
Politicization of the CFIUS Process

While no decision-making process in Washington can be entirely immune from political influence, a number of factors can conspire to make Exon-Florio reviews especially inviting targets for manipulation by competing corporate interests. First, the very nature of an Exon-Florio review involves two highly sensitive political issues: foreign ownership and national security. Each of these issues independently can grab the attention of individual constituents, and each certainly also receives attention from interest groups with particular worldviews and varying degrees of influence. As evident in the Dubai Ports World controversy, when these factors combine, they can produce an especially combustible political mix. Second, while most transactions subject to an Exon-Florio review occur in relative anonymity, it is not uncommon for a review by the Committee on Foreign Investment in the United States (CFIUS), much like an antitrust review, to involve a large-stakes or otherwise high-profile transaction. Public scrutiny of such a transaction, and the attendant publicity that may accrue to a politician who takes a noteworthy position on the transaction, increases the transaction's susceptibility to political meddling. Third, and perhaps most important, rival suitors for the US company being acquired may seek to politicize the Exon-Florio process to raise costs for the potential foreign acquirer, or to reopen the bidding process.

As discussed in chapters 1 and 2, each of these factors contributed to the enactment of the Exon-Florio law in 1988, and have motivated subsequent proposed amendments to the law. It should not be surprising, then, that from time to time, Congress has sought to be involved in CFIUS reviews. In the past few years, the CFIUS process has become increasingly politicized for commercial rather than national security reasons, not only be-

cause of stronger internal divisions between security and economic agencies, but also because of increased involvement from external parties, including Congress. Companies seeking to manipulate the CFIUS process for commercial gain have frequently drawn congressional attention to specific cases, and a US bidder may seek to eliminate or reduce competition for a particular asset from foreign bidders by creating political opposition to a foreign acquisition of a particular company. The following are a few examples of such attempted congressional involvement in the CFIUS process, as well as one example of highly politicized congressional action that occurred even before a formal CFIUS review was initiated.

BTR-Norton and Global Crossing

In 1990, only two years after Exon-Florio became law, 119 members of Congress wrote to the president asking for an investigation of the UK firm British Tire and Rubber's (BTR) proposed hostile acquisition of the Norton Company, based in Massachusetts. The letter stated that "we do not believe that any take over of Norton would be in our economic security or national security interest" (Karim 1995). These members of Congress, encouraged by Norton, suddenly changed their tune when a French company, Compagnie de Saint Gobain, offered Norton \$15 more per share. Clearly, Norton manipulated the CFIUS process to its advantage, because no one raised any national security concerns over the French acquisition. It is hard to imagine how a British acquisition of Norton raised national security issues while a French acquisition did not. There were no national security issues with the proposed British acquisition; Norton simply did not want to be acquired by BTR, and used a political campaign toward CFIUS to prevent it.

More recently, in 2002 the famed corporate raider Carl Icahn tried to use pressure from Congress on the CFIUS process to break up the proposed acquisition of Global Crossing by ST Telemedia, a Singaporean company. After shoring up opposition in Congress to the transaction, Icahn later challenged, in US bankruptcy court, the Global Crossing board of directors' business judgment for sticking with ST Telemedia. Icahn claimed that the ST Telemedia acquisition was unlikely to gain CFIUS approval, and therefore the bankruptcy judge should force a new auction for Global Crossing. Icahn was unsuccessful, but his efforts cost the eventual acquirer time, money, and effort to preserve its transaction.

ASML and Silicon Valley Group

In October 2000, ASML Holding N.V. (ASML), a Netherlands-based manufacturer of silicon equipment announced its intention to acquire Silicon

Valley Group (SVG), a semiconductor equipment manufacturer, for \$1.6 billion. The merger would create the world's largest maker of lithography equipment, the powerful machines used to etch microscopic patterns onto silicon wafers. SVG, after informal consultations with CFIUS agencies, formally filed its notice with CFIUS on December 13, 2000, in the waning days of the Clinton administration, starting the initial 30-day clock. ASML later decided to withdraw its CFIUS filing, and refile after the Bush administration took office, in part because of Pentagon opposition, but also to avoid problems associated with running a regulatory process during a political transition.¹ The parties refiled their petition on February 5, 2001, expecting a smooth 30-day review.

SVG and its subsidiary, Tinsley Laboratories, manufactured leading optical equipment used for spy satellites, but according to SVG's CEO, they had not done direct work for the Pentagon for years. Close to the end of the 30-day review, the parties appeared to be on the verge of an agreement with CFIUS, under which ASML committed to invest millions of dollars over a multiyear period. ASML would not, however, be forced to divest its subsidiary, Tinsley Laboratories. Instead, it would commit to making Tinsley products available for Pentagon use, and would require ASML not to transfer Tinsley's technology and employees abroad for a number of years.²

Just before the end of the initial 30-day review period, close to a dozen influential members of Congress, including then Senate Majority Leader Trent Lott (R-MS), then chairman of the House Armed Services Committee Bob Stump (R-AL), and future chairman of the House Armed Services Committee Duncan Hunter (R-CA), objected to the acquisition and called on CFIUS to extend its review into the 45-day "investigation period." Senator Lott, in a letter to Secretary of Defense Donald Rumsfeld and National Security Adviser Condoleezza Rice, stated that precision optics and semiconductor technologies "will remain critical to the development of new systems that will allow us to preserve our national security."³ Further, Lott wrote, "Considering the critical and proprietary nature of the technologies associated with the proposed sale, I believe the full 45-day investigation . . . would provide you with a greater opportunity to fully evaluate and deliberate the impact of the proposed sale on US technological leadership and in areas affecting national security."⁴ According to

1. "ASM Lithography Holding N.V. and Silicon Valley Group, Inc. Announce Intent to Withdraw and Refile Their Petition for Exon-Florio Review," *Business Wire*, January 7, 2001.

2. Peter Spiegel, "Rival Accused after Security Fears Block High-Tech Sale," *Financial Times*, March 9, 2001, The Americas, 12.

3. Glenn Simpson, "Pentagon Moves to Postpone Dutch Deal for Silicon Valley Group," *Wall Street Journal*, March 8, 2001, B6.

