

CRS Report for Congress

Exon-Florio Foreign Investment Provision: Overview of H.R. 556

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Summary

During the Second Session of the 109th Congress, Members of Congress introduced over two dozen measures to address various concerns with foreign investment that arose from the proposed purchase of the British-owned P&O Ports by Dubai Ports World in early 2006. Of the measures that were introduced, **H.R. 5337** and **S. 3549** from the House and Senate, respectively, garnered significant support and passed their respective bodies on July 26, 2006. The 109th Congress ended before a Conference Committee was convened on H.R. 5337 or S. 3549 and both measures lapsed. So far in the 110th Congress, Congresswoman Maloney introduced **H.R. 556**, the National Security Foreign Investment Reform and Strengthened Transparency Act of 2007, on January 18, 2007. The measure was approved by the House Financial Services Committee on February 13, 2007 with amendments, and was approved with amendments by the full House on February 28, 2007, by a vote of 423 to 0. This measure is similar to many of the provisions of H.R. 5337 from the 109th Congress.

The measure attempts to address six perceived problems with the current statutes that Members identified during the 109th Congress: 1) that the principal members of the interagency Committee on Foreign Investment in the United States (CFIUS) at times seem not to be well informed of the outcomes of reviews and investigations regarding proposed or pending investment transactions; 2) that CFIUS has interpreted incorrectly the requirements under current statutes for investigations of transactions that involve firms that are owned or controlled by a foreign government; 3) that reporting requirements under current statutes do not provide Congress with enough information about the operations and actions of CFIUS for Members to fulfill their oversight responsibilities; 4) that CFIUS exercises too much discretion in its ability to choose which transactions it investigates; 5) that the definition of national security used by CFIUS is no longer adequate in a post-September 11th world; and 6) that deadlines placed on CFIUS to complete reviews and investigations of investment transactions do not provide adequate time in some instances for the Committee to complete its reviews and investigations.

This report provides background information on the Committee on Foreign Investment in the United States and on the Exon-Florio provision. In addition, the report provides an overview of H.R. 556. This report will be updated as warranted by events.

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Overview

During the 109th Congress, Members of Congress introduced over two dozen measures to address various concerns with foreign investment that arose from the proposed purchase of the British-owned P&O Ports¹ by Dubai Ports World² in early 2006.³ In particular, the transaction spurred some Members to question the effectiveness of the relatively obscure interagency group, the Committee on Foreign Investment in the United States (CFIUS). The group has been charged with developing and implementing the Administration's policy on foreign investment and with conducting national security reviews under the Exon-Florio provision of the Defense Production Act (50 U.S.C. Sec. 2170). Of the measures that were introduced, H.R. 5337 and S. 3549 from the House and Senate, respectively, garnered significant support and passed their respective bodies on July 26, 2006. The 109th Congress ended before a Conference Committee was convened on H.R. 5337 or S. 3549 and both measures lapsed. So far in the 110th Congress, Congresswoman Maloney has introduced **H.R. 556**, the National Security Foreign Investment Reform and Strengthened Transparency Act of 2007, which was adopted by the full House on February 28, 2007. The bill contains many provisions that are similar to H.R. 5337 from the 109th Congress.

H.R. 556 represents an effort to correct perceived problems with the current process that arose during consideration of the Dubai Ports World transaction. In particular, Members generally expressed concerns about six areas. First, Members were concerned that the principal members of CFIUS at times seem not to be well informed of the outcomes of reviews and investigations made by CFIUS regarding proposed or pending investment transactions, because the duty for reviewing such transactions has been delegated in most agencies to lower-level personnel. Second, some Members argued that CFIUS was interpreting incorrectly the requirements

¹ Peninsular and Oriental Steam Company is a leading ports operator and transport company with operations in ports, ferries, and property development. It operates container terminals and logistics operations in over 100 ports and has a presence in 18 countries.

² Dubai Ports World was created in November 2005 by integrating Dubai Ports Authority and Dubai Ports International. It is one of the largest commercial port operators in the world with operations in the Middle East, India, Europe, Asia, Latin America, the Caribbean, and North America.

³ For additional information, see CRS Report RL33614, *Exon-Florio Foreign Investment Provision: Comparison of H.R. 5337 and S. 3549*, by James K. Jackson; and CRS Report RL33388, *The Committee on Foreign Investment in the United States (CFIUS)*, by James K. Jackson.

under current statutes for investigations of transactions that involve firms that are owned or controlled by a foreign government. Third, many Members argued that the current statutes do not provide Congress with enough information about the operations and actions of CFIUS for them to fulfill their oversight responsibilities. Fourth, some Members argued that CFIUS exercises too much discretion in its ability to choose which transactions it investigates and that it needs to be held more accountable to Congress for its decisions regarding reviews and investigations of investment transactions. Fifth, some Members questioned the definition of national security used by the Committee as being too narrowly interpreted and out of sync with the post September 11th view of national security. Last, some Members expressed their concerns that the time constraints placed on CFIUS to complete reviews and investigations of investment transactions does not provide adequate time in some instances for the Committee to complete its reviews and investigations.

