁷

Exon-Florio represented the first time that the United States possessed a system devoted to the vetting of foreign investment when it affects national security. Exon-Florio authorized the President to investigate any proposed or pending takeovers "which could result in foreign control of persons engaged in interstate commerce in the United States."⁵⁸ If necessary, the President could also "suspend or prohibit any acquisition, merger, or takeover" if such transaction "threaten[ed] to impair the national security."⁵⁹

The review itself would be based on an analysis of several 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, and
- (3) the control of domestic industries and commercial activity by foreign citizens as it affects the capability and capacity of the United States to meet the requirements of national security.⁶⁰

According to the statute, in making his determination, the President would base his decision on whether there was "credible evidence" that the transaction *might* impair national

pertaining to "[t]he economic welfare of individual industries," and the subsequent omission of this provision).

57. *See id.* at 41-42 (explaining that the IEEPA empowered the president to prevent the foreign takeover of a U.S. company, contingent upon his declaration of a national emergency, and that the Exon bill was designed to provide an alternative means to that end).

58. 50 U.S.C. app. § 2170(a) (1988).

59. *Id.* § 2170(c).

60. *Id.* § 2170(e)(1)-(3) (current version at 50 U.S.C.S. app. § 2170(f)(1)-(3) (LexisNexis 2009)). Additional factors would later be added. *See, e.g., infra* text accompanying notes 324-27 (discussing FINSA); *infra* text accompanying notes 101-02 (discussing the Byrd Amendment).

security.⁶¹ The exact meaning of “national security,” however, was purposefully left ambiguous, in theory giving the President flexibility under Exon-Florio to deal with future and as yet unforeseen threats.⁶²

In December 1988, President Reagan issued Executive Order 12,661 delegating to CFIUS the responsibility of carrying out Exon-Florio.⁶³ CFIUS, as chaired by the Secretary of the Treasury, would include the Secretaries of State, Defense, and Commerce, as well as the United States Trade Representative, the Chairman of the Council of Economic Advisers, the Attorney General, and the Director of the Office of Management and Budget.⁶⁴ Additionally, CFIUS would be responsible for “coordinat[ing] the views of the Executive Branch and discharg[ing] the responsibilities with respect to [Exon-Florio].”⁶⁵

As originally formulated by Exon-Florio and Treasury Department regulations,⁶⁶ the CFIUS review process consisted of two distinct parts: a voluntary review period and, if necessary, an investigation period that could culminate in presidential action. Exon-Florio allowed foreign firms to voluntarily submit to review by CFIUS,⁶⁷ although any member of CFIUS could initiate a review independently should that member believe a transaction to fall within the scope of the Exon-Florio Amend-

61. 50 U.S.C. app. § 2158(d) (1988) (current version at 50 U.S.C.S. app. § 2170(d)(4)(A) (LexisNexis 2009)).

62. See Mostaghel, *supra* note 29, at 592-93 (discussing the drafters' commentary on the intentional omission of a definition for “national security”).

63. Exec. Order No. 12,661, 3 C.F.R. 618 (1988) (amending Exec. Order No. 11,858, 3A C.F.R. 159 (1975)).

64. 3 C.F.R. at 620-21 (amending 3A C.F.R. 159). Today, CFIUS has expanded to twelve members, and now also includes the Secretary of Homeland Security, 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. Joshua W. Casselman, Note, *China's Latest 'Threat' to the United States: The Failed CNOOC-Unocal Merger and its Implications for Exon-Florio and CFIUS*, 17 IND. INT'L & COMP. L. REV. 155, 158 (2007).

65. 3 C.F.R. at 620-21 (amending 3A C.F.R. 159).

66. Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons, 31 C.F.R. § 800 (2008). Note that much of the CFIUS process remains unchanged, even by FINSA. Subsequent changes are highlighted *infra*.

67. 31 C.F.R. § 800.401(a) (2008); 50 U.S.C.S. app. § 2170(b)(1)(C)(i) (LexisNexis 2009).

ment.⁶⁸ Though voluntary, foreign firms saw it as in their best interest to submit to CFIUS review early, as Exon-Florio has no statute of limitations, meaning that reviews and investigations could be conducted on deals conducted long ago where no approval was obtained.⁶⁹

Once the parties submitted to review, this first version of CFIUS commenced a thirty-day review period,⁷⁰ during which CFIUS would gather data and conduct any necessary investigations.⁷¹ At the end of the thirty days, CFIUS would decide whether further review in the form of an additional forty-five day investigation period was warranted.⁷² After the forty-five days, CFIUS was to notify the president with a recommendation on a course of action. The president then had fifteen days to announce whether he would take action under Exon-Florio.⁷³ If, however, no investigation was warranted after the initial thirty days, the review process concluded, and the foreign firm's interaction with CFIUS ended with the transaction proceeding forward normally.⁷⁴ Finally, Exon-Florio required the President to "immediately transmit to [Congress] a written report of the President's determination of whether or not to take action."⁷⁵ Such presidential action of course only applied

68. 31 C.F.R. § 800.401(b)-(c) (2008); 50 U.S.C.S. app. § 2170(b)(1)(D) (LexisNexis 2009); Reece, *supra* note 9, at 292.

69. See GRAHAM & MARCHICK, *supra* note 1, at 37 (explaining that CFIUS authority "is not time-limited, nor is there a statute of limitations"); Steven R. Weisman et. al., *Brakes on a Foreign Deal*, N.Y. TIMES, Feb. 21, 2008, at C1 ("CFIUS is a voluntary process . . . but most companies recognize that it's in their interest to file if the transaction might raise national security questions.").

70. 31 C.F.R. § 800.404(a) (2008); 50 U.S.C.S. app. § 2170(b)(1)(E) (LexisNexis 2009).

71. See 31 C.F.R. § 800.501(a)-(b) (2008) (laying out authority to conduct interviews or request meetings to "discuss and clarify issues pertaining to the transaction").

72. Both FINSA and the Byrd Amendment modify this by making investigations mandatory for certain transactions. 31 C.F.R. § 800.503(b), 50 App. U.S.C.A. § 2170(b)(2); see *infra* Part III(c).

73. 50 U.S.C.S. app. § 2170(d)(2) (LexisNexis 2009).

74. 31 C.F.R. § 800.502 (2008). See also Mostaghel, *supra* note 29, at 594 ("If the transaction successfully passes the review, CFIUS will not revisit the transaction later; the review functions effectively as a statute of limitations."). Note, however, that FINSA changes this by implementing a post-transaction monitoring system. See *infra* Part III(c).

75. *Id.* § 2170(g).

for those reviews that extended beyond the forty-five-day investigation period.

During the entire process, informal discussions between CFIUS and the foreign entity typically occurred, often leading to mitigation agreements that eliminated the need for an investigation or presidential action.⁷⁶ Additionally, if the foreign firm voluntarily submitted to review under CFIUS, then it could, at any point prior to the President's announcement of his decision, make a written request to withdraw such notification,⁷⁷ so as either to resubmit at a later date or take the risk that CFIUS would not conduct its own investigation sometime in the future. Unlike comparable review processes in Japan and France,⁷⁸ CFIUS review was not subject to judicial review.⁷⁹

The entire CFIUS process was and is subject to a relatively high level of confidentiality, as potential problem-transactions are often sensitive for both target and acquiring companies. Both Exon-Florio⁸⁰ and the accompanying regulations⁸¹ exempted any material information submitted to CFIUS from the agency disclosure requirements of 5 U.S.C. § 552.⁸² That being said, CFIUS has occasionally released decisions and rationales to the public in high-profile cases, as it did in the Mi-

76. See Ilene Knable Gotts et. al., *Is Your Cross-Border Deal the Next National Security Lightning Rod?*, BUS. L. TODAY, July-Aug. 2007, at 31, 32-33 (explaining the role of informal discussions during the CFIUS review process).

77. 31 C.F.R. § 800.505 (2008); 50 U.S.C.S. app. § 2170(b)(1)(C)(ii) (LexisNexis 2009).

78. U.S. GEN. ACCOUNTING OFFICE, FOREIGN INVESTMENT, FOREIGN LAWS AND POLICIES ADDRESSING NATIONAL SECURITY CONCERNS 8 tbl.1 (1996) [hereinafter GAO: Foreign Laws]. Note, however, that Japan and France also receive far less FDI per year than the United States. *Id.* at 3 fig.1.

79. 31 C.F.R. § 800.601(b)(2) (2008).

80. 50 U.S.C. app. § 2170(b) (1988) (current version at 50 U.S.C.S. app. § 2170(c) (LexisNexis 2009)).

81. 31 C.F.R. § 800.702(a) (2008).

82. FINSA, somewhat surprisingly, left much of the confidentiality aspects of Exon-Florio review intact. See *infra* Part III(c). But see Jonathon C. Stagg, Note, *Scrutinizing Foreign Investment: How Much Congressional Involvement is Too Much?*, 93 IOWA L. REV. 325, 356-57 (2007) (arguing that FINSA compromises sensitive information by "allowing disclosure to more individuals than necessary").

norco-Gold Fields deal in 1989⁸³ and Dubai Ports World-P&O in early 2006.⁸⁴

Responses to Exon-Florio and the newly-empowered CFIUS were pessimistic. Many who advocated free trade saw the hullabaloo surrounding Goodyear and Fujitsu-Fairchild as a "smokescreen" that used national security to hide the true motivation of economic protectionism, or, in the case of Fujitsu, as an expression of underlying American prejudice against Japan.⁸⁵ Such concerns were not without merit, as the 1980s were rife with concerns that foreign investment would weaken fiscal health and independence.⁸⁶ For these critics, Exon-Florio, even in its more moderate form, was an unnecessary solution to an exaggerated problem. Additionally, several features of the Exon-Florio review process evoked controversy and were derided as draconian or easily abused.⁸⁷ One article even suggested that CFIUS review would become the ultimate poison pill in takeover situations, with domestic corporations instigating CFIUS review only as a means of making the hostile acquisition of the American entity too costly and time-consuming to be economically feasible to the foreign bidder.⁸⁸ Despite these criticisms, beginning in the late 1980s Exon-Florio very much became the "center of the U.S. government's foreign economic investment controls."⁸⁹

C. *The Byrd Amendment*

In 1993, Congress was galvanized to revise Exon-Florio after the CATIC-MAMCO transaction.⁹⁰ In November 1989, the state-owned Chinese National Aero-Technology Import and

83. Soseman, *supra* note 34, at 610.

84. Press Release, U.S. Dep't of Treasury, CFIUS and the Protection of the National Security in the Dubai Ports World Bid for Port Operations (Feb. 24, 2006), *available at* <http://www.treas.gov/press/releases/js4071.htm>.

85. Mostaghel, *supra* note 29, at 591.

86. Reece, *supra* note 9, at 289.

87. *See, e. g.*, Henry J. Graham, *Foreign Investment Laws of China and the United States: A Comparative Study*, 5 J. TRANSNAT'L L. & POL'Y 253, 257-58 (1996) (noting that the Exon-Florio "process can easily be abused by an American company facing a hostile takeover by a foreign company").

88. Soseman, *supra* note 34, at 606-12.

89. Mamounas, *supra* note 43, at 387.

90. Mostaghel, *supra* note 29, at 597. The French company Thomson's failed bid for LTV Corporation's missile division also spurred Congress to

Export Corporation ("CATIC") acquired the American corporation MAMCO, a producer of metal parts for civilian aircraft, for \$5 million.⁹¹ CATIC was already viewed with suspicion as it had garnered a reputation for "disregarding foreign-export-control laws."⁹² After determining that MAMCO was in possession of technology that was subject to export controls, CFIUS and President George H. W. Bush ordered CATIC to divest itself of its new American subsidiary.⁹³ CATIC, however, decided to save face by selling MAMCO to an American corporation, DeCrane Aircraft.⁹⁴ Though a seemingly simple exercise of presidential authority, the MAMCO episode was marked by confusion and an overall ad hoc air, evidencing the fact that CFIUS had no way of dealing with the amorphous definition of "national security."⁹⁵ To critics of CFIUS, the transaction was plainly inappropriate, though it was unclear what threat, if any, CATIC's control of MAMCO actually posed to American national security.⁹⁶ Most arguments against the deal boiled down to the fact that CATIC was essentially an arm of the Chinese government.⁹⁷ In regards to state involvement, Exon-Florio was indeed silent as to appropriate action by CFIUS.

In response to the controversy over proper CFIUS review of national security concerns in a deal, Congress enacted the Byrd Amendment of the National Defense Authorization Act

act. *Id.* at 599-600. For my purposes, a discussion of only CATIC-MAMCO should suffice.

91. Jim Mendenhall, Recent Developments, *United States: Executive Authority to Divest Acquisitions under the Exon-Florio Amendment—The MAMCO Divestiture*, 32 HARV. INT'L L.J. 286, 290 (1991).

92. *Id.*

93. Mostaghel, *supra* note 29, at 598.

94. *See id.* at 598-99 ("Although CATIC never admitted that it would divest itself, it announced on August 2, 1990 that it would sell MAMCO to DeCrane Aircraft Holdings Inc., a U.S. company").

95. *See* Mendenhall, *supra* note 91, at 291-92 (noting that the ambiguous term "national security" created much confusion throughout the CATIC-MAMCO ordeal).

96. *See* Mostaghel, *supra* note 29, at 599 (noting that the White House did not specify the nature of the threat to national security in its divestiture order).