4. Glenn Simpson, "Pentagon Moves to Postpone Dutch Deal for Silicon Valley Group."

press reports, with multiple congressional letters streaming in, the Pentagon became even more energized, and forced the review to move to the investigation stage. The Pentagon, and particularly then Deputy Secretary of Defense Paul Wolfowitz, toughened the terms of the security agreement with ASML and continued to oppose the transaction. Ultimately, President Bush approved the transaction, but at one point, it was so perilously close to being rejected that Intel's then CEO, Craig Barrett, an influential figure in Washington, wrote to the secretaries of defense, treasury, and commerce, and met with Vice President Cheney, among others, to lobby for the deal.⁵ Intel relied on SVG for critical inputs, and was worried that without a healthy backer like ASML, SVG's viability was in doubt. That the Pentagon forced an investigation into an acquisition from a leading company based in a friendly country,⁶ of a US technology company without classified contracts with the Pentagon, signaled a sea change in how the Bush administration would handle CFIUS reviews.

It is not unusual for members of Congress to weigh in on important regulatory matters, but the circumstances surrounding the sudden congressional interest in the ASML-SVG transaction were unusual. Congressional interest was stoked by another Silicon Valley-based competitor of SVG—Ultratech Stepper—which sought to acquire part of SVG but was outbid by ASML,⁷ and hired lobbyists to generate opposition on Capitol Hill. In many similar cases, a domestic company seeks to avoid being in the public eye. In this case, Ultratech's CEO was vocal, calling on CFIUS to force ASML to divest Tinsley Laboratories, which CFIUS did. Ultratech also contributed to and activated an antiglobalization group, the US Business and Industrial Council, which circulated fact sheets and videos to hundreds of congressional offices raising national security concerns about the transaction.⁸

The transaction was approved, albeit after an interagency fight and with tougher conditions imposed on ASML: It was forced to commit to significant investments in research and development (R&D), maintain certain R&D functions within the United States, and make good faith efforts to try to sell Tinsley Laboratories to a US owner within six months.⁹ The trans-

5. Toby Sterling, "ASML/SVG Merger Closes, But Deal Once Hung by a Thread," May 23, 2001, available at www.ofii.org (accessed March 10, 2006).

6. The Netherlands cooperates extensively on military and political matters with the United States, and is an active member of NATO.

7. Peter Spiegel, "Rival accused after security fears block high-tech sale," *Financial Times*, March 9, 2001, The Americas, 12.

8. Toby Sterling, "ASML/SVG Merger Closes, But Deal Once Hung by a Thread," May 23, 2001, available at www.ofii.org (accessed March 10, 2006).

9. ASML sold Tinsley Laboratories to Richmond, California-based SSG Precision Optronics Inc. in December 2001. Sarah Cohen, "ASML Sells Tinsley to SSG Precision Optronics," *The Daily Deal*, December 20, 2001, available at www.TheDeal.com (accessed March 10, 2006).

action was troubled to begin with, in large part due to concerns within the Pentagon. But the involvement of Ultratech, a competitor interested in buying Tinsley Laboratories, added fuel to the fire. Had Ultratech not unleashed such a political firestorm, the ASML-SVG transaction might have been approved within 30 days and with fewer conditions. While Ultratech ultimately could not force the deal to be blocked, it successfully politicized the process, extending the review and forcing tougher conditions on a competitor.

VSNL and Tyco Global Network

One of the most unusual attempts by a competitor to politicize the Exon-Florio process occurred in early 2005, when Crest Communications, an Alaska-based company, raised national security concerns about the acquisition of the Tyco Global Network (TGN) by Videsh Sanchar Nigam Limited (VSNL), a telecommunications company based in India and partially owned by the Indian government. TGN was built by the then-high-flying company Tyco in the late 1990s. Its main asset was an undersea cable network connecting the United States to Europe and Japan. TGN did not include a fiber network within the continental United States.

Tyco conducted an auction for TGN in 2004. Although a number of companies expressed interest in TGN, only VSNL's bid was viable. After five months of consultations and negotiations with the Department of Justice (DOJ), Department of Defense (DOD), Department of Homeland Security (DHS), and the Federal Bureau of Investigation (FBI), VSNL and those agencies signed an extraordinarily tough network security agreement (NSA), particularly considering that TGN only connected to the United States, as opposed to operating within it.

In a 47-page filing to the Federal Communications Commission (FCC), unprecedented for the vigor with which it publicly argued that the transaction posed national security risks, Crest argued that the transaction would severely compromise the DOD's net-centric warfare plans and threaten the security and integrity of military, intelligence, and other sensitive communications in the cable network.¹⁰ Crest also claimed that the acquisition was forced by the Indian government, because it has an interest in ensuring India's self-sufficiency and national security, both of which can be better achieved if "VSNL controls such a significant portion of the critical, global submarine cable infrastructure."¹¹

10. Petition to Deny of Crest Communications Corporation, In the Matters of Tyco Telecommunications (US) Inc., Assignor, VSNL Telecommunications (US) Inc., Assignee, et al., Applications for Modification, Assignment and Transfer of Control of Cable Landing Licenses for the Tyco Atlantic and Tyco Pacific Submarine Cable Systems, File Nos. SCL-ASG-20050304-0003; SCL-MOD-20050301-0004; SCL-T/C-20050301-0005, at 3 (March 31, 2005).

11. Petition to Deny of Crest Communications Corporation, 12.

In response, Tyco claimed that Crest's claim before the FCC "serves only to further Crest's ongoing corporate 'greenmail' and retaliation strategy against Tyco Telecommunications (US)."¹² According to Tyco, Crest and Tyco had engaged in business negotiations involving another segment of Tyco's business. When Tyco refused to grant Crest a substantial discount on Tyco's services, "Crest followed through on its explicit threat . . . to oppose the TGN sale."¹³

Hyperbolic claims and counterclaims by attorneys are common at the FCC; this transaction was unusual in that competitive carriers placed national security issues before the FCC, even though the FCC, as discussed in chapter 2, defers to the executive branch on matters of national security.

Crest's national security claims received attention in the press and Congress. Fortunately, however, it does not appear that CFIUS agencies paid much attention because Crest's complaints were obviously based on a commercial dispute. On April 7, 2005, only a few weeks after Crest filed its national security arguments with the FCC, the DOJ, DHS, DOD, and FBI signed an NSA with VSNL.¹⁴ On April 11, these same agencies notified the FCC that they had no national security objections to the FCC granting VSNL the licenses it requested.