The Committee on Foreign Investment in the United States (CFIUS)

The Committee on Foreign Investment in the United States (CFIUS) is an interagency committee that serves the President in overseeing the national security implications of foreign investment in the economy. CFIUS was established by an Executive Order of President Ford in 1975 with broad responsibilities and few specific powers.⁴ The Committee is housed in the Department of the Treasury and has generally operated in relative obscurity. Initially, CFIUS was established with six members, but the membership has been expanded over time to twelve through various Executive Orders. The twelve members include the Secretaries of State, the Treasury, Defense, Homeland Security, and Commerce; the United States Trade Representative; the Chairman of the Council of Economic Advisers; the Attorney General; the Director of the Office of Management and Budget; 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.⁵

The Exon-Florio Provision

The Exon-Florio provision (Section 2170 of the 1988 Defense Production Act) grants the President broad discretionary authority to take what action he considers to

⁴ Executive Order 11858 (b), May 7, 1975, 40 F.R. 20263.

⁵ Executive Order 11858 of May 7, 1975, 40 F.R. 20263 established the Committee with six members: the Secretaries of State, the Treasury, Defense, Commerce, and the Assistant to the President for Economic Affairs, and the Executive Director of the Council on International Economic Policy. Executive Order 12188, January 2, 1980, 45 F.R. 969, added the United States Trade Representative and substituted the Chairman of the Council of Economic Advisors for the Executive Director of the Council on International Economic Policy. Executive Order 12661, December 27, 1988, 54 F.R. 779, added the Attorney General and the Director of the Office of Management and Budget. Executive Order 12860, September 3, 1993, 58 F.R. 47201, added the Director of the Office of Science and Technology Policy, the Assistant to the President for National Security Affairs, and the Assistant to the President for Economic Policy. Executive Order 13286, Section 57, February 28, 2003, added the Secretary of Homeland Security.

be “appropriate” to suspend or prohibit proposed or pending foreign acquisitions, mergers, or takeovers “of persons engaged in interstate commerce in the United States” which “threaten to impair the national security.” The statute indicates that the President “may” make an investigation to determine the effects on national security of such investments. Most importantly, however, Congress directed that the President can exercise this discretionary authority “only if” he determines that two conditions exist: 1) other U.S. laws are inadequate or inappropriate to protect the national security; and 2) that he must have “credible evidence” that the foreign investment will impair the national security. For the purposes of this legislation, Congress purposely did not define national security, but intended to have the term interpreted broadly without limitation to a particular industry.⁶

In 1988, Congress approved the Exon-Florio provision as part of the Omnibus Trade Act.⁷ Through Executive Order 12661, President Reagan implemented provisions of the Omnibus Trade Act, and he delegated his authority to administer the Exon-Florio provision to CFIUS,⁸ particularly to conduct reviews of foreign investment, to undertake investigations, and to make recommendations, although the statute itself does not specifically mention CFIUS. As a result of President Reagan’s action, CFIUS was transformed from a purely administrative body with limited authority to review and analyze data on foreign investment to one with a broad mandate and significant authority to advise the President on foreign investment transactions and to recommend that some transactions be suspended or prohibited. The Committee has 30 days to decide whether to investigate a case and an additional 45 days to make its recommendation. Once the recommendation is made, the President has 15 days to act.

Regulations developed by the Treasury Department in November 1991 implemented the Exon-Florio provision.⁹ These regulations created a system of voluntary notification by the parties to an investment transaction and they allow for notices of acquisitions by agencies that are members of CFIUS. Despite the voluntary nature of the notification, firms largely comply with these provisions because the regulations stipulate that foreign acquisitions that are governed by the Exon-Florio review process, but that do not notify the Committee, remain subject indefinitely to divestment or other appropriate actions by the President. This process has become one in a number of regulatory steps that firms consider as they undertake a merger, acquisition, or takeover.

The “Byrd Amendment”

In 1992, Congress amended the Exon-Florio statute through section 837(a) of the National Defense Authorization Act for Fiscal Year 1993. Known as the “Byrd

⁶ *Congressional Record*, Daily Edition, vol. 134, April 20, 1988. p. H2118.

⁷ P.L. 100-418, title V, Subtitle A, Part II, or 50 U.S.C. app 2170.

⁸ Executive Order 12661 of December 27, 1988, 54 F.R. 779.

⁹ Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons. 31 C.F.R. Part 800.

Amendment” after the amendment’s sponsor, the provision requires CFIUS to investigate proposed mergers, acquisitions, or takeovers in cases where:

- (1) the acquirer is controlled by or acting on behalf of a foreign government;
and
- (2) the acquisition results in control of a person engaged in interstate commerce in the United States that could affect the national security of the United States.¹⁰

This amendment came under particularly intense scrutiny by the 109th Congress as a result of the DP World transaction. Many Members of Congress and others believed that this amendment required CFIUS to undertake a full 45-day investigation of the transaction, because DP World was “controlled by or acting on behalf of a foreign government.” The DP World acquisition, however, exposed a sharp rift between what some Members apparently believed the amendment directed CFIUS to do and how the members of CFIUS were interpreting the amendment. In particular, some Members of Congress apparently interpreted the amendment to require CFIUS to conduct a mandatory 45-day investigation without exception if the foreign firm involved in a transaction is owned or controlled by a foreign government.

Representatives of CFIUS, however, argued that there were two factors that controlled their decision not to conduct a 45-day investigation of the transaction. First, they argued that the requirements of the Exon-Florio provision itself precluded them from engaging in a 45-day investigation, because their initial review did not find “credible evidence” that the transaction would impair national security, a basic threshold for CFIUS to meet in order to invoke the Exon-Florio provision. Secondly, representatives indicated that they interpret the amendment to mean that a 45-day investigation is discretionary and not mandatory, again because of the requirement that a transaction must be found to cause an impairment to national security before the Exon-Florio provision can be invoked.