97. *See id.* at 600 ("The common point in the rejection of [CATIC-MAMCO and Thomson-LTV] was not necessarily the severity of the threat to national security, but rather that both foreign investors were governmental actors.").

for Fiscal Year 1993 ("Byrd Amendment"),⁹⁸ which effected three important changes to Exon-Florio. First, the Byrd Amendment imposed a *mandatory* forty-five day investigation for those transactions involving states or sovereign-owned firms which "could affect" national security, arguably establishing a broader standard than the previous standard, which encompassed only transactions that "threaten[ed] to impair" national security.⁹⁹ Second, the Byrd Amendment added fourth and fifth factors to be considered under any Exon-Florio review, namely the "potential effects of the proposed or pending transaction on sales of military goods, equipment, or technology to any country . . . identified by the Secretary of State"¹⁰⁰ and the "potential effects of the proposed or pending transaction on United States international technological leadership in areas affecting United States national security."¹⁰¹

D. *Exon-Florio in Action*

The impact of Exon-Florio can at times seem minor or trifling. Even today, CATIC-MAMCO stands as the only instance where a president has ever exercised his powers under Exon-Florio to unwind a transaction or order a divestiture.¹⁰² Between 1997 and 2004, a total of 470 notifications were received, resulting in 451 acquisitions but only eight forty-five-day investigations and only two presidential decisions (both not to act).¹⁰³ If we include all FDI transactions between 1988 and 2005, CFIUS was notified only 1,593 times,¹⁰⁴ accounting for a mere ten percent of the total number of FDI transactions during the same period. Of these 1,593 transactions, only

98. National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 837, 106 Stat. 2315, 2463-65 (1992) (amending 50 U.S.C. app. § 2170 (1988)).

99. *Compare* 50 U.S.C. app. § 2170(c) (1988) ("Action by the President"), with 50 U.S.C. app. § 2170(b) (1994) ("Mandatory Investigations"). See also Mostaghel, *supra* note 29, at 601 ("This change is significant because it is a broader standard than the 'threatens to impair the national security standard . . .'").

100. 50 U.S.C. app. § 2170(f)(4) (1994).

101. *Id.* § 2170(f)(5).

102. GRAHAM & MARCHICK, *supra* note 1, at 102.

103. U.S. GOV'T ACCOUNTABILITY OFFICE, DEFENSE TRADE: NATIONAL SECURITY REVIEWS OF FOREIGN ACQUISITIONS OF U.S. COMPANIES COULD BE IMPROVED 7 tbl.1 (2007) [hereinafter GAO: CALVARESI-BARR].

104. GRAHAM & MARCHICK, *supra* note 1, at 57 tbl.2.1.

twelve warranted presidential decisions (including the CATIC divestiture).¹⁰⁵ For members of Congress, this suggested that CFIUS was “reluctant to use the additional [forty-five] days allowed.”¹⁰⁶ Concerns that the undefined “national security” element would prove to be the undoing of foreign investment therefore seem to have been overly pessimistic, to say the least. However, the numbers tell only half the story. As many have argued, CFIUS and Exon-Florio have worked best as a deterrent, keeping foreign investors from even contemplating egregious transactions.¹⁰⁷ More importantly, CFIUS, through its informal mechanisms, provides opportunities for parties to change tactics and, if necessary, to restructure their deals to mitigate any impact on American national security, actions that are not easily captured by statistics.¹⁰⁸

In the halcyon days of the 1990s, though, foreign investment continued to flow in, with only limited interference from CFIUS. Arguments that CFIUS would become a poison pill or that the Exon-Florio Amendment would fatally chill foreign investment seemed ill-justified. Indeed, I would argue that, despite the numbers, CFIUS was doing its job appropriately for the needs of the times.¹⁰⁹ The times, however, were about to change dramatically in the next decade.

105. *Id.* at 56.

106. GAO: CALVARESI-BARR, *supra* note 103, at 3.

107. *See, e.g.*, Mamounas, *supra* note 43, at 394 (noting that “the influence of the [CFIUS] review process as a deterrent is powerful, yet subtle”).

108. *See* 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, 212-13 (2002) (“Exon-Florio’s value lies in . . . the opportunity created by the review process for the federal government to restructure a transaction.”).

109. Arguably, CFIUS’s narrow focus protects national security without chilling investment. *See* News Release, U.S. Dep’t of Treasury, Deputy Secretary Robert M. Kimmitt Remarks on Policy Principles for Sovereign Wealth Funds and Recipient Countries to the United States Council for International Business (Oct. 13, 2008), *available at* <http://www.treas.gov/press/releases/hp1202.htm> (“CFIUS continues to focus solely on *genuine* national security concerns and reviews annually only a small portion of transactions.” (emphasis added)).

III. CNOOC, DUBAI PORTS WORLD, AND THE POLITICIZATION OF THE EXON-FLORIO PROCESS

Since its creation, Exon-Florio has been criticized as a potential tool of economic protectionism.¹¹⁰ With the coming of the 21st century, an even greater threat to FDI would emerge: politicization.¹¹¹ Closely related to economic protectionism, politicization injects a level of political concern that is *external* to the main issues of national security. Politicization is often based not on fact but on emotion, and not on consensus but on division. Though politicization has always been a concern,¹¹² in the post-9/11 age two transactions would come to define the threat of politicization to FDI: CNOOC's attempted acquisition of Unocal, and DP World's acquisition of Pacific & Oriental Steam Navigation Company. Both acquisitions would have a similar galvanizing effect to that of Fairchild-Fujitsu and Goldsmith-Goodyear in the 1980s, and CATIC-MAMCO in 1993. However, with CNOOC and DP World, the levels of congressional and public interference into what should have been closed interactions between the parties and CFIUS reached unacceptable levels.

The political concerns regarding both these acquisitions can be traced to the terrorist attacks on September 11, 2001. The attacks signified a sea change in nearly every facet of American life, and CFIUS and Exon-Florio were no exception. For one thing, the nation's sudden preoccupation with its security spurred investing companies to submit to CFIUS notification far more often than in the previous decade.¹¹³ While George W. Bush's Administration did not turn CFIUS into a

110. See, e.g., Soseman, *supra* note 34, at 611 ("The danger exists that a future administration . . . could invoke the Exon-Florio amendment as a protectionist tool.").

111. See GRAHAM & MARCHICK, *supra* note 1, at 123 ("In the past few years, the CFIUS process has become increasingly politicized for commercial rather than national security reasons.").

112. See, e.g., Soseman, *supra* note 34, at 619 (noting that foreign investment must not be viewed in political terms).

113. Indeed, in 2005, 65 FDI transactions were submitted for notification, up by 22 from the 43 transactions in 2002. GRAHAM & MARCHICK, *supra* note 1, at 57 tbl.2.1. By 2006, the number would jump to 113. Gotts et. al., *supra* note 76, at 31. On the other hand, it should be understood that 2006 saw a total of 1,730 cross-border mergers and acquisitions, and even then, none of the 113 notifications resulted in any blockage by either CFIUS or the president. Thomas E. Crocker, *What Banks Need to Know About the Coming Debate*

wholesale bludgeon against FDI, it was clear that national security was being “construe[d] . . . more broadly” after 9/11.¹¹⁴ A side effect of the 9/11 attacks was the creation of a highly politicized society, one where politics and fear created a toxic atmosphere. This environment resulted in the first major public CFIUS received in over a decade.

A. *CNOOC-Unocal*

The first of two transactions that would define the problem of politicization occurred in mid-2005 in the context of the People’s Republic of China’s growing need for fuel and natural resources.¹¹⁵ In the spring of that year, Unocal Corporation (formerly the Union Oil Company of California) was in the process of being purchased by its large rival, Chevron Corporation. By the mid-2000s, Unocal, once a major international player in the energy market, had been reduced to a relatively modest oil company with gross revenues of only \$8.2 billion in 2004,¹¹⁶ and domestic oil production that amounted to less than one percent of total American consumption.¹¹⁷ In contrast, Chevron was an energy power player and was set to become the fourth-largest oil corporation in the world with its acquisition of Unocal.¹¹⁸ Toward this end, on April 4, 2005, the Unocal board accepted Chevron’s offer to acquire Unocal for \$16.5 billion mixed cash and stock.¹¹⁹ The acquisition

over CFIUS, *Foreign Direct Investment, and Sovereign Wealth Funds*, 125 *BANKING L.J.* 457, 458 (2008).

114. Crocker, *supra* note 113.

115. See Casselman, *supra* note 64, at 161 (noting that China had become “the world’s second largest oil consumer after the United States”).

116. DICK K. NANTO ET AL., *CRS REPORT FOR CONGRESS: CHINA AND THE CNOOC BID FOR UNOCAL: ISSUES FOR CONGRESS 9 (2005)*, available at <https://www.hsdl.org/homsec/docs/crs/nps21-060806-12.pdf>. Compare this with a company like ConocoPhillips, which had revenues of \$135.4 billion in 2004. *Id.*

117. James A. Dorn, *U.S.-China Relations After CNOOC*, *FREEMAN*, Dec. 2005, at 30, 31.

118. Kevin McGill, Note, *Selling Away Our Oil: Protectionism and the True Threat Raised by CNOOC’S Attempted Acquisition of UNOCAL*, 23 *GA. ST. U.L. REV.* 657, 662 (2007).

119. *Is CNOOC’s Bid for Unocal a Threat to America?*, KNOWLEDGE@WHARTON, Nov. 21, 2005, <http://knowledge.wharton.upenn.edu/article.cfm?articleid=1240> [hereinafter *Threat to America*].

moved forward apace, with Chevron obtaining antitrust approval in early June 2005.¹²⁰

On June 23, 2005, the proposed Chevron-Unocal transaction suddenly looked less certain when the China National Offshore Oil Corporation ("CNOOC") made an unsolicited all-cash bid of \$18.5 billion for Unocal through a Hong Kong subsidiary ("CNOOC Ltd.").¹²¹ The bid did not come as a major surprise to most on Wall Street, as rumors of CNOOC's interest in the acquisition had been circulating for several months.¹²² CNOOC's bid also coincided with China's broader effort to feed its voracious new appetite for natural resources, with Unocal's overseas holdings, primarily in Southeast Asia, making it a particularly valuable target of acquisition.¹²³ CNOOC's (and CNOOC Ltd.'s) CEO Fu Chengyu, insisted, however, that the acquisition was a "friendly" one and stated in the company's press release that:

The combination is expected to more than double CNOOC Limited's oil and gas production and increase its reserves by nearly 80% to approximately four billion barrels of oil equivalent. Approximately 70% of Unocal's current proved oil and gas reserves are in Asia and the Caspian region. It is expected that the merged company would also have an improved oil and gas balance, with total reserves of approximately 53% oil and 47% natural gas.¹²⁴

Despite the apparent financial benefits to both parties, CNOOC's bid contained additional features that proved extremely troublesome to American politicians. For one thing, CNOOC was one of the three majority state-owned petroleum companies in China.¹²⁵ CNOOC's management also had close ties with the Chinese government—its CEO, Fu Chengyu, was

120. NANTO ET. AL., *supra* note 116, at 1.

121. *Id.*

122. GRAHAM & MARCHICK, *supra* note 1, at 128.

123. See NANTO ET. AL. *supra* note 116, at 7, 10 (noting China's "growing energy needs" and listing Unocal's international operations).

124. Press Release, CNOOC Ltd., CNOOC Limited Proposes Merger with Unocal Offering U.S. \$67 per Unocal Share in Cash (June 23, 2005), *available at* <http://www.cnooltd.com/encnooltd/newszx/news/2005/957.shtml>.

125. See NANTO ET. AL., *supra* note 116, at 4. The China National Petroleum Corporation (CNPC/PetroChina) and the China Petroleum & Chemical Corporation (Sinopec) constitute the other two companies. *Id.*

the secretary of the Communist Party Leading Group.¹²⁶ More significantly, the deal was heavily subsidized by the Chinese state. CNOOC's parent company provided \$7 billion in financing (\$2.5 billion interest free, \$4.5 billion at 3% over thirty years),¹²⁷ and another \$6 billion was borrowed from a Chinese state-owned bank.¹²⁸ Though the CNOOC bid was not the first instance of China's expansionary interests reaching unaccommodating American shores,¹²⁹ none of the previous transactions aroused the level of ire that CNOOC came to face.

Reaction to CNOOC's bid on the floor of Congress was immediate and intense. According to one account, "hardly a day went by in Washington without another attack on the transaction."¹³⁰ On the day following the Chinese bid, Congress drafted a letter to then-Secretary of the Treasury John Snow urging a CFIUS review.¹³¹ Within a week congressional attacks grew more severe, and on June 30, 2005, the House overwhelmingly passed Congressman Richard Pombo's (R-CA) House Resolution 344, calling for thorough presidential re-

126. Mamounas, *supra* note 43, at 403.

127. Casselman, *supra* note 64, at 162.

128. Specifically, CNOOC's financing from banks was to come from bridge loans from Goldman Sachs and JPMorgan totaling \$3 billion, and \$6 billion from the Industrial and Commercial Bank of China (ICBC). See AFX News Limited, *CNOOC using cash, loans in Unocal bid; Goldman/JPMorgan offer bridge - UPDATE*, AFX NEWS LTD., June 23, 2005, <http://www.forbes.com/feeds/afx/2005/06/23/afx2107339.html>.