CNOOC's Proposed Acquisition of Unocal

When the China National Offshore Oil Corporation (CNOOC) announced on June 23, 2005, that it was making a "friendly" bid of \$18.5 billion for Unocal, the US-based oil and gas company, it touched off a firestorm in Washington and put the previously obscure CFIUS onto the front pages of newspapers around the world.¹⁵ Rumors of CNOOC's potential interest in Unocal had swirled around New York and other financial centers earlier in the year, and CNOOC had considered but later decided not to formally bid for Unocal in the spring of 2005. After taking bids from a number of interested parties, in April 2004 Unocal's board of directors accepted the Chevron Corporation's offer to acquire Unocal for \$16.4 billion in cash and

12. Joint Opposition to Petition to Deny, In the Matters of Tyco Telecommunications (US) Inc., Assignor, VSNL Telecommunications (US) Inc., Assignee, et al., Applications for Modification, Assignment and Transfer of Control of Cable Landing Licenses for the Tyco Atlantic and Tyco Pacific Submarine Cable Systems, File Nos. SCL-ASG-20050304-0003; SCL-MOD-20050301-0004; SCL-T/C-20050301-0005, at 1 (April 11, 2005).

13. Joint Opposition to Petition to Deny, In the Matters of Tyco Telecommunications, 2.

14. Joint Opposition to Petition to Deny, In the Matters of Tyco Telecommunications, 22.

15. CNOOC press release, "CNOOC Limited Proposes Merger with Unocal Offering US\$67 per Unocal Share in Cash," June 23, 2005, available at www.cnooltd.com (accessed March 10, 2006). See also Stephanie Kirchgassner, "Chinese Case Puts Secretive Panel in Spotlight: US Vetting of Foreign Takeovers Is Hot Topic," *Financial Times*, August 4, 2005, 22.

stock.¹⁶ CNOOC then decided to seek to supplant Chevron's bid with a sweeter offer.¹⁷

With nominal oil prices at record levels, strong anti-China sentiment in Washington, and a domestic company interested in preserving its agreement with Unocal, CNOOC's attempt to acquire Unocal set the stage for a "perfect storm" in Congress for a debate on the national security implications of foreign investment in the United States. The negative reaction against the CNOOC bid came quickly and with force. Even before CNOOC formally announced its bid, congressmen Duncan Hunter (R-CA) and Richard Pombo (R-CA) sent a letter to the Bush administration asking it to review and potentially block the bid.¹⁸ Outside of Congress, Mikkal Herberg, director of the Asian energy security program at the National Bureau of Asian Research, a Seattle-based think tank, predicted that the CNOOC bid would "feed the fear that the Chinese are coming, the Chinese are coming."¹⁹ C. Richard D'Amato, chairman of the US-China Economic and Security Review Commission, a congressional advisory panel, said, "When we're so dependent on foreign suppliers, giving away American sources of petroleum and hydrocarbons doesn't make sense to me."²⁰ Congressman Richard Pombo (R-CA) stated, "I do not believe it is in the best interest of the United States to have Unocal owned by the Chinese national government. . . . I am afraid that such an acquisition would come with disastrous consequences for our economic and national security."²¹ Sam Bodman, the US secretary of energy, stated that the US government's review of a CNOOC-Unocal transaction, presumably under CFIUS, would be a "truly complex matter."²² Further fanning the flames, Liu Jianchao, Chinese foreign ministry spokesman, warned the United States to "allow normal trade relations to take place without political interference."²³ This

16. Chevron press release, "Chevron Texaco Announces Agreement to Acquire Unocal," April 4, 2005, available at www.chevron.com (accessed March 10, 2006).

17. Chevron is a client of Covington & Burling, the law firm in which David Marchick, one of the authors of this book, is a partner.

18. Russell Gold, Matt Pottinger, and Dennis K. Berman, "China's CNOOC Lobs in Rival Bid to Acquire Unocal—Oil Firm's \$18.5 Billion Offer Aims to Knock Out Chevron; Concerns in Washington," *Wall Street Journal*, June 23, 2005, A1.

19. James F. Peltz, Elizabeth Douglass, and Evelyn Iritani, "Chinese Oil Firm Bids for Unocal," *Los Angeles Times*, June 23, 2005, A1.

20. Peltz, Douglass, and Iritani, "Chinese Oil Firm Bids for Unocal."

21. David R. Baker, "Chinese Oil Firm Trumps Chevron Bid for Unocal," *San Francisco Chronicle*, June 23, 2005, A1.

22. David Greising, "China Bids for Oil Giant Unocal; State-Owned Company Offers \$18.5 Billion," *Chicago Tribune*, June 23, 2005.

23. David Barboza and Andrew Ross Sorkin, "Chinese Oil Giant in Takeover Bid for US Corporation," *New York Times*, June 23, 2005, A1.

statement was measurably softer than an unusually tin-eared statement a few weeks later from the Chinese foreign ministry: “We demand that the US Congress correct its mistaken ways of politicizing economic and trade issues and stop interfering in the normal commercial exchanges between enterprises of the two countries.”²⁴ Members of Congress typically do not react well to such warnings from a Chinese government official.

Opponents of the CNOOC acquisition focused on a number of distinct arguments. First, they argued that, given high oil prices and tight supplies, ownership of key global energy assets by a Chinese state-owned firm would put global energy sources at risk, as CNOOC might hoard Unocal’s oil and gas reserves for China’s exclusive use, taking important supplies off the global market. Since the United States’ national and energy security depended on secure supplies of oil and gas, a sale to CNOOC would compromise US national security interests. Second, opponents argued that the proposed CNOOC acquisition was an attempt by the Chinese government to control critical oil and gas supplies, and such supplies and the accompanying revenues would strengthen the Chinese government and state.²⁵ Third, opponents argued that preferential loans to CNOOC by Chinese state-owned banks and CNOOC’s state-owned parent put US companies at a competitive disadvantage.²⁶ Fourth, opponents argued that a CNOOC acquisition of Unocal would potentially facilitate the transfer of sensitive technologies to China.²⁷ Fifth, opponents maintained that, since the Chinese would never allow a US company to acquire a major Chinese oil company, the United States should block the transaction on reciprocity grounds.

Supporters of the transaction, including one of the authors of this book, argued that since oil and gas are fungible, and oil markets are global, there would be no national security issues associated with the transaction (Graham 2005b). Second, supporters argued that, given the relatively small size of Unocal’s global oil and gas holdings, a CNOOC acquisition would have a negligible impact on global energy markets. Third, supporters maintained that Chinese companies already possessed, or could easily acquire from other companies, the type of sophisticated dual-use technol-

24. Peter S. Goodman, “China Tells Congress to Back Off Businesses; Tensions Heightened by Bid to Purchase Unocal,” *Washington Post*, July 5, 2005, A1.