CFIUS representatives also argued that their decision not to launch a full 45-day investigation of the DP World was the result of an extensive informal review of the transaction prior to the case being officially filed with CFIUS and as a result of a formal 30-day review. During these two reviews, CFIUS members believed that all concerns that had been expressed by members of CFIUS had been adequately resolved so that by the time of the review no member of CFIUS had any unresolved concerns about the impact of the transaction on national security. They conceded that the case met the first criterion under the Byrd amendment, because DP World was controlled by a foreign government, but that it did not meet the second part of the requirement, because CFIUS had concluded during the 30-day review that the transaction “could not affect the national security.”¹¹

¹⁰ P.L. 102-484, October 23, 1992.

¹¹ Briefing on the Dubai Ports World Deal before the Senate Armed Services Committee, February 23, 2006.

As a result of the attention by both the public and Congress, DP World officials indicated that they would sell off the U.S. port operations to an American owner.¹² On December 11, 2006, DP World officials announced that a unit of AIG Global Investment Group, a New York-based asset management company with \$683 billion in assets, but no experience in port operations, would acquire the U.S. port operations for an undisclosed amount.¹³

Through the Exon-Florio provision, Congress directed that the President or his designee *may* consider a short list of factors in deciding whether to block a foreign acquisition, merger, or takeover. Again, the President has broad discretion under the current statute to decide the basis on which he determines whether a transaction might impair the national security. This list includes the following factors:

- (1) domestic production needed for projected national defense requirements;
- (2) the capability and capacity of domestic industries to meet national defense requirements, including the availability of human resources, products, technology, materials, and other supplies and services;
- (3) the control of domestic industries and commercial activity by foreign citizens as it affects the capability and capacity of the U.S. to meet the requirements of national security;
- (4) the potential effects of the transactions on the sales of military goods, equipment, or technology to a country that supports terrorism or proliferates missile technology or chemical and biological weapons; and
- (5) the potential effects of the transaction on U.S. technological leadership in areas affecting U.S. national security.

Part of Congress's motivation in adopting the Exon-Florio provision apparently arose from concerns that foreign takeovers of U.S. firms could not be stopped unless the President declared a national emergency or regulators invoked federal antitrust, environmental, or securities laws. Through the Exon-Florio provision, Congress attempted to strengthen the President's hand in conducting foreign investment policy, while providing a cursory role for itself as a means of emphasizing that, as much as possible, the commercial nature of investment transactions should be free from political considerations. Congress also attempted to balance public concerns about the economic impact of certain types of foreign investment with the nation's long-standing international commitment to maintain an open and receptive environment for foreign investment.

Furthermore, Congress did not intend to have the Exon-Florio provision alter the generally open foreign investment climate of the country or to have it inhibit

¹² Weisman, Jonathan, and Bradley Graham, "Dubai Firm to Sell U.S. Port Operations," *The Washington Post*, March 10, 2006. p. A1.

¹³ King, Neil Jr., and Greg Hitt, "Dubai Ports World Sells U.S. Assets — AIG Buys Operations that Ignited Controversy As Democrats Plan Changes," *The Wall Street Journal*, December 12, 2006. p. A1.

foreign direct investments in industries that could not be considered to be of national security interest. The basic approach of the provision, therefore, was to presume that foreign investment generally has a ‘positive effect on the economy and that it should be encouraged and restricted only in those cases in which a specific transaction had met a burden of proof that the proposed investor “might take action that threatens to impair the national security.”

At the time the Exon-Florio provision was adopted, some analysts believed the provision could potentially widen the scope of industries that fell under the national security rubric. CFIUS, however, is not free to establish an independent approach to reviewing foreign investment transactions, but operates under the authority of the President and reflects his attitudes and policies. As a result, the discretion CFIUS uses to review and to investigate foreign investment cases reflects policy guidance from the President. In addition, Congress did not adopt a specific definition of national security when it approved the Exon-Florio provision. Instead, during a review or investigation of a foreign investment, each member of CFIUS is expected to apply that definition of national security that is consistent with the legislative mandate of the CFIUS member. As a result, the CFIUS process relies on each member applying their own particular definition of national security and making any concerns that arise from such a review known to the other members of CFIUS.

Foreign investors are also constrained by legislation that bars foreign direct investment in such industries as maritime operations, aircraft, banking, resources and power.¹⁴ Generally, these sectors were closed to foreign investors, primarily for national defense purposes, prior to passage of the Exon-Florio provision to prevent these areas from being subject to foreign control.

Exon-Florio Provision After September 11, 2001

Arguably, the events of September 11, 2001, have reshaped Congressional attitudes toward the Exon-Florio provision and the manner in which it should be used. During discussion about the Exon-Florio provision prior to its passage in 1988, the Reagan Administration opposed a definition of national security that included “essential commerce and national security,” because the administration argued that the definition was too broad. Ultimately, the Reagan Administration succeeded in getting the term “essential commerce” dropped from the provision. After the September 11th terrorist attacks, however, Congress passed and President Bush signed the USA PATRIOT Act of 2001 (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism).¹⁵ In this act, Congress provided for special support for “critical industries,” which it defined as:

systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating

¹⁴ CRS Report RL33103, *Foreign Investment in the United States: Major Federal Restrictions*, by Michael V. Seitzinger.