129. Mitchell Silk & Richard Malish, *Are Chinese Companies Taking over the World?*, 7 CHI. J. INT'L L. 105, 126 (2006) (noting that American backlash to Chinese emergence was "particularly acute"). By 2005, Chinese companies had already conducted several deals in the United States with varying degrees of success (including the successful acquisition of IBM by Lenovo and Hutchinson Whampoa's failed acquisition of Global Crossing); all the deals underwent some form of CFIUS review. *Id.* at 126-28.

130. GRAHAM & MARCHICK, *supra* note 1, at 131.

131. Mamounas, *supra* note 43, at 404. Arguably, the letter was pointless. CNOOC Ltd. had already implied that it was prepared to submit to CFIUS, stating that it was confident it would pass any Exon-Florio hurdles and that it was "willing to divest or take other actions with respect to any of Unocal's non-E&P assets in North America to the extent such divestitures and actions would not give rise to a material adverse effect on Unocal, including considering special management arrangements for Unocal's U.S. non-controlling, minority pipeline interests and its storage assets." Press Release, CNOOC Ltd., *supra* note 124.

view of any transaction.¹³² The resolution went on to name oil and gas as assets "critical to national security"¹³³ and attacked CNOOC's bid as heavily subsidized by the Chinese government.¹³⁴ H.R. 344 represented a major break from CFIUS precedent, particularly in its treatment of oil and gas.¹³⁵ While some experts certainly saw how oil *could* impact national security,¹³⁶ others saw the episode as Congress unnecessarily meddling in a legitimate economic transaction.¹³⁷ Mostly, however, Pombo's resolution should be seen as the opening salvo of a battle that would be waged over the course of the next two months.

CNOOC, for its part, tried to address congressional concerns and submitted notification to CFIUS on July 2, 2005.¹³⁸ Submission to CFIUS had always been in the cards for CNOOC, as the Chinese company hoped that a quick CFIUS review would allow it to beat the clock and get its offer in front of Unocal shareholders before August 10, the day shareholders would vote on the Chevron bid.¹³⁹ The original terms of the deal had been written in anticipation of potential American skittishness, leading CNOOC to provide a number of highly attractive terms in its initial bid.¹⁴⁰ Such terms included a willingness to divest certain parts of Unocal if necessary as well as a willingness to retain "substantially all" existing Unocal

132. H.R. Res. 344, 109th Cong. (2005). *See also* NANTO ET. AL. *supra* note 116, at 1 (noting the passage of the resolution); Mamounas, *supra* note 43, at 404 (same).

133. Mamounas, *supra* note 43, at 404.

134. *Id.* at 405.

135. Steve Lohr, *Unocal Bid Opens Up New Issues of Security*, N.Y. TIMES, July 13, 2005, at C1 (observing, "if the political push [to treat oil and gas as critical to national security] gains momentum, it will change the mandate and reach of [CFIUS]").

136. *See, e.g.*, McGill, *supra* note 118, at 667 (noting that if one accepts George Kennan's definition of national security as "'the continued ability of this country to pursue its internal life without serious interference,' then disruption in oil imports most certainly poses a threat to U.S. national security").

137. *See, e.g.*, Dorn, *supra* note 117, at 30 (arguing that "[t]here was no need for Congress to get involved in the CNOOC-Unocal transaction").

138. *See Threat to America*, *supra* note 119.

139. Jad Mouawad, *Chinese Company Asks U.S. to Review its Bid for Unocal*, N.Y. TIMES, July 2, 2005, at C4.

140. Casselman, *supra* note 64, at 162.

personnel (including management).¹⁴¹ This latter concession stood in stark contrast to Chevron's bid, which had "announced plans to extract hundreds of millions of dollars of cost savings," likely by implementing layoffs.¹⁴²

Congress, meanwhile, continued to express its displeasure at the thought of a Chinese-owned American oil subsidiary, even as CFIUS review was underway.¹⁴³ The House had already cut off funding to CFIUS with House Amendment 431 to House Resolution 3058, prohibiting the use of Treasury funds to approve any deal between CNOOC and Unocal.¹⁴⁴ Chevron also got into the fight, raising its bid to \$17 billion with 40% paid in cash,¹⁴⁵ though this was still not enough to meet the all-cash \$18.5 billion bid from CNOOC.¹⁴⁶

Congress eventually delivered the fatal blow. In the midst of debating an energy bill, it decided to include a new provision requiring a four-month-long study of Chinese energy needs before any transaction between CNOOC and Unocal could be completed.¹⁴⁷ The Energy Bill that eventually passed essentially doomed CNOOC's bid, in that it made it impossible to present its offer to Unocal shareholders before their vote on August 10.¹⁴⁸ As a result, CNOOC Ltd. withdrew its bid on August 2, before CFIUS even had a chance to complete its review.¹⁴⁹ Some argued that the intensity of congressional reaction was due to both the high price of oil at the time and

141. Press Release, CNOOC Ltd., *supra* note 124.

142. *Id.*

143. On July 15, 2005, Senator Dorgan introduced S. 1412, 109th Cong. (2005), banning any merger or acquisition of Unocal by CNOOC Ltd. NANTO ET AL., *supra* note 116, at 15.

144. H.R. Res. 3058, 109th Cong. (2005) (enacted); *see also* Casselman, *supra* note 64, at 163 (explaining the prohibitive effect of Amendment 431 on the deal).

145. NANTO ET AL., *supra* note 116, at 1.

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

147. Energy Policy Act of 2005, H.R. 6, 109th Cong. § 1837 (2005) (enacted). *See also* Mouawad, *Congress Calls*, *supra* note 146 (noting that "Congressional negotiators . . . added a provision that requires a four-month-long study of China's energy needs before the government can approve [CNOOC's] bid").

148. *See id.* ("The additional time further cloud[ed] the prospects for the Chinese offer and ma[de] it more likely that shareholders of Unocal . . . [would] approve the lower bid by Chevron.").

149. Casselman, *supra* note 64, at 164.

Washington's general anti-Chinese attitude.¹⁵⁰ Regardless of the motivation, the end result was beyond trivial: CNOOC abandoned its acquisition, and Unocal accepted Chevron's bid on August 10, 2005.¹⁵¹

B. *Dubai Ports World–P&O Steam Navigation*

Although CNOOC-Unocal had set a new high standard for congressional interference, a second transaction within the year would soon eclipse it in rhetoric and hyperbole.¹⁵² On November 29, 2005, Dubai Ports World ("DP World") announced its intention to acquire the British-based Peninsular and Oriental Steam Navigation Company ("P&O").¹⁵³ In 2005, DP World, a Dubai state-owned company based in the United Arab Emirates, was the world's seventh-largest port operator.¹⁵⁴ There was just one problem with this deal, namely that P&O's American subsidiary held operation leases on six American ports: Baltimore, Newark, Philadelphia, New Orleans, Houston, and Miami.¹⁵⁵ As noted by supporters of the transaction (including the White House), these leases as held by P&O were only in terms of port *operations*. Thus DP World's acquisition of P&O would not have placed DP World in charge of any of the ports' security, nor would it have made DP World the ports' owner.¹⁵⁶

Unlike in CNOOC-Unocal, in DP World-P&O CFIUS was given a full opportunity to exercise its duties. Recognizing the perceived threat to national security posed by the potential transfer of U.S. port leases to DP World, DP World and P&O initiated informal discussions with CFIUS on October 17,

150. See, e.g., GRAHAM & MARCHICK, *supra* note 1, at 129 ("With nominal oil prices at record levels, strong anti-China sentiment in Washington . . . CNOOC's attempt to acquire Unocal set the stage for a 'perfect storm' in Congress.").

151. NANTO ET AL., *supra* note 116, at 1.

152. GRAHAM & MARCHICK, *supra* note 1, at 138 ("[T]he polemics surrounding the DP World-P&O case were especially raucous, even more so than in the CNOOC-Unocal case.").

153. Press Release, U.S. Dep't of Treasury, *supra* note 84.

154. GRAHAM & MARCHICK, *supra* note 1, at 137.

155. *Id.* at 137; David E. Sanger, *Under Pressure, Dubai Company Drops Port Deal*, N.Y. TIMES, Mar. 10, 2006, at A1.

156. Mostaghel, *supra* note 29, at 607 (citing Press Release, White House, Fact Sheet: The CFIUS Process and the DP World Transaction (Feb. 22, 2006)).

2005, informing CFIUS that they planned to submit notification for review.¹⁵⁷ Between October and the formal notification on December 16, CFIUS, DP World, and P&O remained in continual communication, including a briefing held by DP World for both CFIUS and the Department of Homeland Security.¹⁵⁸ CFIUS requested a full threat analysis from the intelligence community in November, which it received prior to the formal notification date.¹⁵⁹ By January 17, 2005, thirty days after formal notification was filed, but almost ninety days after its initial contact with DP World, CFIUS announced its decision that the transaction could go forward as planned.¹⁶⁰ CFIUS required that DP World maintain the current security arrangements as held by P&O and that any change be accompanied by thirty days advance notice to the Department of Homeland Security.¹⁶¹ With support from both CFIUS and President George W. Bush, DP World proceeded with the acquisition of P&O for \$6.8 billion, outbidding a Singaporean rival.¹⁶²

The American response upon learning that an Arabic kingdom had taken over the “security” of American ports was immediate and intensely negative.¹⁶³ For many members of Congress, CFIUS’s January 17 decision was likely a vindication of their earlier distrust of the agency during CNOOC-Unocal,¹⁶⁴ as CFIUS had foregone the forty-five-day review for state-owned entities, finding it unnecessary.¹⁶⁵ DP World, however, realized that CFIUS review had done little to quell

157. Press Release, U.S. Dep’t of Treasury, *supra* note 84.

158. *Id.*

159. *Id.*

160. *Id.*

161. GRAHAM & MARCHICK, *supra* note 1, at 138.

162. Sanger, *supra* note 155.

163. See DAVID M. MARCHICK & MATTHEW J. SLAUGHTER, COUNCIL ON FOREIGN RELATIONS, GLOBAL FDI POLICY: CORRECTING A PROTECTIONIST DRIFT 6 (2008), available at http://www.cfr.org/content/publications/attachments/FDI_CSR34.pdf (quoting Senator Frank Lautenberg (D-NJ) as stating, “Don’t let them tell you this is just the transfer of title. Baloney. We wouldn’t transfer title to the Devil; we’re not going to transfer title to Dubai.”).

164. See Crocker, *supra* note 113, at 459 (noting that Congress was already concerned about the way the Executive Branch and CFIUS were handling the review of foreign investment, including a lack of transparency).

165. Mostaghel, *supra* note 29, at 606.

American dissent and took the unprecedented action of voluntarily submitting to the forty-five-day second stage investigation by CFIUS.¹⁶⁶

Heeding the public outcry, Congress moved to block the transaction and called for hearings with members of CFIUS, to see what had gone "wrong."¹⁶⁷ One hearing held before the Subcommittee on Domestic and International Monetary Policy, Trade, and Technology a week before DP World eventually backed down was particularly telling.¹⁶⁸ During the hearing, then-Congressman (now Senator) Bernard Sanders (I-VT) gave what would soon prove to be a typical attack on the transaction:

[F]rankly, it is incomprehensible to me that a President who has talked so much about national security would allow this agreement to go through. . . . I cannot understand how [CFIUS] would okay a deal that would put the operations of major American ports into the hands of a company that is wholly owned by the United Arab Emirates Government.¹⁶⁹

With Congress threatening to block any attempt by DP World to acquire the port leases and President Bush threatening to veto any such congressional measure, a showdown seemed imminent.¹⁷⁰ On March 8, the House Appropriations Committee voted 62 to 2 to block DP World's acquisition of the leases.¹⁷¹ President Bush was spared from following through on his threat to veto when, on March 9, 2006, Dubai succumbed to the political pressure and promised to "transfer" the American port leases to a domestic corporation.¹⁷²

166. *Id.*

167. See GRAHAM & MARCHICK, *supra* note 1, at 140 (noting that "close to a dozen congressional committees held hearings on the subject").

168. *Foreign Investment, Jobs, and National Security: The CFIUS Process: Hearing Before the Subcomm. on Domestic and International Monetary Policy, Trade, and Technology of the H. Comm. on Financial Services*, 109th Cong. 7-12 (2006) [hereinafter *CFIUS Hearings*].

169. *Id.* at 22.

170. See David D. Kirkpatrick, *How the Clock Ran Out on the Dubai Ports Deal*, N.Y. TIMES, Mar. 10, 2006, at A18 (noting a move in Congress "toward passing legislation to block the acquisition" and a message from the White House spokesman that "the president stood by his pledge to veto any legislation blocking the acquisition").