25. Statement of C. Richard D’Amato, chairman, US-China Economic and Security Review Commission, *National Security Dimensions of the Possible Acquisition of Unocal by CNOOC and the Role of CFIUS: Hearing Before the House Committee on Armed Services*, 109th Congress, 1st sess., July 13, 2005.

26. Allan Sloan, “Lending a Helping Hand: The Math Behind CNOOC’s Rich Offer to Buy Out Unocal,” *Newsweek*, July 18, 2005, available at www.newsweek.com (accessed March 12, 2006).

27. Statement of C. Richard D’Amato, US-China Economic and Security Review Commission, *National Security Dimensions of the Possible Acquisition of Unocal by CNOOC and the Role of CFIUS*.

ogy that Unocal allegedly held. Thus, a CNOOC acquisition would not give Chinese companies access to technologies that could potentially undermine US security interests. Fourth, supporters argued that the United States had a strong interest in maintaining open markets and encouraging open investment policies around the world; blocking the CNOOC-Unocal transaction would lead to protectionism and ultimately hurt US interests.²⁸ Finally, CNOOC itself made it clear that it would be willing to sell Unocal's assets based in the Gulf of Mexico if Chinese ownership of such assets created national security concerns.²⁹

In the six weeks that followed before CNOOC ultimately abandoned its bid, hardly a day went by in Washington without another attack on the transaction:

- 41 members of Congress sent a letter to Treasury Secretary John Snow in late June 2005, asking that the potential transaction “be reviewed immediately to investigate the implications of the acquisition of US energy companies and assets by CNOOC and other government-controlled Chinese energy companies.”³⁰
- On June 30, 2005, the US House of Representatives voted 333-92 to prohibit the Treasury Department's use of funds for recommending approval of the sale of Unocal to CNOOC.³¹ On the same day, the House also approved, by a vote of 398-15, a nonbinding resolution urging an Exon-Florio review of the bid, stating that CNOOC in control of Unocal “could take action that would threaten to impair the national security of the United States.”³² The language of the resolution mirrored the statutory test in the Exon-Florio Amendment. In other words, the House of Representatives went on record with the view that CFIUS should block the transaction.
- On July 11, 2005, Senators Kent Conrad (D-ND) and Jim Bunning (R-KY) wrote a letter to United States Trade Representative Rob Port-

28. Editorial, “No Way to Treat a Dragon,” *New York Times*, August 4, 2005, A18.

29. Fu Chengyu, “Why Is America Worried?” *Wall Street Journal*, July 6, 2005, A14.

30. Letter to Treasury Secretary John W. Snow from Representative William J. Jefferson et al. (undated).

31. H Amdt. 431 offered to HR 3058 by Representative Carolyn Kilpatrick of Michigan, approved in roll call vote no. 353, 109th Congress, 1st sess., 151 *Congressional Record* H5515 (daily ed. June 30, 2005).

32. Expressing the Sense of the House of Representatives that a Chinese State-Owned Energy Company Exercising Control of Critical United States Energy Infrastructure and Energy Production Capacity Could Take Action That Would Threaten to Impair the National Security of the United States, HR 344, 109th Congress, 1st sess., 151 *Congressional Record* H194 (daily ed. January 25, 2005): § 1, 4. The resolution was offered by Representative Pombo and approved in roll call vote no. 360.

man and Secretary of Commerce Carlos Gutierrez suggesting that CNOOC's proposed acquisition "is inconsistent with China's WTO commitments."³³ The letter took aim at the financing arrangements CNOOC had made to support the acquisition, stating "the proposed acquisition is not being conducted on commercial terms and has little commercial justification. CNOOC's bid for Unocal will require CNOOC to secure \$16 billion in funding from outside sources. Of this \$16 billion, \$13 billion will be provided by entities owned by the Chinese government; and \$7 billion of this funding will be in the form of no-interest or low-interest loans from its state-owned parent company."³⁴

- On July 13, 2005, the House Armed Services Committee held a hearing on the proposed CNOOC acquisition. Among the witnesses was former CIA director Jim Woolsey, who called the proposed deal a "takeover attempt of a US company by the most powerful communist dictatorship in the world. . . . Oil can be used as a weapon of war."³⁵
- Also on July 13, 2005, Senators Charles Grassley (R-IA) and Max Baucus, the chairman and ranking member of the powerful Senate Finance Committee, wrote to the president expressing concerns about funding for the CNOOC bid, stating: "The offer by CNOOC Ltd. for Unocal raises an important question; namely, whether it is appropriate for state-owned enterprises to subsidize investment transactions to acquire scarce natural resources that are in high demand. When government subsidies are directed toward the acquisition and development of scarce resources, any ensuing market distortions should be of particular concern. Such subsidies may facilitate the allocation of scarce resources to inefficient or less-efficient producers. Any review by CFIUS should take into account the impact this type of subsidized acquisition may have on the US economy and its potential threat to our national security interests."³⁶
- On the same day, representative Richard Pombo wrote to congressman Joe Barton, chairman of the House Committee on Energy and Commerce, asking Barton to amend the draft energy bill moving through Congress. The proposed amendment would limit CFIUS's ability to

33. Letter to the Honorable Carlos M. Gutierrez and Ambassador Rob Portman from Senators Kent Conrad and Jim Bunning (July 11, 2005), available at conrad.senate.gov (accessed March 10, 2006).

34. Letter to the Honorable Carlos M. Gutierrez and Ambassador Rob Portman from Senators Kent Conrad and Jim Bunning (July 11, 2005).

35. See statements of Representative James Woolsey before the House Armed Services Committee, *Hearing on the National Security Implications of the Possible Merger Between the China National Offshore Oil Corporation (CNOOC) and the Unocal Corporation* (July 13, 2005).

36. Senators Charles E. Grassley and Max Baucus, "Grassley, Baucus Express Concern Over Potential CNOOC-Unocal Deal" press release, July 13, 2005.

review the proposed CNOOC transaction until the Departments of Energy and State completed a wide-ranging study of the proposed transaction. Among other things, the study, which according to the amendment would need to be completed within 180 days, would require assessments of the type, nationality, and location of energy assets sought for investment by companies in the People's Republic of China (PRC); an assessment of the extent to which China's investment in energy assets was on market-based terms, free from government subsidies; the effect of such investment on the United States' control of dual-use and export-controlled technologies; and the relationship between the PRC and energy-related businesses such as CNOOC.