¹⁵ P.L. 107-56, title X, Sec. 1014, October 26, 2001; 42 U.S.C. Sec. 5195c(e).

impact on security, national economic security, national public health or safety, or any combination of those matters.¹⁶

This broad definition is enhanced to some degree by other provisions of the act, which specifically identify certain sectors of the economy, therefore, as likely candidates for consideration as critical infrastructure, including telecommunications, energy, financial services, water, transportation sectors,¹⁷ and the “cyber and physical infrastructure services critical to maintaining the national defense, continuity of government, economic prosperity, and quality of life in the United States.”¹⁸ The following year, Congress adopted the language in the Patriot Act on critical infrastructure into The Homeland Security Act of 2002.¹⁹

By adopting the terms “critical infrastructure” and “homeland security,” following the events of September 11, 2001, Congress demonstrated that the attacks fundamentally altered the way many Members of Congress and many in the public view the concept of national security. As a result, many in Congress and in the public have come to believe that economic activities are a separately identifiable component of national security. In addition, many in Congress and elsewhere apparently perceive greater risks to the economy arising from foreign investments in which the foreign investor is owned or controlled by foreign governments as a result of the terrorist attacks. The Dubai Ports World case, in particular, demonstrated that there was a difference between the post-September 11 expectations held by many in Congress about the role of foreign investment in the economy and of economic infrastructure issues as a component of national security and the operations of CFIUS. For some Members of Congress, CFIUS seemed to be out of touch with the post-September 11, 2001 view of national security, because it remains founded in the late 1980s orientation of the Exon-Florio provision, which views national security primarily in terms of national defense and downplays or even excludes a broader notion of economic national security.

Activity within Congress and the intense public and congressional reaction that arose from the proposed Dubai Ports World acquisition spurred the Bush Administration in late 2006 to make an important administrative change in the way CFIUS reviews foreign investment transactions. CFIUS and President Bush approved the acquisition of Lucent Technologies, Inc. by the French-based Alcatel SA, which was completed on December 1, 2006. Before the transaction was approved by CFIUS, however, Alcatel-Lucent was required to agree to a national security arrangement, known as a Special Security Arrangement, or SSA, that restricts Alcatel’s access to sensitive work done by Lucent’s research arm, Bell Labs, and the communications infrastructure in the United States.

The most controversial feature of this arrangement is that it allows CFIUS to reopen a review of the deal and to overturn its approval at any time if CFIUS believes

¹⁶ Ibid.

¹⁷ 42 U.S.C. Sec. 5195c(b)(2).

¹⁸ 42 U.S.C. Sec. 5195c(b)(3).

¹⁹ 6 U.S.C. Sec. 101(4).

the companies “materially fail to comply” with the terms of the arrangement. This marks a significant change in the CFIUS process. Prior to this transaction, CFIUS reviews and investigations had been portrayed, and had been considered, to be final. As a result, firms were willing to subject themselves voluntarily to a CFIUS review, because they believed that once an investment transaction was scrutinized and approved by the members of CFIUS the firms could be assured that the investment transaction would be exempt from any future reviews or actions. This administrative change, however, means that a CFIUS determination may no longer be a final decision and it adds a new level of uncertainty to foreign investors seeking to acquire U.S. firms. A broad range of U.S. and international business groups are objecting to this change in the Administration’s policy.²⁰

Overview of H.R. 556

H.R. 556 was approved by the House Financial Services Committee on February 13, 2007, with amendments. The amendment offered by Committee Chairman Frank and Representative Price included six changes to the bill as it was introduced on January 18, 2007. These changes responded to concerns that were expressed by the Bush administration that some of the procedures that would have been established under H.R. 556 would have created new levels of bureaucracy and administrative bottlenecks that potentially could have delayed and discouraged foreign investment. The changes would 1) allow a Deputy Secretary of an Undersecretary of an agency to approve an investment transaction on behalf of the respective agency instead of requiring the Secretary to approve the transaction; 2) require the Deputy Secretary of an agency to certify investment transactions by companies that are owned by a foreign government; 3) give the Director of National Intelligence “adequate time” to consider national security implications instead of requiring a minimum of 30 days to examine security implications; 4) clarify that agencies act on behalf of CFIUS in administering agreements to mitigate security concerns that are raised about a foreign investor during a CFIUS review; 5) strike a provision that would have allowed CFIUS to reopen approvals; and would have required the Attorney General to report to Congress.²¹

On February 28, 2007, H.R. 556 was approved with amendments by the full House. The three amendments that were adopted clarified the language of the measure in some cases and added a number of new sections. In particular, the measure added a new factor that requires CFIUS and the President to consider the impact of an investment transaction on U.S. efforts to curtail human smuggling in approving a transaction. Another change would require CFIUS to notify Senators and Members of Congress if the Committee determines that the areas represented by the Senator or Member would be “significantly” affected by an investment transaction.

²⁰ Kirchgaessner, Stephanie, US Threat to Reopen Terms of Lucent and Alcatel Deal Mergers, *Financial Times*, December 1, 2006. P. 19; Pelofsky, Jeremy, Businesses Object to US move on foreign Investment, *Reuters News*, December 5, 2006.

²¹ House Financial Services Committee Clears Amended CFIUS Reform Bill by Voice Vote, *International Trade Daily*, February 14, 2007.

H.R. 556 attempts to address congressional concerns by establishing CFIUS by statutory authority, thereby giving Congress a direct role in determining the make-up and operations of the Committee. The measure would have the Secretary of the Treasury continue to serve as the Chairman of CFIUS, despite the misgivings of some Members, and the Secretary of Homeland Security and the Secretary of Defense serve as Vice Chairmen. In other respects, the bill retains the basic structure of the Committee as it presently exists, except that it would add the Secretary of Energy as a permanent member of CFIUS.