171. GRAHAM & MARCHICK, *supra* note 1, at 140.

172. Sanger, *supra* note 155.

One “senior political official with intimate knowledge of the deliberations” characterized DP World’s retreat as a political decision by Dubai to “help [their] friends” in Washington avoid further embarrassment.¹⁷³

C. *Consequences of a Politicized Process*

The politicization of both CNOOC-Unocal and DP World-P&O created huge uncertainties for the investing entities.¹⁷⁴ Some argue that congressional interference economically injured Unocal shareholders, who lost money as a result of CNOOC’s bid withdrawal.¹⁷⁵ While many still debate whether or not CNOOC’s bid was truly superior to Chevron’s,¹⁷⁶ the simple fact is that the decision was taken out of the hands of Unocal’s shareholders and directors. The direct economic impact on DP World is more difficult to establish since the acquisition involved was a non-American entity.¹⁷⁷ But in a broader sense, the breakdown of any foreign transaction that *could have* brought improved technology, capital, or management had it been completed successfully can be said to have caused economic harm to the United States.¹⁷⁸

The CNOOC and DP World episodes also highlight the long-term effects of politicization as equally, if not more, problematic as compared to the economic effects. Congressional interference, for instance, arguably created doubt about the sincerity of American concerns in subsequent transactions, resulting in damage to American prestige or goodwill in invest-

173. *Id.*

174. GRAHAM & MARCHICK, *supra* note 1, at 141.

175. Dorn, *supra* note 117, at 31. Arguably the interference also hurt employees, assuming of course that CNOOC intended to keep its promise to retain most of Unocal’s employees. See Press Release, CNOOC Ltd., *supra* note 124 (noting CNOOC’s original intention to retain employees).

176. While CNOOC’s bid was larger on pure numbers, some argued that CNOOC’s bid was the riskier of the two as a result of the long regulatory battle ahead of it. See McGill, *supra* note 118, at 661-662.

177. Even DP World’s ultimate acquiescence was riddled with costs. DP World was unable to transfer title for nearly a year, due to interference and objections of various port authorities. See Ken Belson, *Port Authority Now Accepts Dubai Deal, Easing Debate*, N.Y. TIMES, Feb. 17, 2007, at B2 (discussing the Port Authority of New York and New Jersey’s long holdout but eventual acceptance of a deal for DP World to sell its leases to an American company).

178. GRAHAM & MARCHICK, *supra* note 1, at 141.

ing states.¹⁷⁹ Such interference may have encouraged foreign investors to enter into relationships with less decorous (or more politically dangerous) partners rather than Americans.¹⁸⁰ Politicization could also chill future FDI if not reined in,¹⁸¹ in that it makes it unpredictable as to when a transaction will run afoul of the government.¹⁸² In hindsight, congressional concern over Unocal was probably a reflection of "contentious" trade relations with China rather than any specific national security concern.¹⁸³ Congress, in other words, used national security as a smokescreen to up the ante for this pre-existing dispute, much as it was criticized as doing in the 1980s, when Exon-Florio was passed.¹⁸⁴ Congressmen also raised the issue of the political nature of the trading state in

179. CNOOC's CEO reportedly stated that the United States had "set a bad example for the rest of the world" during the controversy over CNOOC's bid. *China Invests Overseas While Building Domestic Walls*, INT'L PETROLEUM FIN., Aug. 5, 2008. See also Keith Bradsher, *China's Oil Setback: The Fallout; China Retreats Now, But It Will Be Back*, N.Y. TIMES, Aug. 3, 2005, at C1 (noting that an immediate impact of CNOOC's failed bid would be negative public opinion of the United States back in China, though not necessarily to the degree of criticism directed against Japan for its textbook controversies"); Gaurav Sud, Note, *From Fretting Takeovers to Vetting CFIUS: Finding a Balance in U.S. Policy Regarding Foreign Acquisitions of Domestic Assets*, 39 VAND. J. TRANSNAT'L L. 1303, 1325 (2006) (arguing that heightened review of FDI could also impact American investment abroad, as other nations also heighten their FDI review policies).

180. See Bradsher, *supra* note 179 ("One worry outside China is that the failed bid could encourage Chinese oil companies to step up investing in countries like Sudan and Myanmar, whose leaderships are in poor favor with the White House and yet are eager for any investment they can get."); NANTO ET. AL., *supra* note 116, at 3 (noting that China has been forced to establish oil arrangements with countries like Iran, Venezuela, and Sudan).

181. GRAHAM & MARCHICK, *supra* note 1, at 141. See also Victor Lewkow, *Congress Tightens Exon-Florio "National Security" Reviews of Foreign Investment in the United States*, in CONTESTS FOR CORPORATE CONTROL 2008: CURRENT OFFENSIVE & DEFENSIVE STRATEGIES IN M&A TRANSACTIONS, at 463, 469 (PLI Corp. Law & Practice, Course Handbook Ser. No. 13964, 2008) (noting that there is now a high level of "regulatory uncertainty" in "sensitive sectors" for foreign investors).

182. See GRAHAM & MARCHICK, *supra* note 1, at 141. Cf. Sud, *supra* note 183, at 1321 (noting how inconsistency in past CFIUS practice has added "to the confusion concerning its present role").

183. See *Threat to America*, *supra* note 119 (noting that American politicians have been criticizing Chinese trade policies "for years").

184. Cf. *supra* text accompanying note 85 (discussing the use of national security as a smokescreen for protectionist and other motivations).

the DP World context, carefully—and sometimes not so carefully—suggesting that Dubai was an untrustworthy entity whose undemocratic regime made it an inappropriate entity to be controlling American ports.¹⁸⁵

Taken in isolation, neither CNOOC nor DP World was a typical case, and neither appeared to have had an impact on the flow of FDI into the United States.¹⁸⁶ In the context of DP World, there were even some suggestions that DP World's retreat would "relieve[] some of the political pressure," thus making the climate *safer* for foreign investment.¹⁸⁷ However, the two transactions cannot be so divorced from context. When viewed as part of a broader pattern or attitude, the congressional role in the failure of each transaction becomes a dangerous signal to future investors. If Congress's reaction represents a shifting attitude on FDI as a matter of policy, it will not be long before foreign investors simply begin to invest elsewhere.¹⁸⁸ CNOOC, for example, soon looked west instead of east for its oil, eventually finding it in Central Asia in an acquisition for PetroKazakhstan.¹⁸⁹

CNOOC's successful bid for PetroKazakhstan illustrates an ironic truth about politicization. In this acquisition, CNOOC managed to find private backing from Citigroup, thus completely avoiding state loans.¹⁹⁰ Part of the reason for this was that the PetroKazakhstan deal was a much smaller transaction and CNOOC had no need for large state loans.¹⁹¹ It is also possible, however, that CNOOC-PetroKazakhstan was

185. See *CFIUS Hearings*, *supra* note 168, at 23 (statement of Senator Sanders noting that UAE lacked democratic institutions).

186. See Eduardo Porter, *DP World and U.S. Trade: A Zero-Sum Game*, N.Y. TIMES, Mar. 10, 2006, at C1 (noting in reference to the CNOOC case, that ". . . there has been no letup in investment flows into the United States in its wake," and similarly, anticipating that the DP World case "is unlikely to make a consequential dent in foreign investment flows into the country").

187. *Id.*

188. See *id.* ("It could make U.S. assets less attractive to foreign buyers because they wonder whether there will be potential future buyers if they decide later to sell what they have purchased."); Mostaghel, *supra* note 29, at 614 ("Foreign investors may think twice about investing in the United States if by doing so they run the risk of being branded as terrorist supporters.").

189. NANTO ET. AL., *supra* note 116, at 5-6.

190. *Id.*

191. PetroKazakhstan was purchased for \$4.18 billion as compared to the nearly \$18 billion CNOOC offered for Unocal. *Id.* at 1, 6.

a less controversial deal as a result of the geography and politics involved and, thus, a safer bet for private investment banks. In this light, the politicization of CNOOC-Unocal may have sealed its own fate, as a major reason for Congress's attack on the Unocal bid was the financing from the Chinese state.¹⁹² Private financing could have defused this attack to some extent, but private loans were probably unavailable given the political risks. While this is merely a counterfactual exercise, one can at least imagine what might have happened had private financiers backed the deal, rather than Chinese state banks.

IV. THE INHERENT DANGERS OF POLITICIZATION

Legal and financial scholars have generally acknowledged the negative economic and political effects of the politicization of transactions, as laid out above.¹⁹³ But congressional or political interference with the CFIUS/FDI process is more deeply problematic than simply in its direct effects. Politicization, or, more accurately, inappropriate congressional oversight of the FDI review process, is flawed in its very nature, in that it threatens the legitimacy and effectiveness of FDI review. Politicization takes decisions out of the hands of CFIUS, a decision-making body that, while not perfect, is in the best position to analyze FDI threats to national security. It then places that decision-making power in the hands of politicians who are subject to short-term considerations and often have little expertise in the subject matter.

192. See *supra* text accompanying note 134 (noting concerns about Chinese financing of CNOOC's bid).

193. See, e.g., GRAHAM & MARCHICK, *supra* note 1, at 141 (concluding that politicization will increase risks for foreign investors, thereby diminishing the value of domestic assets, productivity, and potential job creation); McGill, *supra* note 118, at 677-78 (claiming that expansive review of foreign acquisitions has the effect of discouraging foreign direct investment, "which should be a paramount concern given the country's need to reduce its current account imbalance"); Mostaghel, *supra* note 29, at 614 (maintaining that "[s]igmatizing legitimate business transactions as security risks may weaken 'confidence in the dollar'" and chill foreign investment).

A. *The Comparative Administrative Expertise & Institutional Competence of Congress and the Executive*

1. *Review by Congress*

Foreign investment is a complicated matter that implicates a host of overlapping issues. Any review of FDI on national security grounds must therefore be not only holistic, but also consistent, flexible, and in good faith.¹⁹⁴ By each of these standards congressional review of foreign investment falls short. Congressional proposals regarding FDI are often designed to “appeal to the emotions”¹⁹⁵ instead of facts, and they frequently rely on fiery rhetoric and colorful hyperbole.¹⁹⁶ From a historical perspective, the legislative branch has proven itself incapable of the kind of cool-headed, high-level analysis that FDI review demands.

As reflected in the CNOOC and DP World episodes, congressional interference in the Exxon-Florio process immediately brought inconsistency into the review process. This was due in part to the structure of the legislature. The United States Congress consists of 435 representatives and 100 senators, and each member is subject to pressures from particular industries and interest groups.¹⁹⁷ Unlike CFIUS, which is essentially an executive multi-agency body, and therefore several steps removed from direct popular accountability, Congress is subject to the changing circumstances and emotions of individual constituencies.¹⁹⁸ This natural tendency toward disunity¹⁹⁹ is

194. See Mostaghel, *supra* note 29, at 613, 616 (“The Executive must have the flexibility to respond to true threats to national security while still encouraging foreign investment. . . . The broad scale of foreign investment activity in the United States mandates that transactions be reviewed in a consistent manner that considers all aspects.”).

195. *Id.* at 611.

196. See *supra* text accompanying note 42.

197. See Paul Rose, *Sovereigns as Shareholders*, 87 N.C. L. REV. 83, 116 (2008) (noting the heightened risk of “political mischief” where U.S. constituents have an interest in opposing a foreign investor); McGill, *supra* note 118, at 678 (arguing that politicization can lead to individual politicians “blindly thwarting any acquisitions that would negatively impact *their own districts or states*” (emphasis added)).

198. See Mostaghel, *supra* note 29, at 610 (“Homeland security is the very stuff of politics, and it is, for this reason, far better examined under the rational light of CFIUS than under the white heat of the political arena.”).

199. Inter-Congress debate was also common, with several senators strongly supporting DP World and Unocal. For example, Senator John

only part of Congress's underlying structural instability as a regulatory agency. Coupled with this inconsistent voice, Congress has also shown a disconcerting susceptibility to the siren call of economic protectionism.²⁰⁰ In other words, not only does Congress speak with *too* many voices, but too often those voices reflect concerns of inadequate scope (provincial, not national) and message (economics, not security).

On a practical level, while CFIUS is governed by the flexibly drafted Exon-Florio Amendment, Congress is not governed by *any* statutory limitations on the scope of its FDI review. Rather than granting the legislative branch the needed flexibility to address the different transactions that may come before it, this lack of standardization instead creates confusion and unnecessary risk, as the standards and milestones upon which Congress bases its decision are often a matter of guesswork. Following the DP World episode, for example, Congress was faced with a similar Dubai-based acquisition in which Dubai International Capital LLC made a bid for the Doncasters Group Ltd., a British engineering firm.²⁰¹ This time around, Congress let the acquisition proceed with minimal interference.²⁰² While some members of Congress pointed to (1) a more "careful, thoughtful" review process and (2) what they believed to be a more controllable products-based transaction,²⁰³ it is difficult to see why Dubai International was valid and DP World was not, or how Dubai International differed from the aircraft transaction of CATIC-Mamco years earlier.

Even if Congress were able to provide the needed flexibility and consistency in its review process, its reliance on emotion would still call into question the good faith nature of its determinations. For both DP World-P&O and CNOOC-Unocal, congressional reactions were colored as much by nationalism and politics as by national security. Stemming from this,

Warner (R-VA) strongly supported the DP World transaction. Kirkpatrick, *supra* note 170.

200. See Soseman, *supra* note 34, at 603 (noting that "competing interests create a policy dilemma regarding which interest will dominate—protectionism or open investment" and citing the Exon-Florio amendment as "a policy of active protectionism").

201. Mostaghel, *supra* note 29, at 616-17.

202. See *id.* at 617 ("Unlike the DP World situation . . . congressional response was muted.").

203. *Id.* at 617.

the congressional model of foreign investment review often seemed consciously divorced from the facts.