- On July 15, 2005, Senator Byron Dorgan introduced a bill in the US Senate that would block, through legislation, the CNOOC acquisition of Unocal. The bill, after reciting various findings that argued against the transaction, simply stated, "Notwithstanding any other provision of law, the merger, acquisition or takeover of Unocal by CNOOC is prohibited."³⁷
- Also on July 15, five senators wrote to Senator Peter Domenici, chairman of the Senate Committee on Energy and Natural Resources, opposing the CNOOC acquisition. The five senators also asked Domenici to include the same amendment that Congressman Pombo had previously written about to Congressman Barton.³⁸
- On July 20, Senator Charles Schumer offered an amendment to an appropriations bill that would prevent a foreign government-owned entity from acquiring a US company until 30 days after the secretary of state had delivered an assessment as to whether there were reciprocal laws allowing for similar transactions in that foreign country. The amendment passed the Senate by a voice vote.³⁹
- On July 29, Senate and House negotiators agreed to adopt, with slight changes, the amendment authored by Congressman Pombo requiring that the secretaries of energy, defense, and homeland security conduct a study of China's growing energy requirements and the implications of "such growth on the political, strategic, economic, or national security of the United States."⁴⁰ The amendment prohibited CFIUS from

37. Bill to prohibit the merger, acquisition, or takeover of Unocal Corporation by CNOOC Ltd. of China. S 1412, 109th Congress, 1st sess., 151 *Congressional Record*: S 8386–8387 (daily ed. July 15, 2005).

38. Letter to Senator Pete V. Domenici from Senators Conrad Burns, Byron Dorgan, Mary Landrieu, Lindsey Graham, and Mel Martinez (July 15, 2005).

39. S 8522, 151 *Congressional Record* (daily ed. July 20, 2005): S 8574. Amendment introduced by Senator Schumer, later became SA 1304 to HR 3057.

40. *Energy Policy Act of 2005*, § 1837, Public Law 109-58, *US Statutes at Large* 119, 594.

concluding its national security review of an “investment in the energy assets of a United States domestic corporation by an entity owned or controlled by the government of the People’s Republic of China” until after a period of 141 days. In other words, once the amendment became law, CFIUS could not complete its review of a potential CNOOC-Unocal transaction for 141 days, or 51 days longer than the maximum of 90 days established under the Exon-Florio Amendment.

Six days after the Senate and House conferees for the Energy Policy Act adopted the Pombo Amendment, CNOOC announced that it was withdrawing its bid for Unocal. In a statement, CNOOC’s Chairman Fu Chengyu said, “CNOOC has given active consideration to further improving the terms of its offer, and would have done so but for the political environment in the US.”⁴¹ Mr. Fu called the negative political reaction to CNOOC’s bid “regrettable and unjustified.” Despite bidding almost \$1 billion more than Chevron, the political backlash against the proposed acquisition created too much risk for both CNOOC and Unocal.

Indeed, while the focus of congressional opponents to the CNOOC bid was squarely on the CFIUS process, the ultimate decision makers would have been the boards of directors of Unocal and CNOOC, and Unocal’s board needed to assess the likelihood that a CNOOC acquisition of Unocal would ultimately gain CFIUS approval. According to press reports and a Unocal Securities and Exchange Commission (SEC) filing, Unocal’s board of directors would have sided with CNOOC if the Chinese company had further increased its bid in light of the regulatory risk the transaction would face.⁴²

The CNOOC-Unocal case was also unusual in CNOOC’s decision to file a formal notice with CFIUS, thereby asking CFIUS to commence consideration of its national security review, even though Unocal was formally and contractually committed to be acquired by Chevron. Simultaneous with the filing, CNOOC issued a press release saying that the company made the filing so “the Committee can begin to review CNOOC’s proposal to merge with Unocal Corp. CFIUS regulations provide that the Committee will ask Unocal to respond to its questions with respect to the transaction within seven days of the Committee’s request.”⁴³ CNOOC further stated that “we have given Unocal certainty with regard to our proposal, which is all cash, and assurances with regard to the regulatory approval process.”

41. Fu Chengyu, press release, “CNOOC Announces That It Has Withdrawn Its Offer for Unocal,” August 2, 2005, available at www.cnooc.com.cn (accessed January 12, 2006).

42. Russell Gold and Kate Linebaugh, “CNOOC Pressured Unocal on Deal, Derailing Progress,” *Wall Street Journal*, July 26, 2005, A2.

43. CNOOC press release, “CNOOC Limited Files CFIUS Notice,” July 1, 2005, available at www.cnoocld.com/press.

The CNOOC move to file with CFIUS was unusual because, typically, both parties to a transaction file a joint voluntary notice with CFIUS. CNOOC filed alone, triggering a process in which CFIUS, at its discretion, could ask Unocal for information to complete the filing.⁴⁴ CFIUS regulations do allow one “party,” acting alone, to file a notice,⁴⁵ and they authorize CFIUS to seek information from other parties to a transaction or potential transaction.⁴⁶ Nevertheless, according to the Department of the Treasury, there have been only three cases out of more than 1,600 in which CFIUS has accepted a filing from only one of the parties. Given the politically charged atmosphere surrounding the CNOOC case, one could expect that CFIUS agencies would not want to break new ground and accept a unilateral filing, particularly since it was unclear whether a CNOOC-Unocal transaction would ever materialize.

Throughout the congressional debate over the CNOOC proposal, the White House and CFIUS agencies, as appropriate, scrupulously tried to stay out of the fray. When asked about the transaction, Scott McClellan, the White House press secretary, demurred, stating, “There are procedures in place, and if a bid goes through then we would expect the appropriate procedures to be followed.”⁴⁷ Responding to a reporter’s question about CNOOC’s unilateral CFIUS filing, Tony Fratto, a Treasury spokesman, stated, “A CFIUS review may begin when the necessary information from a potential acquiring company and target company is filed with the Com-

44. See Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons, *Code of Federal Regulations*, title 31, sec. 800.402(a)(2). If CFIUS chooses to delay acceptance of the notice and the beginning of the review to obtain any information that has not been submitted by the notifying party, it may inform the nonnotifying party that a notice has been submitted with respect to a proposed transaction involving the party, and request that the information required by the regulations be forwarded within seven days.

45. Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons, sec. 800.401(a).

46. Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons, sec. 800.402(b), which reads,

If fewer than all the parties to an acquisition submit a voluntary notice:

(1) Each notifying party shall provide the information set out in this section with respect to itself and, to the extent known or reasonably available to it, with respect to each non-notifying party.