According to the measure, the Committee would operate under the same time frame that currently exists with 30 days allotted for a review, 45 days for an investigation and 15 days for the President to make his determination. The President would retain his authority as the only officer with the authority to suspend or prohibit certain types of foreign investments. The measure would also place additional requirements on firms that resubmitted a filing after previously withdrawing a filing before a full review is completed.

In H.R. 556, no review or investigation would be considered to be complete until it had been approved by a majority of the members of CFIUS and signed by the Secretary of the Treasury and the Secretary of Homeland Security to insure that principal members of CFIUS were aware of all reviews and investigations completed by CFIUS. The bill would require CFIUS to review all ‘covered’ foreign investment transactions to determine whether a transaction threatens to impair the national security. A covered foreign investment transaction is defined as any merger, acquisition, or takeover which results in “foreign control of any person engaged in interstate commerce in the United States.”

The measure places increased requirements on CFIUS to review investment transactions in which the foreign person is owned or controlled by a foreign government. It is unclear, however, to what extent the bill would alter the current process. The measure would explicitly require CFIUS to review all investment transactions in which the foreign person is owned or controlled by a foreign government, but the measure does not amend or alter the current statute in the area that has been the source of recent differences between CFIUS and Congress. In particular, the current statute states that the President, and through him CFIUS, can use the Exon-Florio process “only if” he finds that there is “credible evidence” that a foreign investment will impair national security. As a result, CFIUS has determined, as was the case in the Dubai Ports transaction, that if the Committee does not have credible evidence that an investment will impair the national security that it is not required to undertake a full 45-day investigation. It is possible that CFIUS could continue to operate in this manner, regardless of the passage of the measure.

In addition, if CFIUS does act to investigate all foreign investment transactions in which the foreign person is owned or controlled by a foreign government, foreign investors may well regard it as an important policy change by the United States toward foreign investment. As previously stated, the current system presumes that foreign investment transactions are acceptable and provide a positive contribution to the economy. As a result, the burden is on the members of CFIUS to prove that a particular transaction is a threat to national security. H.R. 556, however, might be

interpreted to presume that investment transactions in which the foreign person is owned or controlled by a foreign government are a threat to the nation's security simply because of the relationship to the foreign government and, therefore, might require the firms to prove that they are not a threat. Although the number of investment transactions a year in which the foreign investor is associated with a foreign government is small compared with the total number of foreign investment transactions, foreign investors and foreign governments likely will view this as a significant change in the traditional U.S. approach to foreign investment.

The bill attempts to increase the role of congressional oversight by requiring greater reporting by CFIUS on its actions either during or after it completes reviews and investigations and by increasing reporting requirements on CFIUS. H.R. 556 would require the Secretary of the Treasury, the Secretary of Homeland Security, and the Secretary of Commerce to sign and approve any review or investigation. In those cases in which the foreign person involved in an investment transaction is owned or controlled by a foreign government, a majority of the members of CFIUS would be required to approve the transaction and the President and the chair and vice chairs of CFIUS would be required to sign off on investments in which at least one member of CFIUS did not agree with the decision of the majority to approve the transaction.

The measure would require CFIUS to provide Congress with a greater amount of detailed information about its operations. H.R. 556 would require CFIUS to notify specified Members at the conclusion of any investment investigation and to report annually to Congress. H.R. 556 also would provide for greater reporting on and increased authority for CFIUS to negotiate provisions with the foreign firms involved in investment transactions to mitigate the impact of the transaction. Under current statutes, CFIUS has no authority to negotiate such agreements with firms and it is not clear that it has any authority to enforce such agreements. H.R. 556 provides for a process to track the agreements and to report the progress of such agreements and any changes to the agreements to the members of CFIUS and to the President.

The measure also would amend the current statute regarding the meaning of national security and would place additional requirements on CFIUS regarding national security reviews. The bill would explicitly require the Director of National Intelligence to conduct reviews of any investment that posed a threat to the national security. The bill also provides for additional factors the President and CFIUS would be required to use in assessing foreign investments. In particular, the bill would add implications for the nation's critical infrastructure as a factor for reviewing or investigating an investment transaction.

CFIUS National Security Investigations

According to the Exon-Florio provision and subsequent regulations issued by the Treasury Department, CFIUS has 30 days after it receives the initial formal notification by the parties to a merger, acquisition, or a takeover, to decide whether to investigate a case as a result of its determination that the investment "threatens to impair the national security of the United States." If during this 30-day period all the members of CFIUS conclude that the investment does not threaten to impair the national security or if the concerns of any member are resolved, the review is terminated. If, however, at least one member of the Committee determines that the

investment does threaten to impair the national security and if these concerns are not resolved, CFIUS can proceed to a 45-day investigation. At the conclusion of the investigation or the 45-day review period, whichever comes first, the Committee can decide to offer no recommendation or it can recommend that the President suspend or prohibit the investment. The President is under no obligation to follow the recommendation of the Committee to suspend or prohibit an investment.

In a subsequent amendment, the Byrd Amendment, CFIUS is required to conduct a 45-day investigation of a transaction in any instance in which the foreign entity is controlled by or acting on behalf of a foreign government which could result in the foreign entity gaining control of the U.S. entity **and** that could affect the national security of the United States. Such an investigation is required to begin no later than 30 days after CFIUS receives written notice of the proposed or pending merger, acquisition, or takeover and be completed in no more than 45 days.