As many saw after the fact, the structure of the Unocal purchase was likely not nearly as problematic as Congress portrayed it.²⁰⁴ The congressional reaction was therefore severely out of proportion when compared to the *actual* importance of Unocal for American energy needs. By 2005, Unocal was no longer a major player in the energy industry, with the Congressional Research Service categorizing it as something closer to a “large independent producer than the major multinational oil company it once was.”²⁰⁵ It possessed no refineries in the United States, meaning that it imported no crude oil for American consumption.²⁰⁶ Its most valuable assets were located primarily overseas, which was the primary reason CNOOC found it so attractive in the first place.²⁰⁷ In 2004, the year before the transaction, Unocal produced only 577 million cubic feet of natural gas and 69,700 barrels of oil per day, or “the equivalent of about 1% of U.S. natural gas consumption.”²⁰⁸ If that was not enough to placate American fears, during the midst of the controversy in July 2005, Unocal transferred its Canadian subsidiary to Pogo Producing Company, an American entity.²⁰⁹ In light of these facts, the congressional description of the CNOOC-Unocal deal as a threat to “vital U.S. energy assets”²¹⁰ was a mischaracterization at best and pure hyperbole at worst. The fact that CNOOC had announced its intention to keep Unocal’s American holdings in American hands and that it was even willing to divest itself of

204. See McGill, *supra* note 118, at 671 (noting that “most energy experts” did not believe that the CNOOC acquisition would pose any threat to American abilities to meet its energy needs). For a detailed attack on the grounds of congressional concern, see Casselman, *supra* note 64, at 164-170 (“Was Congress’ Reaction to CNOOC’s Bid Warranted?”).

205. NANTO ET. AL., *supra* note 116, at 9.

206. *Id.* at 11.

207. See generally, Press Release, CNOOC Ltd., *supra* note 124. For a detailed overview of Unocal’s overseas assets, including natural gas in Thailand and significant interests in the Congo, Indonesia, and Azerbaijan, see *id.* at 10-11.

208. *Id.* at 9.

209. *Id.*

210. Dorn, *supra* note 117, at 30 (statement made by Representative Joe Barton of Texas).

those holdings²¹¹ should have further mitigated national security concerns.

Critics of the deal argued that while Unocal had a limited market presence, it was nevertheless critical to American national security in other, less measurable ways, particularly in its possession of dual-use technology with possible military applications.²¹² The accuracy of this concern is not at issue. Rather, the problem is that Congress decided to supersede the body that was already capable of analyzing this threat: CFIUS. In fact, it had already been shown that CFIUS took dual-use technology into account, as the fear that China would appropriate dual-use technology for military application was a key concern in the MAMCO divestment twelve years earlier.²¹³ The fact that CFIUS was not allowed to complete its review now seems even more ironic; dual-use technology "would almost certainly have [been] considered [in the CNOOC review] . . . under a factor of Exxon-Florio."²¹⁴

The congressional reaction to DP World was even more disproportionate than its reaction to Unocal. For one thing, in the DP World transaction, CFIUS *did* conduct a review. On the other hand, CFIUS also unanimously agreed to forego the mandated forty-five day investigation period for state-controlled entities, deeming it unnecessary.²¹⁵ Despite this, two facts militate in CFIUS's favor and suggest that Congress had little reason for its attack on the deal. First, DP World voluntarily submitted to the forty-five day investigation after Congress raised its ire. Second, CFIUS was at least somewhat justified in its decision to dispose of the additional investigatory period,

211. Press Release, CNOOC Ltd., *supra* note 124.

212. See Casselman, *supra* note 64, at 165-66 (noting that although "Unocal is a relatively minor player on the world's oil and gas scene," "concerns were raised that Unocal [] possessed dual-use technology" that could prove useful to the Chinese military).

213. See Mendenhall, *supra* note 91, at 290-91 (noting that MAMCO's products, "while made only for commercial use, could theoretically be converted for use in military aircraft as well" and that the CFIUS investigation assessed "MAMCO's present and potential production and technological capabilities").

214. Casselman, *supra* note 64, at 166.

215. Mostaghel, *supra* note 29, at 606.

considering that it had effectively spent a full ninety days interacting with all relevant parties before coming to its decision.²¹⁶

Whatever CFIUS's reasoning, Congress was blithely unconvinced by the facts of the transaction in DP World. As one politician memorably stated after listening to all the arguments that national security was not at risk: "You may have the facts on your side, but it just doesn't matter. This transaction is not acceptable to the 'biscuit and gravy' crowd."²¹⁷ In some ways, congressional concerns were legitimate and the perceived threat by DP World could be distinguished from that of CNOOC.²¹⁸ For example, the argument was made that the DP World transaction would have "woven the foreign company into the fabric of the homeland in a way that giving access to oil from offshore sources would not."²¹⁹ As noted above, however, DP World was never going to be in a position of ownership regarding the ports and was never going to be in charge of security.²²⁰ In reality, Americans had long since given up the protection of their own ports, with the *New York Times* noting that "few American [port] operators remain."²²¹ Political pressure at that time was of a particularly partisan strain, one in which the long-suffering Democrats finally saw an opportunity to attack President Bush's stance on an issue of security, regardless of the facts.²²²

In both CNOOC-Unocal and DP World-P&O, Congress used factors external to both the transactions and national security to make their case, pointing out numerous times that the governments of China and the UAE were undemocratic. Congressman Joe Barton, for example, reminded President Bush in a letter that China was not one of the United States's

216. See Press Release, U.S. Dep't of Treasury, *supra* note 84 (noting that "roughly 90 days after the parties to the transaction first approached CFIUS . . . all CFIUS members agreed that this particular transaction should be allowed to proceed, pending any other regulatory hurdles before the companies").

217. Crocker, *supra* note 113, at 460.

218. See Mostaghel, *supra* note 29, at 610 (arguing that "the physical presence of DP World in the United States was an important difference between this transaction and the CNOOC situation").

219. *Id.*

220. *Id.* at 607.

221. Sanger, *supra* note 155.

222. Crocker, *supra* note 113, at 459.

"allies in democracy."²²³ Such rhetoric suggests that congressional concerns over CNOOC-Unocal were not related to questions of "strategic assets," but rather reflected an underlying political and ideological hostility towards China held by certain members of the United States government.²²⁴ On the one hand, it is true that China cannot count itself as a traditional ally of the United States, and one could argue that this fact alone made CNOOC problematic.²²⁵ On the other hand, the passion evinced by Congress during the CNOOC-Unocal episode highlighted how simplistically Congress treated geopolitical relationships in the context of the proposed deal. As others have noted, Chinese communism has become a far more complex concept since the 1980s, with "the question of state control" being "particularly complicated."²²⁶ Throughout the CNOOC deal, Congress revealed that it was probably less concerned with the intricacies of Chinese state ownership and its potential effects on national security, and more concerned with sound bites on hot-button issues like trade relations.²²⁷

The congressional attacks on DP World seemed even more out of place, as Dubai was an ally in the U.S. war on terror.²²⁸ Many in Congress, however, honed in on the fact that Dubai (and the United Arab Emirates) was neither politi-

223. Mamounas, *supra* note 43, at 404.

224. See Dorn, *supra* note 117 (citing a statement in a congressional hearing from Frank Gaffney, the president of the Center for Security Policy, noting the "folly of abetting Communist China's effort to acquire more of the world's relatively finite energy resources"). Note also the somewhat misleading nature of the statement as China had long since abandoned the commune for the stock market trading floor.

225. See GRAHAM & MARCHICK, *supra* note 1, at 102-04 (noting that because China is the only one of the United States' major trading partners who is not a "strategic or political ally," transactions involving China will therefore "draw scrutiny from CFIUS agencies").

226. *Id.* at 105.

227. One consultant describes the entire bid as a "political bombshell" that "comes at an especially problematic time in U.S.-China trade relations." *Threat to America*, *supra* note 119.

228. See Debra McCown, *A Five Month Flurry*, USA TODAY, Mar. 15, 2006, at 13A (noting a statement by President Bush that the United Arab Emirates was an ally in the war on terror); Interview by Fox News' Fox Friends with Saxby Chambliss, U.S. Senator (R-Ga) (Mar. 14, 2006) [hereinafter Chambliss Interview] (Senator Chambliss stating that the UAE is a "huge ally, being involved in the intelligence community for the last several years").

cally democratic nor culturally occidental. As Congressman Sanders stated during hearings on the DP World transaction: “[T]here are, as I understand it, no Democratic institutions in the [UAE]. There is no transparency. People cannot speak up, or else they go to jail. And yesterday, we learned that the parent company of Dubai Ports World is honoring an Arab boycott of Israel.”²²⁹

What Congressman Sanders failed to note in his litany of complaints was how any of those facts affected DP World’s acquisition of P&O or how that acquisition would impact American national security in any substantive way. When DP World’s port acquisition finally collapsed, some members of Congress blamed it on “political expedience” and, ultimately, on the ignorance of Congressmen regarding the facts of the transaction.²³⁰

While the political structure of the investing country *can* have an effect on national security considerations, the shouts of “communist” and “terrorist” used by Congress were more akin to punditry than sober review. Professor Mostaghel sums up the concern best: “We must be careful not to allow national preoccupation with terrorism to blind us to the reality of a globalized economy.”²³¹

2. *Review by the Executive*

CFIUS, though imperfect, is nevertheless part of the Executive branch, a branch of government that is in a better position to analyze national security threats than Congress, by nature of its access to information, its more holistic approach, and its general flexibility. Structurally, CFIUS review possesses a host of advantages over congressional review, not the least of which is that foreign investment is and has been the traditional bailiwick of a president who is constitutionally responsible for much of the nation’s security and war-making abili-

229. *CFIUS Hearings*, *supra* note 168, at 23.

230. *See, e.g.*, Associated Press, *Ignorance Killed Port Deal, Lawmaker Says*, CHARLESTON GAZETTE, Mar. 13, 2006, at 2A (reporting that Republican lawmakers from Georgia said “the controversy over the ports deal was largely a result of lack of knowledge about the transaction, and political expedience”).

231. Mostaghel, *supra* note 29, at 616.

ties.²³² Certainly the Executive branch's access to particular sources of information makes it a better candidate to review FDI than Congress.²³³ One official in the Department of Homeland Security (DHS), an executive agency, testified that DHS had been in contact with DP World for many months prior to the formal filing of the transaction.²³⁴ In fact, DHS already had "strong relationships" with DP World and had worked with them through "various programs that are administered by Customs and Border Protection and by the Coast Guard."²³⁵ The DHS official went on to say that "[CFIUS] had a record of understanding the nature of [DP World] and its operation and its commitments to the security regime."²³⁶ It is precisely this sort of practical experience with foreign states that members of Congress often lack.²³⁷

Beyond expertise, the Executive's nation-wide perspective allows it to take a more holistic approach on the "economy as a whole."²³⁸ At least theoretically, the president and the executive agencies are less vulnerable to the influence of small interests.²³⁹ Moreover, when foreign investment demands flexibility,²⁴⁰ CFIUS is in a far better position than Congress to pro-

232. See generally U.S. CONST. art. II, § 2 (detailing powers of the president including the making of treaties with foreign states).

233. See *CFIUS Hearings*, *supra* note 168, at 8 (noting that CFIUS encompasses the Community Acquisition Risk Center (CARC), which provides a threat assessment on every notified transaction); Mostaghel, *supra* note 29, at 619-20 (noting that Congress lacked information during its attacks on DP World).

234. *CFIUS Hearings*, *supra* note 168, at 10.

235. *Id.*

236. *Id.*

237. For a striking contrast on the issue of expertise, see Chambliss Interview, *supra* note 228 (Senator Chambliss stating that while he understood that the UAE was an important ally, he didn't know much else about the country).

238. See Soseman, *supra* note 34, at 603 (noting that the executive is forced to look at the "economy as a whole," in comparison to members of Congress who focus on "one district or state").

239. See *id.* (noting that "Congresspersons are susceptible to pressure from certain industries or corporations located in their district and are more responsive to calls for protecting domestic firms").

240. See Mostaghel, *supra* note 29, at 613 (arguing that the "Executive must have the flexibility to respond to true threats to national security while still encouraging foreign investment").

vide the necessary “neutral” viewpoint.²⁴¹ CFIUS can “give close scrutiny to acquisitions of potential concern while avoiding undue exposure of sensitive commercial or classified information.”²⁴² Where Congress is myopic and must cater to diverse constituencies, CFIUS has clarity of purpose and a greater ability to find the “right” answer.

Oversight by the Executive does not mean that CFIUS remains static. Following 9/11, President Bush added the Department of Homeland Security to CFIUS’s roster.²⁴³ The addition of DHS shifted the balance from primarily economic agencies to security ones, thus resulting in “more investigations and stricter security-related conditions for CFIUS approval.”²⁴⁴ Though it is possible to argue the normative merits of security versus economics, the shift was one the Executive made as it believed necessary.

While the Executive and CFIUS may be better situated than Congress to conduct FDI review, they are not ideal. In the early years of Exon-Florio, many feared that the Executive was too unfettered in its discretion and that it would be able to use the undefined “national security” terminology as a protectionist weapon.²⁴⁵ In the years since, though, that fear has failed to come to fruition.²⁴⁶ Currently, however, many are concerned that CFIUS reads national security too narrowly, not too broadly.²⁴⁷ Additionally, critics of CFIUS often suggest that the multi-agency can also be taken over by instances of inter-department disputes, so that CFIUS is no more unified in

241. *See id.* at 611-13 (noting that Congress is emotional but CFIUS provides a “flexibly neutral view”).