(2) The Staff Chairman may delay acceptance of the notice, and the beginning of the 30-day review period, in order to obtain any information set forth under this section that has not been submitted by the notifying party. Where necessary to obtain such information, the Staff Chairman may inform the non-notifying party or parties that notice has been initiated with respect to a proposed transaction involving the party, and request that certain information set forth in this section, as specified by the Staff Chairman, be forwarded to the Committee within seven days after such request by the Staff Chairman.

47. Jad Mouawad, “Unocal’s Chinese Suitor Wants U.S. Review,” *New York Times*, June 28, 2005, C6.

mittee, and the Committee determines that a transaction is likely to be successful. . . . CFIUS does not provide 'advisory opinions.'"⁴⁸ CFIUS never acted on the CNOOC filing, as congressional pressure ultimately led CNOOC to withdraw.

It is unknown how CFIUS would have ultimately ruled on the proposed CNOOC-Unocal transaction if the transaction had gone forward. The only detailed public statement ever offered by the Bush administration was made by Deputy Treasury Secretary Robert Kimmit, in testimony before the Senate Committee on Banking, Housing and Urban Affairs. In response to a question by Senator Richard Shelby, the chairman of the committee, about whether the proposed CNOOC acquisition would be subject to a mandatory investigation pursuant to the Byrd Amendment to Exon-Florio, Kimmit stated:

Let's talk about the public facts. The fact is it was a state-owned company . . . receiving concessional financing, according to reports, wanting to make an investment into a sensitive sector, sensitive by [China's] definition, since they will not let US companies invest in that [sector] in China . . . it would seem to me that it falls squarely within Section B, which was the Byrd Amendment in 1992.⁴⁹

In other words, according to Kimmit, CFIUS would have subjected a CNOOC-Unocal transaction to extraordinary scrutiny.

The Dubai Ports World Controversy

Of all of the cases in which Exon-Florio reviews have become politicized, the Dubai Ports World (DP World) acquisition of Peninsular and Oriental Steam Navigation Company (P&O) stands out in several ways. Statements by congressional leaders from both parties denouncing the deal were unusually strong, so strong that defenders of the deal could have credibly argued that anti-Arab sentiment was a factor in the statements. As a perfect example of the hyperbole, Senator Frank Lautenberg (D-NJ), a leading opponent of the transaction, stated, "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."⁵⁰ Senator Charles Schumer (D-NY) denounced the transaction at a press conference that included families of vic-

48. Matt Pottinger and John M. Biers, "To Secure Unocal, Timing May Be Key. Vote on Chevron Bid Nears, and CNOOC Works to Hasten US Regulatory Review," *Asian Business News*, July 4, 2005, available at <http://online.wsj.com> (accessed March 9, 2006).

49. Senate Committee on Banking, Housing and Urban Affairs, *Implementation of the Exon-Florio Amendment and the Committee on Foreign Investment in the United States: Hearing Before the Senate Committee on Banking, Housing and Urban Affairs*, 109th Congress, 1st sess., October 20, 2005.

50. John Cranford, "Defining 'Ours' in a New World," *CQ Weekly*, March 6, 2006, 592.

tims of the September 11, 2001, attacks on the United States, a clear emotional appeal to the hearts and minds of the American public.⁵¹ The controversy was played out on the front pages of newspapers, in Congress, and even on Air Force One (President Bush issued his veto threat on Air Force One), over a period of three weeks in the spring of 2006.⁵²

DP World, a firm based in Dubai, the United Arab Emirates, manages container terminals and other port-related operations in 14 countries. At the end of 2005, it was the seventh-largest port operator in the world. It is owned by the government of Dubai via the Ports, Customs, and Free Zones Corporation, a Dubai governmental agency. P&O was founded in 1837 and historically was known as a steamship operator, as its name implies. However, in early 2005, P&O sold its remaining oceangoing ship-operating business (it retains a ferry service) so that the firm became mostly a ports operator. These activities account for about 80 percent of its profits.⁵³ Thus, at the end of 2005, P&O was the fourth-largest port operator in the world. It operated 27 container terminals and over 100 logistics services in 18 countries, including the United States.

In October 2005, P&O received a buyout overture from DP World, which led to a bidding war between DP World and a Singapore-based port operator. The buyout offer was reported in the *Wall Street Journal* on October 31; thus, the possibility of DP World taking over port operations of P&O was public knowledge.⁵⁴ On November 29, P&O announced that it would accept the DP World offer. The deal would be subject to scrutiny under Exon-Florio, because P&O owned a US subsidiary, P&O Ports North America, which managed operations at six US ports, in Newark, Philadelphia, Baltimore, Miami, New Orleans, and Houston. Following standard procedures, representatives of DP World met with CFIUS staff on October 17, and with representatives of the most relevant CFIUS agencies, specifically the DHS, Customs and Border Protection, the US Coast Guard, the DOJ, and Department of Commerce.⁵⁵ During this informal

51. Will Lester, "Lawmakers Decry Takeover of U.S. Ports," *Associated Press*, February 20, 2006, available at www.forbes.com (accessed March 10, 2006).

52. David E. Sanger and Eric Lipton, "Bush Would Veto Any Bill Halting Dubai Port Deal," *New York Times*, February 22, 2006, A1.

53. In 1994, P&O sold its remaining passenger ship business (by then, mostly cruise ships) to Carnival Cruise Lines. In 1996, P&O placed its container (cargo) operations into a joint venture with Royal Nedlloyd (then renamed P&O Nedlloyd), in which P&O retained a 25 percent interest. P&O Nedlloyd, including the P&O interest, was sold to A. P. Moeller-Maersk of Denmark in early 2005.

54. Jason Singer, "P&O Attracts Buyout Overture Amid Shipping-Industry Boom," *Wall Street Journal*, October 31, 2005, A3.

55. See testimony of H. Edward Bilkey, COO of Dubai Ports World, before the US Senate Committee on Commerce, Science and Transportation, *Hearing on Security of Terminal Operations at U.S. Ports*, February 28, 2006.

prefiling period, CFIUS and the relevant member agencies began a preliminary review and analysis of the proposed transaction, and upon request, DP World provided additional information to the relevant officials. A meeting of representatives of DP World and P&O Ports North America with the full CFIUS was held on December 6, 2005. Shortly after, on December 15, DP World filed formal notification to CFIUS, triggering the statutory 30-day CFIUS review of the proposed transaction.