H.R. 556 would establish the Committee on Foreign Investment in the United States as a matter of statute and would amend the current procedures for a CFIUS review and investigation. The measure would strike out the first two sections of the current statute that deal with investigations and replace them with provisions that would provide for the same 30-day review and 45-day investigation stages that exist under the current provision, but would alter the provision in a number of ways. First, the measure would explicitly indicate that the investigation would be conducted by the Committee on Foreign Investment in the United States, which is referred to only as the President's designee in the current statute. Next, the measure would amend and broaden the language in the current statute regarding national security by indicating that national security for this provision would be construed "so as to include those issues relating to 'homeland security,' including its application to critical infrastructure."

The measure would provide for "National Security Reviews and Investigations," which are not a part of the current CFIUS process, although the Director of National Intelligence is often asked to participate in CFIUS reviews and investigations. In an important departure from the current procedure, CFIUS would be required to ("shall") review any merger, acquisition, or takeover to determine the effects of the transaction on the national security of the United States. In addition, CFIUS would be required to (shall) conduct an investigation of a transaction if the Committee determines that the transaction would result in foreign control of any person engaged in interstate commerce in the United States. Currently, CFIUS has broad discretion to determine which cases it reviews and investigates, since its directive states that it "may" review or investigate a transaction. Once a review has been initiated, a firm cannot withdraw its notice unless it provides a written request for such a withdrawal and the request is approved in writing by the Chairperson, in consultation with the Vice Chairpersons of the Committee.

In addition to any entity that is a party to a merger, acquisition, or takeover being able to initiate a review, the President, the Committee, or any member of the Committee also could request that CFIUS review a transaction. This authority could not be delegated by any member of CFIUS to any person other than to an appropriate Deputy Secretary, Under Secretary, or the equivalent. These individuals would be able to review a transaction that previously had been reviewed and approved under

certain circumstances: (1) if it was later discovered that false or misleading material information had been submitted to CFIUS; (2) if material information, including documents, had been omitted from information submitted to CFIUS; or (3) if a party to a transaction had intentionally failed to adhere to any mitigating agreements or conditions upon which the original approval had been granted and no other remedy or enforcement tool was available to address such a breach of the mitigating agreement.

The measure also would require the President, acting through CFIUS, to conduct a National Security investigation of the effects of a transaction on the national security of the United States and to take any “necessary” actions in connection with the transaction to protect the national security of the United States under certain conditions. These conditions would be: (1) as a result of a review of the transaction, CFIUS determined that the transactions threatened to impair the national security of the United States and that the threat had not been mitigated during or prior to a review of the transaction, or the foreign person was controlled by a foreign government; (2) during a roll call vote of the members of CFIUS at least one member voted against approving the transaction; (3) the Director of National Intelligence had identified “particularly complex national security or intelligence issues” that threaten to impair the national security of the United States and CFIUS members had not been able to develop and agree on measures to mitigate the threat during a review. The investigation would be required to be completed within 45 days, but the measure would provide for an extension of the deadline of up to an additional 45 days if the extension had been requested by the President or by a roll call vote of two-thirds of the CFIUS members.

During the markup session on the measure, the House Committee on Financial Services provided an important exception to the requirement that CFIUS conduct an investigation of a transaction if it determines during a review that a party to a transaction is owned or controlled by a foreign government. Instead, the measure would not require such an investigation, even if CFIUS had determined during a review that the party to a transaction was controlled by a foreign government if: 1) it also determined that the transaction “will not affect” the national security of the United States and 2) no agreement or condition was required, relative to the transaction, to mitigate any threat to the national security.

Also, the measure would require the approval of a majority of the members of CFIUS and the approval of, and a signed determination by, the Secretary of the Treasury, the Secretary of Homeland Security, and the Secretary of Commerce on any review or investigation in order for the CFIUS process to be considered final or complete. For those cases in which the foreign entity was determined to be controlled by a foreign government and at least one member of CFIUS did not vote in favor of approval, the CFIUS investigation process would not be considered to be complete until the President and the Chairperson, and the Vice Chairperson of the Committee signed the Committee report to indicate their approval.

In an other important change during the markup session, the House Committee added the requirement that action by the President is required in certain cases. Specifically, the measure would require the President to approve and sign his approval of an investment transaction in which the party to the transaction is a person

or a country that has been determined by the Secretary of State under the Export Administration Act or other provisions of law repeatedly to have provided support for acts of terrorism

The bill would grant the Director of National Intelligence “adequate time” to carry out a thorough analysis of “any threat to the national security of the United States” of any merger, acquisition, or takeover. This analysis specifically would include a request for information be made from the Department of the Treasury’s Director of the Office of Foreign Assets Control and the Director of the Financial Crimes Enforcement Network. In addition, the Director of National Intelligence would be required to seek and to incorporate the views of “all affected or appropriate” intelligence agencies. The Director of National Intelligence, however, would maintain a role that is independent from CFIUS by not serving as an official member of CFIUS and would not serve in a policy role other than to provide analysis in connection with an investment transaction. Firms would not be prohibited under this measure from submitting additional information or modifying any agreement in connection with a transaction while the transaction was being reviewed or investigated.

Composition of CFIUS

The Committee on Foreign Investment in the United States (CFIUS) was created by Executive Order of President Ford in 1975²² to serve the President in overseeing the national security implications of foreign investment in the economy. President Ford’s 1975 Executive Order established the basic structure of CFIUS, and directed that the “representative”²³ of the Secretary of the Treasury be the chairman of the Committee. The Executive Order also stipulated that the Committee would have “the primary continuing responsibility within the Executive Branch for monitoring the impact of foreign investment in the United States, both direct and portfolio, and for coordinating the implementation of United States policy on such investment.”²⁴ Presently, the Committee consists of twelve members, including the Secretaries of State, the Treasury, Defense, Homeland Security, and Commerce; the United States Trade Representative; the Chairman of the Council of Economic Advisers; the Attorney General; the Director of the Office of Management and Budget; 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.²⁵

²² Executive Order 11858 (b), May 7, 1975, 40 F.R. 20263.