242. *Id.*

243. GRAHAM & MARCHICK, *supra* note 1, at 58.

244. *Id.*

245. *See, e.g.*, Soseman, *supra* note 34, at 611 (noting that “a future administration . . . could invoke the Exon-Florio amendment as a protectionist tool” by reinterpreting “the term ‘national security’ to mean economic security”).

246. *See supra* Part I(d) (Exon-Florio in Action), on the relative lack of CFIUS issues.

247. *See* U.S. GOV’T ACCOUNTABILITY OFFICE, DEFENSE TRADE: ENHANCEMENTS TO THE IMPLEMENTATION OF EXON-FLORIO COULD STRENGTHEN THE LAW’S EFFECTIVENESS 11 (2005) [hereinafter GAO: ENHANCEMENTS TO EXON-FLORIO] (“As a result of the narrow definition, some issues the Defense, Homeland Security, and Justice officials believe have important national security implications, such as security of supply, may not be addressed.”).

voice than Congress.²⁴⁸ Perfection, however, has never been a workable standard in regulatory law. Indeed, CFIUS still makes its decisions by consensus.²⁴⁹ Thus, even when there is internal debate, the agency nevertheless speaks as a unified entity, something Congress can never do. Moreover, it is subject to direct oversight by the Executive in a way that individual members of Congress are not. As a matter of workability, the Executive and CFIUS simply function better than the myriad voices of Congress, even if they do not function perfectly.

B. *Opportunity for Abuse*

As a corollary to the institutional competence problem that arises out of politicization of issues in Congress, congressional review also invites gaming of the system, a concern that has plagued Exon-Florio since it was first passed. In the early years of Exon-Florio, many analysts feared that American companies would instigate CFIUS review as a novel defense to hostile takeovers, purposefully playing up national defense issues in order to instigate review, thus delaying the transaction or causing it to collapse entirely.²⁵⁰ This "Pentagon ploy" revealed itself in early reviews as parties brought to CFIUS's attention minor transactions involving swimming pools, hotels, and even bulbs and seeds.²⁵¹ CFIUS, of course, did not intercede in these instances. As the years went by, however, the concern that companies might actively undermine hostile takeovers through the medium of CFIUS receded, in part because of the general decline in hostile takeovers.²⁵²

Today, there is still a concern about abuse of process, only now there is a fear of abuse by third parties rather than by target entities. Congressional interference in the Exon-Florio process reinforces the tendency of third parties to claim that

248. *See id.* at 3 (noting that CFIUS does not always speak with a unified voice, and that there is often tension between the economic-focused agencies (the Treasury), and security-focused agencies (i.e. DHS)).

249. *Id.* app. I at 27 (Comments from the Department of Treasury).

250. Soseman, *supra* note 34, at 606-07. *See also* Reece, *supra* note 9, at 302 ("Exon-Florio may also be misused as an anti-takeover device").

251. Soseman, *supra* note 34, at 606-07.

252. *See generally* Dan W. Puchniak, *The Japanization of American Corporate Governance? Evidence of the NeverEnding History for Corporate Law*, 9 *ASIAN-PAC. L. & POL'Y J.* 7, 33-39 (2007) (discussing the decline of hostile takeovers due to the effectiveness of defensive measures like the poison pill).

FDI implicates national security concerns in order to advance their own economic agendas. Politicization encourages this trend by placing de facto review power into the hands of Congress, a body of politicians particularly susceptible to external influence, thus making it more likely that appeals from third parties will affect the fate of a transaction.²⁵³ Evidence suggests, in contrast, that CFIUS is at least nominally independent and difficult for third parties to influence.²⁵⁴

The furor over the CNOOC-Unocal and DP World-P&O deals can be traced to the instigations of third parties.²⁵⁵ In the former case, congressional ire was driven in part by the heavy lobbying of Chevron, the original bidder for Unocal.²⁵⁶ In the latter case, third-party manipulation was even more direct. When DP World announced its plan to acquire P&O in November 2005, the response was collective silence. Congress did not react until February of the following year.²⁵⁷ Congress was pushed out of its lethargy primarily by Eller & Company, a small stevedoring firm based in Miami that had been engaged in a commercial dispute with P&O.²⁵⁸ Eller originally went to CFIUS with complaints about the DP World acquisition to increase its leverage with P&O.²⁵⁹ It was only after CFIUS disregarded Eller's concerns that Eller chose to lobby Congress.²⁶⁰ Once the transaction entered the congressional agenda, the flames of debate were stoked by the media. Even more so than in CNOOC-Unocal, television and media pundits played a major role in the controversy over DP World's acquisition.²⁶¹

253. See *supra* text accompanying notes 197-200.

254. See Stagg, *supra* note 82, at 337 (noting that historically CFIUS and the President have been remarkably "reluctant to discourage foreign investment except in extreme cases.").

255. Of course CNOOC and DP World are only examples of a larger trend. For example, third party interference in the form of Carl Icahn against ST Telemedia, a Singapore communications firm, was key in the auction of Global Crossing in 2002. See Rose, *supra* note 197, at 114.

256. See Bradsher, *supra* note 179 (noting that "the Unicol bid upset Chevron . . . which lobbied Congress heavily against the CNOOC bid").

257. GRAHAM & MARCHICK, *supra* note 1, at 139.

258. *Id.*

259. *Id.*

260. *Id.*

261. See Sanger, *supra* note 155 (noting that uproar was driven in part by talk radio); *PBS NewsHour with Jim Lehrer* (PBS television broadcast Mar. 10, 2006) (interview with columnist David Brooks noting that much of the furor

CNN's "Hardball Program" in particular used the uproar to attack President Bush, who generally supported both the CFIUS process and DP World.²⁶²

The impact of third-party interference in both cases made ripples in the legal world as well. After 2006, practitioners were on guard against third parties, including "competing bidders, business rivals, or other stakeholders," who might "utilize the CFIUS process to obtain leverage over the parties or to impact the timing and certainty of the transaction."²⁶³ As these cases illustrate, the politicization of the FDI review process gives third parties the opportunity to inappropriately interfere with transactions in the name of national defense. The core problem with this behavior is that national security is not always a true motivation for these third parties, and therefore they interfere with and distract from Exon-Florio's actual goals.

Yet congressional susceptibility to influence from the outside is not limited to third parties. As foreign investors learn the intricacies of the politicized process, they, too, may one day invest in lobbyists.²⁶⁴ In transactions with actual national security concerns, this backdoor review process could prove more dangerous than the trumped-up threats of DP World and CNOOC, precisely because it would be hidden, with a now-compliant Congress.

was aroused by television and radio personalities like Michael Savage and Lou Dobbs).

262. See, e.g., Lou Dobbs Tonight, *Senators Today Blasted Government Officials Who Tried To Win Support For The Administration's Port Deal; A Look At Whether Or Not Terminal Operators Are Involved In Security At U.S. Ports; CFIUS Members May Have Broken U.S. Law; Sectarian Violence In Iraq Spiraling Out Of Control; Author Accuses Bush of Being a Pretend Conservative*, CNN TRANSCRIPTS, February 23, 2006, <http://transcripts.cnn.com/TRANSCRIPTS/0602/23/ldt.01.html>.

263. Gotts et. al., *supra* note 76, at 34. See also Edward D. Herlihy, *Takeover Law and Practice 2007*, in CONTESTS FOR CORPORATE CONTROL 2008: CURRENT OFFENSIVE & DEFENSIVE STRATEGIES IN M&A TRANSACTIONS, at 242-43 (PLI Corp. Law & Practice, Course Handbook Ser. No. 13964, 2008) (noting that after DP World, foreign investors should be on the lookout for any weaknesses, lest a competing bidder or reluctant target use regulatory hurdles to "frustrate the acquisition").

264. See Bradsher, *supra* note 179 (noting that "Japanese companies responded to protectionism in the United States in the 1980's by hiring hundreds of lobbyists in Washington" although Chinese companies had not yet done so).

C. *The FINSA “Solution”*

For Congress, the events of 2005-2006 did not reflect inappropriate politicization in FDI,²⁶⁵ but rather confirmed fears that CFIUS inadequately addressed national security concerns.²⁶⁶ Many in Congress were already troubled by what they saw as CFIUS’s lack of transparency.²⁶⁷ As one analysis aptly stated:

Issues included CFIUS’s purported failure to respond to Congressional inquiries concerning the review process, which heightened Congress’s distrust of the adequacy of the process; CFIUS’s reluctance to brief Congress on particular transactions because of confidentiality concerns; and a perception by some in Congress that the White House exercised a ‘hands off’ approach toward security reviews, which further contributed to Congressional concern that the process failed to weigh legitimate security concerns.²⁶⁸

With the close of the DP World debacle, Congress set about addressing these perceived flaws,²⁶⁹ a process that culminated in the passage of the Foreign Investment and National Security Act of 2007 (“FINSA”).²⁷⁰ The legislation that

265. Congress, after all, could rely on the fact that the Constitution authorizes Congress to regulate FDI if it so chooses under the Commerce Clause. U.S. CONST. art. 1, § 8, cl. 3.

266. Robert S. LaRussa et. al., *New Law Heightens Scrutiny of Foreign Acquisitions of U.S. Companies*, 4 N.Y.U. J. L. & Bus. 285, 291 (2007).

267. GRAHAM & MARCHICK, *supra* note 1, at 52 (noting the “growing frustration with what many in Congress perceived as a lack of transparency within the CFIUS process, as well as growing anxiety generally over the specter of large-scale investments in the United States by Chinese and Gulf state companies”); Anthony Michael Sabino, *Transactions that Imperil National Security*, N.Y. ST. B.J., Nov.-Dec. 2005, at 20 (“Almost nothing is known about the internal functioning of CFIUS because of the highly sensitive nature of its deliberations, and there is precious little on the record that details its operations.”).

268. Crocker, *supra* note 113, at 459.

269. See Associated Press, *Dubai Port Uproar Spurs Passage of Bill*, N.Y. TIMES, July 27, 2006, at A20, available at <http://www.nytimes.com/2006/07/27/washington/27ports.html> (“The House and the Senate voted on Wednesday to make it easier for Congress to watch over [CFIUS].”).

270. Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, 121 Stat. 246 (amending Section 721 of the Defense Production Act of 1950, 50 U.S.C. app. § 2170 (2006)).

emerged as FINSA was the product of over a year of congressional debate in which numerous proposals for reform were put forth.²⁷¹ FINSA represented the most dramatic overhaul of the Exon-Florio process since the Byrd Amendment in 1993.²⁷² Four changes bear further analysis.²⁷³

First, FINSA sought to clarify the open-ended nature of "national security" by including within the definition "those issues relating to 'homeland security,' including its application to *critical infrastructure*."²⁷⁴ FINSA went on to define critical infrastructure as "systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems or assets would have a debilitating impact on national security."²⁷⁵ Energy, in particular, was included as a factor to be considered.²⁷⁶

Second, FINSA expanded on the Byrd Amendment's mandate that CFIUS "shall" conduct the forty-five-day second stage review for state-entity acquisitions that "could affect" national security.²⁷⁷ Unlike the Byrd Amendment, which still allowed some leeway in its mandatory investigation language,²⁷⁸ under FINSA, mandatory investigations are now required in

271. Cecil Hunt, *Review of Foreign Acquisitions of U.S. Businesses: The CFIUS Process Under FINSA*, 2008 A.L.I.-A.B.A. CONTINUING LEGAL EDUC. COURSE OF STUDY 305, 308.

272. See generally Kristy E. Young, Note, *The Committee on Foreign Investment in the United States and the Foreign Investment and National Securities Act of 2007: A Delicate Balancing Act That Needs Revision*, 15 U.C. DAVIS J. INT'L L. & POL'Y 43, 57 (2008) (discussing the key provisions of FINSA).

273. For a more detailed overview of how FINSA changed Exon-Florio, see generally Lewkow, *supra* note 181, and LaRussa et. al., *supra* note 264.

274. 50 U.S.C.S. app. § 2170(a)(5) (LexisNexis 2009) (emphasis added).

275. *Id.* § 2170(a)(6).

276. *Id.* § 2170(f)(6) (listing for consideration, "potential national security-related effects on United States critical infrastructure, including major energy assets").

277. Compare 50 U.S.C. app. § 2170(b) (1994), with 50 U.S.C.S. app. § 2170(b)(2)(B)(i)(II) (LexisNexis 2009). See also Lewkow, *supra* note 181, at 471 (noting that FINSA by default requires investigation of acquisitions that involve a foreign government-controlled company even if national security is not implicated).