During the 30-day review, the DHS negotiated with DP World to provide a “letter of assurances,” a common form for a security agreement negotiated under the CFIUS process. This letter was finalized and submitted to CFIUS on January 6.⁵⁶ The letter stipulated that DP World would maintain “no less” than current levels of membership and cooperation by P&O Ports North America in existing security arrangements and that DP World would provide the DHS with 30 days advance notice of any change in membership or cooperation in these security arrangements. It also agreed to operate all US facilities to the extent possible with US management, to designate a corporate officer with DP World to serve as point of contact with the DHS on security matters, to provide any relevant information to DHS upon request, and to assist US law enforcement agencies in any matter related to port security, including disclosing information as agencies requested.⁵⁷ Comforted that the letter of assurance satisfied their security concerns, CFIUS cleared the transaction on January 17, 2005, without requiring it to be subject to the more extensive 45-day review.

Despite this clearance, the case became highly politicized, but not until mid-February, about a month after the initial CFIUS decision to clear it. Thus, this case stands out among the cases discussed in this chapter for four reasons. First, of all of these cases, the polemics surrounding the DP World–P&O case were especially raucous, even more so than in the CNOOC-Unocal case. Second, the case did not involve a direct foreign purchase of a US firm, but rather an indirect purchase of US assets through one foreign firm acquiring another foreign firm. Because P&O is a British firm and the takeover by DP World would give the latter control over a number of British firms, the takeover was also subject to a security review by authorities in the United Kingdom. These authorities, like their American counterparts at CFIUS, concluded that the transaction would not compromise port security in the United Kingdom. Curiously, in the United Kingdom—a country that, like the United States, has been subject to terrorist attacks at the hands of Islamic extremists—no objections were raised,

56. This letter was initially meant to be confidential; however, on February 21, the Ports, Customs, and Free Zone Corporation of Dubai gave permission for the letter to be publicly released. See Defendants’ Response to Order to Show Cause at Exhibit C, *Corzine v. Snow et al.*, No. 06-833 (D.N.J.).

57. Defendants’ Response to Order to Show Cause at Exhibit C, *Corzine v. Snow et al.*, No. 06-833 (D.N.J.).

either in the press or in Parliament, to this clearance. Third, the sound and fury surrounding the DP World case in the United States erupted only in mid-February 2006, following an article published in the *New York Times* critical of the deal, and subsequent public denunciations by Schumer, Hillary Clinton (D-NY), and Robert Menendez (D-NJ) regarding the transaction—five months after the *Wall Street Journal* had made the deal public knowledge.⁵⁸ Never before had an Exon-Florio case become so highly politicized only after the underlying transaction had been cleared. Fourth, after almost three weeks of nonstop news coverage and commentary by members of Congress, including leaders of both parties and mostly adverse to the investor, the investor asked that the case be reopened and subject to the extensive 45-day review.⁵⁹ To our knowledge, never before have parties that have already cleared CFIUS requested an additional, more rigorous review.

The catalyst for the political controversy appears to have been a small stevedoring firm based in Miami, Eller & Co. Eller had a long-standing commercial dispute with P&O, and sought to block the deal to increase its leverage in its negotiations with P&O. Eller first sought to intervene with CFIUS, which, appropriately, decided not to factor a commercial dispute into its national security analysis. When Eller could not make its case before CFIUS, it began to stoke the flames on Capitol Hill in late January through a Washington lobbyist, Joe Muldoon. Israel Klein, a spokesperson for Senator Schumer, the leading opponent of the transaction, stated that “Eller was really the canary in the mineshaft for many people on the Hill” regarding the DP World–P&O deal.⁶⁰

With the benefit of hindsight, we can confidently say that it is not a surprise that the DP World case became politicized; indeed, it was highly likely from the outset. The only real surprise is that it took so long for the politicization to happen. The politicization had two causes. First, the deal involved ports, which were already concerns for homeland security. Second, it involved an investor based in a Middle Eastern nation, and ever since September 11, Americans have been skittish about almost anything involving the Middle East. The United Arab Emirates has been an ally and friend of the United States throughout the post–September 11 period, but many persons critical of the DP World–P&O deal seemed quite unaware of this fact.

A recent report by the National Commission on Terrorist Attacks upon the United States (2004)—the so-called 9/11 Commission—has questioned

58. See timeline described in David Sanger, “Under Pressure, Dubai Company Drops Port Deal,” *New York Times*, March 10, 2006, A1.

59. David E. Sanger, “Threats and Responses: Port Security; Dubai Deal Will Undergo Deeper Inquiry into Security,” *New York Times*, February 27, 2006, A15.

60. Neil King Jr. and Gregg Hitt, “Small Florida Firm Sowed Seed of Port Dispute,” *Wall Street Journal*, February 28, 2006, A3.

the adequacy of security measures in US ports. It did not cite foreign ownership of operating companies at US ports as a factor in US port security shortcomings;⁶¹ instead it focused on real deficiencies in US port security. Nonetheless, the report doubtlessly created jitters in both the US public and Congress about port security. Thus, when the DP World acquisition of P&O's US port operations became widely known, it was not entirely unreasonable that some public concern regarding security implications of this acquisition might arise.

As the administration, and especially Treasury Deputy Secretary Robert Kimmit, was later to acknowledge publicly, one major failure in this case was that of the administration to recognize that the DP World–P&O acquisition might become highly politicized, or evoke an emotional response from the US public. Thus, the case catalyzed many in Congress to argue for greater transparency in the CFIUS process. The administration admitted that it would have been well served to brief congressional leaders on the case during the CFIUS investigation. Even with such briefings, however, the facts of the case created a second, even more “perfect storm” than CNOOC/Unocal for a political controversy in Congress—an investment in US ports operations by a company owned by an Arab government, at a time when President Bush's popularity was lagging. These facts, combined with a domestic company eager to fan the flames (Eller), created a witches' brew in Congress.

As the controversy developed, Congress was abuzz. Close to a dozen congressional committees held hearings on the subject, and at most of these, members of Congress excoriated CFIUS officials for their supposed lapse in judgment. When Senate Majority Leader Bill Frist (R-TN) and other leaders stated their intent to block the deal, President Bush threatened to veto legislation that blocked the transaction.⁶² DP World's request for a 45-day full investigation failed to mollify critics in Congress. On March 8, members of the powerful House Appropriations Committee voted by a whopping 62-2 margin to block the transaction.⁶³ The next day, Senate Republicans lost a procedural vote offered by Senator Schumer to close debate on a lobbying reform bill, thereby creating the opportunity for Schumer to force a Senate vote on whether to block the transaction. That same day, congressional leaders, including Frist and Speaker of the House Dennis Hastert (R-IL), informed President Bush that they could not garner the votes to sustain a presidential veto of a bill blocking the DP World ac-

61. In addition to the six port facilities managed by P&O, the majority of other US ports were managed by firms of foreign nationality, including those in New York and Los Angeles.