²³ The term “representative” was dropped by Executive Order 12661, December 27, 1988, 54 F.R. 780.

²⁴ Executive Order 11858 (b), May 7, 1975, 40 F.R. 20263.

²⁵ Executive Order 11858 of May 7, 1975, 40 F.R. 20263 established the Committee with six members: the Secretaries of State, the Treasury, Defense, Commerce, and the Assistant to the President for Economic Affairs, and the Executive Director of the Council on International Economic Policy. Executive Order 12188, January 2, 1980, 45 F.R. 969, added the United States Trade Representative and substituted the Chairman of the Council of Economic Advisors for the Executive Director of the Council on International Economic

The measure would establish the members of CFIUS as a matter of statute, compared with the present situation in which CFIUS is a creation of various presidential orders. CFIUS would include the same twelve members that currently constitute the Committee, but the measure would also add the Secretary of Energy to CFIUS. The Secretary of the Treasury would continue to serve as the Chairperson of the Committee, but a new Vice Chairperson position would be created and held by the Secretary of Homeland Security and the Secretary of Commerce. The Committee would be empowered to “take such testimony, receive such evidence, administer such oaths,” in order to carry out a review or investigation. The Committee also would be able to require the attendance and testimony of “such witnesses and production of such books, records, correspondence memoranda, papers, and documents” as the Chairperson of the Committee determines to be “advisable.”

Presidential Actions

H.R. 556 would leave unaltered the current Exon-Florio provision, which grants the President the authority to “take such action for such time as the President considers appropriate to suspend or prohibit” any acquisition, merger, or takeover by a foreign entity of “persons engaged in interstate commerce in the United States” that threaten to impair the national security. The President is required to announce his decision within 15 days after CFIUS completes its investigation of a proposed transaction. The President also has the authority to direct the Attorney General to seek appropriate relief, including divestment relief, in the district courts of the United States in order to implement and enforce this decision by the President.

Findings

H.R. 556 also would leave unchanged the current Exon-Florio provision, which grants the President the authority to block proposed or pending foreign acquisitions of “persons engaged in interstate commerce in the United States” that threaten to impair the national security. Congress directed, however, that before the President can invoke this authority he must believe that the case meets two tests, or findings. First, he must believe that other U.S. laws are inadequate or inappropriate to protect the national security. Secondly, he must have “credible evidence” that the foreign investment will impair the national security.

Factors Used in Findings

As it is currently written, the Exon-Florio provision includes a list of five factors the President *may* consider in deciding to block a foreign acquisition. These factors

²⁵ (...continued)

Policy. Executive Order 12661, December 27, 1988, 54 F.R. 779, added the Attorney General and the Director of the Office of Management and Budget. Executive Order 12860, September 3, 1993, 58 F.R. 47201, added the Director of the Office of Science and Technology Policy, the Assistant to the President for National Security Affairs, and the Assistant to the President for Economic Policy. Executive Order 13286, Section 57, February 28, 2003 added the Secretary of Homeland Security.

are also considered by the individual members of CFIUS as part of their own review process to determine if a particular transaction threatens to impair the national security. This list includes the following elements:

- (1) domestic production needed for projected national defense requirements;
- (2) the capability and capacity of domestic industries to meet national defense requirements, including the availability of human resources, products, technology, materials, and other supplies and services;
- (3) the control of domestic industries and commercial activity by foreign citizens as it affects the capability and capacity of the U.S. to meet the requirements of national security;
- (4) the potential effects of the transactions on the sales of military goods, equipment, or technology to a country that supports terrorism or proliferates missile technology or chemical and biological weapons; and
- (5) the potential effects of the transaction on U.S. technological leadership in areas affecting U.S. national security.

H.R. 556 would amend the current factors the President and the Committee use to evaluate mergers, acquisitions, or takeovers. In particular, the statute would change the status of the factors to be considered from being discretionary (may) to being required (shall) in evaluating a transaction. Also, this measure would add four more factors to the five that currently exist. These new factors are:

- (1) whether the transaction has a security-related impact on critical infrastructure in the United States;
- (2) the potential effects of the transaction on the efforts of the United States to curtail human smuggling and to curtail drug smuggling;
- (3) whether the entity involved is being controlled by a foreign government; and
- (4) such other factors as the President or his designee “may determine to be appropriate, generally or in connection with a specific review or transaction.”

The bill would make the United States immune from any liability for any losses or expenses incurred by the parties to an investment transaction as a result of actions taken by CFIUS if the entities did not submit a written notification to CFIUS or if the transaction was completed prior to the completion of a CFIUS review or investigation.

Confidentiality

The Exon-Florio provision codified confidentiality requirements that are similar to those that appeared in Executive Order 11858 by stating that any information or documentary material filed under the provision may not be made public “except as

may be relevant to any administrative or judicial action or proceeding.”²⁶ The provision does state, however, that this confidentiality provision “shall not be construed to prevent disclosure to either House of Congress or to any duly authorized committee or subcommittee of the Congress.” The Exon-Florio provision requires the President to provide a written report to the Secretary of the Senate and the Clerk of the House detailing his decision and his actions relevant to any transaction that was subject to a 45-day investigation.²⁷ As presently written, there is no requirement for CFIUS or the President to notify or otherwise inform Congress of cases it reviews or of the outcome of any investigation.