278. In particular, Exon-Florio as amended by Byrd required mandatory investigations not simply with state-owned entities, but only in those cases that "could affect" national security. 50 U.S.C. app. § 2170(b) (1994). See also GRAHAM & MARCHICK, *supra* note 1, at 105 (noting that under the Byrd Amendment CFIUS considers "whether there is state control, and whether the transaction could affect U.S. national security").

any “foreign government-controlled transaction.”²⁷⁹ Even in non-government transactions, second-stage investigations are necessary if the transactions would put “critical infrastructure” in foreign hands.²⁸⁰ However, in the latter case CFIUS may forego the investigation if it determines that there has been adequate mitigation.²⁸¹

Third, FINSA codified the informal mitigation process that had marked Exon-Florio review prior to 2007 by explicitly granting CFIUS the power to “negotiate, enter into or impose, and enforce any agreement or condition with any party to the covered transaction in order to mitigate any threat to the national security.”²⁸² The power to mitigate deals was left open-ended, but the agreement must be based on a “risk-based analysis.”²⁸³ Also new to Exon-Florio, CFIUS can now modify, monitor, and enforce mitigation agreements.²⁸⁴

Most significantly, FINSA imposed a greater level of congressional oversight over FDI approval.²⁸⁵ FINSA granted to Congress the power to request a briefing on any transaction for which Exon-Florio review had concluded.²⁸⁶ FINSA further required that CFIUS present an annual report to the “chairman and ranking member of the committee of jurisdiction in the Senate and the House of Representatives.”²⁸⁷ The reports should give Congress information on statistics (numbers of notifications), transactions (the parties, the business sectors involved, the foreign countries, etc.), procedures

279. 50 U.S.C.S. § 2170(b)(2)(B)(i)(II) (LexisNexis 2009).

280. *Id.* § 2170(b)(2)(B)(i)(III).

281. *Id.*

282. *Id.* § 2170(d)(1)(A).

283. *Id.* § 2170(d)(1)(B).

284. Specifically, enforcement falls to the lead agency (as selected by the Treasury secretary that carried out the initial investigations). *Id.* § 2170(l)(3)(A).

285. 50 U.S.C.S. app. § 2170(g) (LexisNexis 2009) (“Additional Information to Congress; Confidentiality”). See also LaRussa et. al., *supra* note 266, at 285 (“The new law increases Congressional oversight of CFIUS . . .”).

286. 50 U.S.C.S. app. § 2170(g)(1). Congress may also request a briefing on transactions regarding compliance with mitigation agreements. *Id.* Such briefings are not required to be classified but can be made so if necessary. *Id.* § 2170(g)(2).

287. *Id.* § 2170(m)(1).

(numbers of withdrawals, re-filings, abandonments, etc.), and mitigations (types and conditions).²⁸⁸

Reactions to these changes have been muted. When compared to the more severe proposals,²⁸⁹ most analysts felt that FINSA adequately addressed problems in the process and was less aggressive than it could have been.²⁹⁰ In particular, business watchers were pleased that FINSA did not tinker with the confidential nature of the CFIUS process.²⁹¹ On the other hand, Professor Rose suggested that FINSA may "successfully discourage *political* investment by [sovereign wealth funds]."²⁹²

Despite the muted reaction, increased congressional oversight has not been without its share of controversy. Some have argued that the congressional power to call briefings "significantly increases the probability that foreign investment deals will be scuttled for political purposes."²⁹³ The briefings' request power, however, really only implicates concluded transactions *a la* DP World. Congress arguably already had the power to call hearings (and indeed did so often) before the passage of FINSA, so that FINSA merely codified the practice.²⁹⁴ Some practitioners argued the opposite, suggesting that Congress might *avoid* interference post-FINSA, the theory being that having inserted itself into the process with FINSA, Congress would be less likely to attack the process it had devel-

288. *Id.* § 2170(m)(2)(A)–(E).

289. After the collapse of the CNOOC-Unocal deal, for example, Congress attempted to implement a power that would allow it to *directly* override any CFIUS process. See GRAHAM & MARCHICK, *supra* note 1, at 51 (discussion of the Inhofe bill).

290. See, e.g., LaRussa, *supra* note 266, at 285 (noting that "the final version did not include the most draconian provisions of earlier proposals"); Lewkow, *supra* note 181, at 474 (noting rejection of "some of the most controversial and burdensome proposals for CFIUS reform").

291. See Crocker, *supra* note 113, at 465 (noting that FINSA is remarkable for *not* requiring "that CFIUS break confidentiality by notifying Congress of pending transactions"). But see Stagg, *supra* note 82, at 353 (arguing that FINSA leaves open the ability of congressional staffs and "even state senators" to view confidential material from briefings with CFIUS).

292. Rose, *supra* note 197, at 117.

293. Stagg, *supra* note 293, at 353.

294. See Lewkow, *supra* note 181, at 474 (noting that FINSA codifies the reality that "significant political and administrative risks remain for foreign acquirers" rather than creating a paradigm shift on its own).

oped as insufficient.²⁹⁵ It remains to be seen which, if either, position is correct. FINSA is still too young a law to gauge its eventual effects. However, some signs point to a more complicated interaction between FINSA and CFIUS. In some ways FINSA did address Congress's underlying concerns regarding the CFIUS process, particularly its reporting and mitigation aspects. If Congress is satisfied with CFIUS's review process, then it will not have any logical reason to interfere as it did in CNOOC-Unocal and DP World-P&O. Yet, meddling oversight by Congress is arguably the exact reason why the collapses of CNOOC-Unocal and DP World-P&O were so problematic in the first place. The achievement of FINSA, therefore, is that it reduces certain congressional concerns by making the review process more understandable post hoc, and not that it creates additional congressional control. As I will argue in the final section, however, FINSA could have done more to reduce concerns of Congress.

V. SUGGESTIONS FOR REFORM

Congressional interference is a problem that has no easy solutions. On the one hand, Congress cannot be shut out of the process, as it is constitutionally authorized to act against an FDI transaction if it so chooses.²⁹⁶ On the other hand, as explained above, the effect of congressional interference is potentially damaging to FDI in both the short-term and long-term. At best, one can hope to reduce congressional concerns over the CFIUS process in a way that does not compromise the process's integrity or effectiveness. In that regard, FINSA was a partial success, but it was not perfect. This Note argues that two additional reforms to the Exon-Florio review process could further improve the CFIUS process. By making CFIUS appear more effective to Congress, the likelihood that Congress will step in should be reduced.²⁹⁷

295. LaRussa et. al., *supra* note 266, at 301. The authors, however, do not go as far as to suggest that there will be less interference, noting that "mixed signs [are] coming from Congress about whether they will let the process work." *Id.* at 302.

296. See U.S. CONST. art. I, § 8, cl. 3 (granting Congress the power "to regulate Commerce with foreign Nations").

297. See LaRussa et. al., *supra* note 266, at 301 (noting that Congress will be invested in the CFIUS process now, since FINSA was drafted to deal with the "issues that were important to Congress").

A. *More Robust Mitigation*

The first change is one that FINSA has already implemented in part: the power for CFIUS to enter into mitigation agreements ("MAs").²⁹⁸ The effectiveness of the mitigation process is well established. Even before the passage of FINSA, most transactions flagged for CFIUS review also underwent pre-filing mitigation discussions that addressed national security concerns by amending transactions or limiting the scope of acquisitions.²⁹⁹ This in turn reduced the likelihood of additional periods of investigation and provided a more streamlined review process. Additionally, the mitigation process was case-by-case, avoiding the need for what Deputy Treasury Secretary Robert Kimmitt referred to (post-FINSA) as "blunt tools, such as sectoral restrictions."³⁰⁰ Making this process more robust and open could further reduce the risks of congressional interference and also signal to foreign investors that CFIUS possesses the structure and consistency that it has been accused of lacking in the past.³⁰¹

Due to the secret nature of the pre-FINSA mitigation process, pre-filing negotiation with CFIUS was not always enough to ensure smooth sailing through the regulatory process. Sometimes, the mitigation process succeeded in allaying fears, as in the 2004 acquisition of IBM by Lenovo, another Chinese corporation with state ties.³⁰² Like the CNOOC deal a year later, the Lenovo transaction raised alarms in Washington, in this case regarding China's ability to access information on IBM's government customers and potential access to government computer systems. The deal only succeeded after Lenovo entered into a MA promising, among other things, that Lenovo would be physically barred from certain buildings in IBM's North Carolina office park (thus addressing concerns of industrial espionage).³⁰³ Politicization, however, can trump the effectiveness of mitigation. DP World was a nearly picture-

298. 50 U.S.C.S. app. § 2170(l) (LexisNexis 2009).

299. See Gotts et. al., *supra* note 76, at 32 (noting that mitigation often allowed transactions to clear CFIUS).

300. News Release, U.S. Dep't of Treasury, *supra* note 109.

301. See Stagg, *supra* note 82, at 340 (noting that "foreign investors find it difficult to ascertain a clear review standard").

302. Sabino, *supra* note 267, at 23.

303. *Id.*

perfect example of the mitigation process, with weeks of pre-notification communication with CFIUS and research by all sides.³⁰⁴ As subsequent history showed, however, the mitigation process was conducted in vain.

With FINSA's explicit codification of the mitigation process, one would hope that the failures of DP World-P&O and CNOOC-Unocal would be a thing of the past. However, FINSA's approach to mitigation is still *ex post*, in that Congress really only deals with mitigation in its receipt of CFIUS's annual report. As a result, FINSA leaves open the possibility that Congress could still step into an *ongoing* transaction and scuttle it.³⁰⁵

Recently released Treasury regulations³⁰⁶ are basically silent on the nature of the mitigation process under FINSA, and I would argue that the mitigation process could be improved by making MAs of completed transactions more easily accessible to the public. These MAs could then be pooled to create a structured public database.³⁰⁷ Such a database would be organized according to economic sector, foreign country, and nature of acquisition. Additionally, it would include the actions taken by the investing entity to address particular national security concerns and would indicate the issues that CFIUS was particularly concerned about during its review. In many ways such a database of MA's would merely be a broader, more streamlined version of CFIUS's report to Congress under FINSA.³⁰⁸ With the creation of a public MA database, there would be increased movement towards self-oversight by

304. See Press Release, U.S. Dep't of Treasury, *supra* note 84 (summarizing the pre-notification communication in DP World's acquisition of P&O).

305. See generally Stagg, *supra* note 82, at 352-56 (discussing "Congress's ability to politicize a foreign-investment transaction, even where no real national-security threat exists").

306. 31 C.F.R. § 800 (2008).

307. Additionally, the database already has precedent. While most reviews by CFIUS were quietly hidden away pre-FINSA, the reviews of foreign acquisitions of domestic firms within the telecommunications sector were made public by the Federal Communications Commission (FCC) on its website. GRAHAM & MARCHICK, *supra* note 1, at 59.

308. In particular, the FINSA-mandated report requires that the annual report include the following on mitigation: "The types of security arrangements and conditions the Committee has used to mitigate national security concerns about a transaction, including a discussion of the methods that the Committee and any lead agency are using to determine compliance with

companies considering transactions, as CFIUS would have appropriate incentives to act consistently with its previous actions or risk attack from the public or Congress.³⁰⁹

Given this self-oversight effect, the MA database would become a reliable source of information and would allow Congress to view mitigation from an *ex ante* position, comparing past MAs in order to determine the legitimacy of current MAs. Users of the database would have to be careful not to treat any particular MA as binding precedent, given the numerous factors that make each transaction different from the next. But the database would at least provide Congress with what it has lacked up until now: insight *ex ante* into the Exon-Florio process.³¹⁰ This transparency would in turn reduce congressional concerns that CFIUS is not successfully reviewing transactions, reducing the likelihood that Congress would attack CFIUS or its decisions.

A database of MAs would also address the investor-side fear of uncertainty. Since every transaction is unique, the records in the MA database could not be relied upon to make precise predictions, but over time the database would create guiding precedents for transactions in particular sectors. Foreign investors could analyze past CFIUS MAs regarding the sectors in which they were interested and hopefully identify specific concerns and points of contention ahead of time. As more MAs were added to the database, the "unknown" nature of the CFIUS process would be minimized. This would reduce the risk of every future acquisition as foreign entities would essentially learn what needs to be done to get a transaction approved, at least at a fundamental level.

There are concerns, however, that an open MA process could be problematic if it were to reveal too much about the internal nature of the CFIUS review process. Some argue, for example, that opening the CFIUS process too much could re-

such arrangements or conditions." 50 U.S.C.S. app. § 2170(m)(2)(E) (LexisNexis 2009).

309. See GAO: CALVARESI-BARR, *supra* note 103, at 12-14 (arguing that CFIUS' secrecy pre-FINSA created a lack of oversight).

310. See *id.* at 4 (noting the lack of information into CFIUS' process because of the lack of investigatory reports to Congress).

sult in unforeseen political ramifications.³¹¹ However, CFIUS already had the ability to reveal such internal procedures before FINSA was enacted.³¹² It simply chose not to do so most of the time.

It is certainly possible the MA database could have negative effects and deter a foreign investor from acquiring an American corporation. The issue, however, is whether it *over-deters*, and the answer is probably not, as long as it deters the actors involved because there are real problems associated with the transaction.³¹³ Take, for example, the case of *In re Global Crossing*, where a bankruptcy judge announced that a state-run Hong Kong firm would be unlikely to obtain CFIUS approval.³¹⁴ As a result, the Hong Kong firm eventually withdrew its bid (and its notification to CFIUS).³¹⁵ Under an MA database scheme, the database would act as the bankruptcy judge did in that case, informing parties when transactions are unlikely to achieve compliance with CFIUS. If anything, a subsequent withdrawal would seem more legitimate because it would be based on objective concerns of national security as analyzed through many past transactions and not on the opinion of a single magistrate or, worse, the opinions of individual congressmen.