62. David E. Sanger and Eric Lipton, “Bush Would Veto Any Bill Halting Dubai Port Deal,” *New York Times*, February 22, 2006, A1.

63. Edward Alden, Stephanie Kirchaessner, and Demetri Sevastopulo, “Dubai Cedes Control in US Ports Battle,” *Financial Times*, March 9, 2006, 1.

quisition. According to news reports, the White House contacted the government of the United Arab Emirates with the news, and DP World announced that it would “transfer fully the US operations” to “a United States entity.”⁶⁴ On March 15, DP clarified its intentions, announcing that it would sell its US operations within four to six months.⁶⁵ Hours later, the US House of Representatives voted by a 377 to 38 margin to reject a motion to strike language in an appropriations bill blocking the transaction. *Congress Daily*, a Capitol Hill newsletter, appropriately closed the saga with the headline, “House Puts a Bullet in Port Deal’s Corpse.”⁶⁶



What can we conclude from these cases? Certainly, politicizing the CFIUS process creates costs for the United States. It increases uncertainty for foreign investors, employees, and customers of the transaction parties. Moreover, if the trend toward politicization of the process continues unabated, foreign investors could shy away from acquiring US companies, creating a chill in the investment market and lowering values for US companies. A politicized regulatory review for a foreign investor could create higher risk for foreign investors than for domestic investors, because of the uncertainty associated with the CFIUS process. As a result, in highly politicized transactions, foreign investors could be forced to pay more for an asset than would domestic investors. Alternatively, if a domestic company seeks to be acquired by another company, and the only interested parties are foreign, the domestic company might see the value of its assets diminished because of the CFIUS process. A failed foreign transaction would also hurt the United States if the foreign investor would have brought an acquired US company improved technologies and new capital that would have enhanced productivity and job creation. All of this translates into higher costs for the US economy and, in some cases, diminished benefits.

Until the Dubai Ports controversy, the formal CFIUS process had stayed, based on anecdotal data and interviews with CFIUS officials, fairly immune to political pressure from competitors or from Capitol Hill. This insulation has been particularly effective for the substance of CFIUS’s national security analyses and measures to mitigate national security concerns. CFIUS officials from the key security agencies—the DOJ, DHS, and

64. Greg Hitt and Neil King Jr., “Dubai Firm Bows to Public Outcry—Under Pressure, DP World to Shed U.S. Holdings; Fears of Political Fallout—Putting Off Foreign Investors?” *Wall Street Journal*, March 10, 2006, A1.

65. Christopher S. Rugaber and Heather M. Rothman, “DP World Pledges to Sell U.S. Holdings In 4–6 Months; House Votes to Block Deal,” *BNA International Trade Daily*, March 16, 2006.

66. *Congress Daily a.m.*, March 16, 2006, available at <http://nationaljournal.com/pubs/congressdaily>.

FBI—pride themselves on the seriousness and rigor with which they conduct a national security analysis of a transaction. The CFIUS services acted appropriately in staying out of the competition between Chevron and CNOOC over Unocal. CFIUS should not review a transaction unless it is clear that the transaction is highly likely to be consummated subsequent to regulatory approval. Career civil servants, not political appointees, conduct most of the analytical work in the key agencies, and typically are not personally exposed to calls or intervention by members of Congress or their staff. Unfortunately, in the wake of the Dubai case, Congress has criticized the apolitical nature of CFIUS, including the fact that decisions are not made at sufficiently senior levels in the US government.

Members of Congress can have an influence on the process, particularly a CFIUS decision to proceed beyond the initial 30-day review to an investigation. Anecdotal evidence and interviews with CFIUS officials suggest that those officials are more willing to respond to congressional pressure to extend the time frame of an investigation than to change their underlying national security analysis for a particular transaction. By ceding ground on process, CFIUS can reduce the pressure on the substance of their work—determining whether a transaction threatens US national security. After the DP World controversy, it is clear that Congress will be more involved in the CFIUS process, and the extent of that involvement is still playing out at the time of this writing.

On the other hand, some congressional and public input into the CFIUS process can create benefits. One benefit might be better information brought to bear on a CFIUS determination. CFIUS cannot and should not refuse to receive information from the public or Congress that may be useful to its national security analysis. Thus, an alert member of Congress, or a whistle blower in a company, could create a benefit by telling CFIUS if one of the parties intentionally misrepresents the information provided in its CFIUS notice, or if CFIUS is unaware of a national security issue related to the acquisition. At the same time, the CFIUS process should not be used to “blow up” a transaction so another bidder can acquire the same company at a lower cost, nor should it be used as leverage for negotiations or other business matters unrelated to national security, as in the Tyco-Crest and DP World–Eller examples. To that end, both to inspire confidence in the integrity of the process and to deter competitors or members of Congress from intervening with CFIUS for commercial, as opposed to national security, reasons, it would be useful for CFIUS to issue a public statement through the Department of the Treasury that it will frown upon attempts by competitors or their representatives to interfere in the national security review process. Such a statement will only be hortatory, and whether CFIUS can effectively distinguish between commercial and national security considerations depends on the desires of leaders of each CFIUS agency to do so. Congress did not set up CFIUS, however, to block transactions that were politically difficult or unpopular. Rather, the statute in-

tends for the president to block only those transactions that create national security risks to the United States. The potential for domestic companies to exploit the CFIUS process against foreign investors is yet another reason, discussed in chapter 6, why Congress should not expand the criteria for CFIUS reviews to include “economic security.” If economic security were added to the statute, the CFIUS process would likely become even more politicized, because it would be much easier for domestic bidders to fashion arguments based on economic security, justifying the need for a particular company to have American rather than foreign owners.

Yet even an unpoliticized CFIUS review can have its flaws, and some of them arise from the way that the CFIUS’s mandate is structured. The next chapter offers recommendations for meaningfully reforming CFIUS, by clarifying standards, perhaps implementing new ones, and avoiding existing attempts at reform that would chill investment that the United States wants.