A similar concern is that an open MA database may cause CFIUS to lose the protection of its confidentiality,³¹⁶ instead revealing more issues with transactions for Congress to attack. But this effect would be counteracted by the fact that transparency would deny Congress the use of blind rhetoric to reject a transaction. With greater openness in CFIUS's actions, Congress would have less political justification to attack the

311. See, e.g., Stagg, *supra* note 82, at 353 (arguing that if the CFIUS report identified a country as one of "concern," such disclosure could result in political tension between the United States and the investing state).

312. See, e.g., Press Release, U.S. Dep't of Treasury, *supra* note 84 (describing the history of the DP World CFIUS review process).

313. Deterrence of FDI by itself is not problematic. CFIUS often deterred problem transactions simply by opening investigations, with the foreign investors abandoning bids immediately. See Mostaghel, *supra* note 29, at 603.

314. *In re Global Crossing Ltd.*, 295 B.R. 720, 732 (Bankr. S.D.N.Y. 2003).

315. Sabino, *supra* note 267, at 23.

316. FINSA remains aware of the importance of confidentiality in the Exxon-Florio process. See 50 U.S.C.S. app. § 2170(c) (LexisNexis 2009). See also Young, *supra* note 272, at 60 (noting FINSA's confidentiality requirements as related to Congress).

process in the way it did in CNOOC or DP World.³¹⁷ While transparency in the MA realm cannot serve as a complete protection against politicization, it may raise the political cost of interference to the point where Congress would be less likely to act without strong justification.

B. *Regulatory Parity*

One of the most important features of FINSA was its attempt to re-define or clarify "national security,"³¹⁸ partially in response to complaints that CFIUS was "nonchalant" and "cavalier" in its execution.³¹⁹ In its attempt to better define "national security," FINSA implemented several additional factors for CFIUS to consider in its review, notably the potential effects on critical infrastructure and energy assets,³²⁰ the potential effects on "critical technologies,"³²¹ and the policies of the investing country on nonproliferation, counter-terrorism, and export control laws.³²² Nevertheless, some saw the new interpretation of national security as "still broad enough to invite mischief."³²³ For the most part, however, these factors had always been part of the CFIUS process *sub silentio*.³²⁴ The addition of the specific factors was likely an attempt to rein in what

317. Compare with Professor Rose's suggestion that the Treasury Department promulgate a narrower definition of "critical infrastructure." Rose, *supra* note 197, at 118-19. For Rose, a clearer definition of critical infrastructure will "ensure that protectionism does not replace true concern for national security." *Id.* at 119. This addresses the problem from the procedural side of things, whereas an MA disclosure process would be a broader *structural* change to the Exon-Florio review. The end result, one hopes, should be the same thing: Congress will not have the vagueness of the review process to hide behind.

318. 50 U.S.C.S. app. § 2170(a)(5) (LexisNexis 2009).

319. See Mamounas, *supra* note 43, at 393 (quoting Mark E. Rosen, *Restrictions on Foreign Direct Investment in U.S. Defense and High Technology Firms: Who's Minding the Store?*, 4 J. LEGAL STUD. 75, 81 (1993)); Rose, *supra* note 197, at 118-19 (describing how the final language of FINSA emerged from much broader interpretations of "national security").

320. 50 U.S.C.S. app. § 2170(f)(6) (LexisNexis 2009).

321. *Id.* § 2170(f)(7).

322. *Id.* § 2170(f)(9).

323. Rose, *supra* note 197, at 118.

324. In one interchange between a congresswoman and a member of CFIUS during hearings on DP World, Congresswoman Carolyn B. Maloney (D-NY) noted that she wanted to include "national infrastructure" as part of the definition of national security. Michael P. Jackson, an undersecretary in

Congress viewed as the inappropriate leadership of the Treasury department.³²⁵ With FINSA, in other words, Congress was addressing the perceived problems of the past (poor Treasury leadership), rather than anticipating the controversies of the future.

CFIUS could better adapt to the reality of modern economies and politics by recognizing that national security and parity of regulations between states are closely linked.³²⁶ Towards this end, CFIUS should take into account the regulatory regime of the investing nation when determining the threat level imposed by a transaction. In implementing parity as a factor, CFIUS should consider the level of regulatory control (both economic and security-based) that the investing country imposes upon counterpart economic sectors. If such control is excessive as compared to the United States, then CFIUS should treat this as a signal that the transaction might be problematic, particularly in cases where multiple acquisitions originate from the same nation and focus on the same economic sector. The degree to which CFIUS should consider regulatory parity (or disparity) will depend on the specific facts surrounding each transaction. The purpose here is primarily to placate congressional concerns by expanding the scope of review to include an “economic” factor with national security implications.³²⁷

Congress has always been concerned with regulatory parity. In the midst of the CNOOC-Unocal transaction, Senator Byron Dorgan (D-ND) stated that, “[o]il and gas are important strategic assets. . . . Do you think Unocal could buy CNOOC? Not in a million years. The Chinese government would not allow that.”³²⁸ Dorgan’s colleague, Senator Schumer (D-NY), went so far as to issue an “executive summary” on China’s internal regulations on foreign investment, deeming them a

DHS, responded, “[c]an I just assure you that in this process, we *do* that.” *CFIUS Hearings*, *supra* note 168, at 18 (emphasis added).

325. GAO: CALVARESI-BARR, *supra* note 103, at 10-11.

326. See, e.g., William Hawkins, Commentary, *Inviting in the Trojan Horse?*, WASH. TIMES, June 8, 2008, at B04 (arguing that China’s unbalanced trade with the United States gives China the ability to launch an economic attack that would be as devastating as any conventional assault).

327. See GAO: CALVARESI-BARR, *supra* note 103, at 9-10 (arguing that the process is overly narrow under the Treasury Department).

328. Mouawad, *supra* note 146.

"one-way street."³²⁹ Rhetoric aside, Dorgan and Schumer had a point. Though the CNOOC acquisition of Unocal was likely not problematic, China's closed FDI policies could nevertheless prove dangerous in future transactions.³³⁰ Ultimately Dorgan and Schumer's concerns went to a theory of economic integration. When *both* states are open to FDI, *neither* will be able to threaten the other's security, creating a model of "Mutually Assured Destruction" for the new world economy. Regulatory parity therefore captures threats to infrastructure by defining the threat in the specific case where one foreign nation can gain control over an economic sector *without* providing the mitigating effect of potential integration. In basic terms, such a scenario would not internalize the national security concerns of the United States.

On a practical level, regulatory parity would provide CFIUS with a substantive factor that reflects the way particular industries are structured and regulated in a way that the term "infrastructure" does not currently encompass. As defined by FINSA, "critical infrastructure" means "systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems or assets would have a debilitating impact on national security."³³¹ Putting aside the circular definition ("national security" is itself vague under FINSA³³² except that it must be considered in "application to critical infrastructure"³³³), CFIUS is arguably left with as little guidance post-FINSA as it had pre-FINSA, with "critical infrastructure" left unduly vague.³³⁴ Parity, conversely, would

329. Press Release, Senator Charles E. Schumer, China's One-Way Street on Foreign Direct Investment & Market Access (Aug. 18, 2005), http://schumer.senate.gov/new_website/record.cfm?id=260470&.

330. See GRAHAM & MARCHICK, *supra* note 1, at 103 tbl.4.2 (noting that while China is the United States' third-largest trading partner, the two nations' "political and security relationship remains tenuous at best").

331. 50 U.S.C.S. app. § 2170(a)(6) (LexisNexis 2009).

332. See Lewkow, *supra* note 181, at 470 (noting that Congress wanted to "preserve flexibility").

333. 50 U.S.C.S. app. § 2170(a)(5).

334. See Rose, *supra* note 199, at 118 (arguing that another avenue to reduce politicization could be a more narrow definition of "critical infrastructure" as promulgated by the Treasury department). *But see* Christopher Corr, *When M&A and National Security Don't Mix*, MONDAQ BUS. BRIEFING, Oct. 24, 2007, available at 2007 WLNR 20878249 (noting that while the term "critical infrastructure" is indeed vague, FINSA somewhat addresses this by

reflect an understanding that threats to national security do not lie in foreign ownership, but rather stem from *invidious* foreign ownership. Regulatory parity serves as a signal for when investment in American infrastructure is less likely to be dangerous, and similarly, *disparity* would be a signal for when there is a greater possibility of invidious foreign purpose. However, regulatory parity should be merely a factor to be considered in the review process, not a dispositive definition of either infrastructure or national security that could potentially hamper CFIUS or tie it down to any specific viewpoint.

Parity also provides a solution to what Congress often saw as a primary flaw of the Exon-Florio process: myopic views of CFIUS members.³³⁵ By looking at parity, CFIUS would be required to analyze transactions on an industry-wide basis. And whereas politicization and the nationalistic language of Congress can end up backfiring against the United States,³³⁶ a parity factor would capture those same concerns while also encouraging foreign nations to loosen their restrictions to the benefit of all parties.³³⁷ In particular, a parity factor would allow CFIUS to take a strong stance against a nation like China³³⁸ without resorting to nationalistic retorts about the nature of China's government. This is particularly important since China will continue to be a major trading partner of the United States.³³⁹ Specifically, parity could be tied to an objective standard (the level of restrictiveness from each regulatory regime). As a corollary, the focus of any parity inquiry would

adding the Departments of Energy and Labor to CFIUS to support Exon-Florio's "broadened focus").

335. See Casselman, *supra* note 64, at 165 (noting that politicians were wary of CNOOC-Unocal not so much on the merits of the deal, but on the aggregate effect of a few deals).

336. See Porter, *supra* note 186 ("[S]ome analysts warn that further political hostility against foreign companies buying American assets could boomerang against the United States.").

337. See Silk & Malish, *supra* note 129, at 130 (noting how overly restrictive Chinese regulations on FDI lead to decreased productivity and inefficiency in resource allocation).

338. China will continue to be a major source of concern in the FDI realm, as it is particularly likely to use its sovereign wealth funds to engage in so-called "political investing." See Rose, *supra* note 197, at 95-96.

339. For problems revolving around a more recent transaction, see Huawei's attempted merger with 3Com. See Samuel Porteous, *Security Issues Cloud Sino-US Acquisitions*, S. CHINA MORNING POST, Mar. 10, 2008, at 4.

be backwards at existing regulations. The upshot of both these principles is that a parity argument would appear both more legitimate to foreign investing states and less focused on unproven future consequences of any particular transaction.

Regulatory parity, however, is not a panacea. In no way should it govern or direct the CFIUS decision, nor should it override other factors. Rather, it should serve only as a signal that a transaction *may* be problematic. Parity, for example, while making the most sense when the investing state is a strategic competitor, would likely be less probative when the risk lies solely in technology transfer or in denial of important defense technologies.³⁴⁰ In such cases, the investing state would not concern itself with whether the United States could invest in its own domestic industries, making a demand for parity meaningless.³⁴¹ Although parity fails to capture the core of these issues, FINSA as it stands is probably already an adequate stop-gap. FINSA requires CFIUS to (a) consider potential effects on the sales of military goods, equipment, and technology to countries identified by the Secretary of State;³⁴² (b) take into account concerns regarding the United States's "international technological leadership";³⁴³ and (c) consider the transaction's national security effects on "critical technologies."³⁴⁴

Ultimately, however, parity would only work in conjunction with the other review factors listed by FINSA.³⁴⁵ CFIUS, of course, would still have to analyze exactly where the threat of the transaction lies.

VI. CONCLUSION

As CNOOC-Unocal and Dubai Ports-P&O show, Congress is an inefficient—and more dangerously, inaccurate—arbiter when it comes to the impact of FDI on national security.

340. See generally Christopher M. Warner, Note, *Foreign Direct Investment and National Security – Post FINSA*, 87 TEX. L. REV. 663, 667-68 (2009) (for a list of risks related to FDI).

341. For one simple example, Japan lacks a traditional domestic defense industry which discourages U.S. investment for the simple reason that there is nothing to invest in. See GAO: FOREIGN LAWS, *supra* note 78, at 23-24.

342. 50 U.S.C.S. app. § 2170(f)(4) (LexisNexis 2009).

343. *Id.* § 2170(f)(5).

344. *Id.* § 2170(f)(7).

345. For example, if China heavily regulated its sweater industry, few would see this as a severe test of American security.

FINSA goes far in addressing the perceived flaws of CFIUS so that the Exon-Florio transaction review process now appears less problematic in the eyes of Congress, but it could go further. Neither a more transparent mitigation process nor the inclusion of additional review factors can ever bring the threat of politicization to zero. Congress will always be subject to special interests, and so, for that matter, will the President. However, an open mitigation process can *reduce* congressional concerns and eliminate a primary justification for congressional interference. Similarly, including a parity factor in the review process can help address the congressional concern that CFIUS does not examine entire economic sectors broadly enough in its review. When implementing both reforms, one needs to balance congressional concerns with maintaining the integrity of the review process.

As FDI continues to grow, there is no question that its effects on national security must be regulated. But the decision for the government to step into a transaction must be made by CFIUS and the Executive Branch, not Congress. Politicization by Congress puts too many “cooks in the kitchen” and creates an increasingly unpredictable atmosphere for FDI in the United States. A more robust and functional Exon-Florio process is therefore necessary. It is essential for the continuing vitality of the American economic experiment. As of today, CNOOC-Unocal and DP World-P&O remain exceptional cases in which politics and trade clashed spectacularly. If they become paradigmatic examples of American policies, however, the risks of investing in the United States will expand to a point at which FDI may freeze entirely, a highly undesirable result.