H.R. 556 would provide for the release of proprietary information “which can be associated with a particular party” to committees only with assurances that the information would remain confidential. Members of Congress and their staff members would be accountable under current provisions of law governing the release of certain types of information.

Mitigation and Tracking

Since the implementation of the Exon-Florio provision, CFIUS has developed several practices that likely were not envisioned when the statute was drafted. For instance, members of CFIUS negotiate conditions with firms at times either to mitigate or to remove matters that raise national security concerns among the members of CFIUS. Such agreements often are informal arrangements that have an uncertain basis in statute and have not been tested in court. These arrangements have been negotiated during the formal 30-day review period, or even during an informal process prior to the formal filing of a notice of an investment transaction.

H.R. 556 would address one concern about CFIUS’s actions by granting CFIUS, or any agency designated by the Chairperson and Vice Chairperson of CFIUS, the authority to negotiate, impose, or enforce any agreement or condition with the parties to a transaction in order to mitigate any threat to the national security of the United States. Such agreements would be based on a “risk-based analysis” of the threat posed by the transaction. Also, if a notification of a transaction is withdrawn before any review or investigation by CFIUS can be completed, the measure grants the Committee the authority to take a number of actions. In particular, the Committee would be able to develop (1) interim protections to address specific concerns about the transaction pending a re-submission of a notice by the parties; (2) specific time frames for re-submitting the notice; and (3) a process for tracking any actions taken by any party to the transaction.

CFIUS also would be granted the authority to designate one or more appropriate federal departments or agencies to negotiate, modify, monitor, and enforce agreements in order to mitigate any threat to national security. The agencies or departments would be required to provide reports on a half-yearly basis to CFIUS and the parties to an agreement would be required to report on the implementation of any

²⁶ 50 U.S.C. Appendix Sec. 2170(c)

²⁷ 50 U.S.C. Appendix Sec. 2170(g).

material change in circumstances. Furthermore, the federal entity or entities would be required to report to CFIUS on any modification to any agreement or condition that had been imposed and to ensure that “any significant” modification is reported to the Director of National Intelligence and to any other federal department or agency that “may have a material interest in such modification.”

In addition, CFIUS would be required to develop a method for evaluating the compliance of firms that had entered into a mitigation agreement or condition that was imposed as a requirement for approval of the investment transaction. Such measures, however, would be required to be developed in such a way that they would allow CFIUS to determine that compliance is taking place without also: (1) “unnecessarily diverting” CFIUS resources from assessing any new covered transaction for which a written notice had been filed; and (2) placing “unnecessary” burdens on a party to a investment transaction.

Congressional Oversight

In hearings that were held after the Dubai Ports World transaction became public, various Members expressed concern that they were provided so little information under the current statutes that their ability to fulfill their oversight responsibilities was hampered. In addition, some Members apparently believed that the current requirements do not provide Members with enough information to address public concerns that occasionally arise concerning particular investment transactions, such as the Dubai Ports World transaction. Currently, the President is required to report to Congress on his determination to take action on a proposed investment transaction after CFIUS has completed a 30-day review and a 45-day investigation of the transaction. The President’s report is required to contain a detailed explanation of the findings and of the factors the President used to make his determination.

The President is also required to provide an assessment of the risk of diversion of defense critical technology posed by an investment transaction if such an assessment is performed and that the assessment be provided to any other individual responsible for reviewing or investigating investment transactions under the Exon-Florio provision. In addition, the President is required to provide Congress with a quadrennial report which evaluates two issues: 1) whether there is credible evidence of a coordinated strategy by one or more countries or companies to acquire U.S. companies involved in research, development, or production of critical technologies for which the United States is a leading producer; and 2) whether there are industrial espionage activities directed or directly assisted by foreign governments against private U.S. companies aimed at obtaining commercial secrets related to critical technologies.

H.R. 556 would increase oversight by the Congress. Not later than five days after CFIUS completed an investigation, or 15 days after the end of an investigation if the President had determined to take actions under the Exon-Florio provision, the Committee would be required to provide a written report to leaders in both Houses of Congress and to the Chairman and Ranking Member of committees in both houses with jurisdiction over any aspect of the transaction and its possible effects on national security, specifically, at a minimum, the Committee on Foreign Affairs, the

Committee on Financial Services, and the Committee on Energy and Commerce in the House. CFIUS also would be required to brief certain congressional leaders if they requested such a briefing. Members of Congress and their staff would be subject to disclosure limitations and proprietary information would be shared with congressional committees only under conditions that would assure the confidentiality of the information.

Under H.R. 556, CFIUS would be required to report annually to Congress on any reviews or investigations that it had conducted during the prior year. Each report would include a list of all reviews and investigations that had been conducted, information on the nature of the business activities of the parties involved in an investment transaction, information about the status of the review or investigation, and information on any withdrawal from the process, any roll call votes by the Committee, any extension of time for any investigation, and any presidential decision or action taken under the Exon-Florio provision. In addition, CFIUS would be required to report on trend information on the number of filings, investigations, withdrawals, and presidential decisions or actions that were taken. The report also would include: cumulative information on the business sectors involved in filings and the countries from which the investments originated; information on the status of the investments of companies that withdrew notices and the types of security arrangements and conditions CFIUS used to mitigate national security concerns; the methods the Committee used to determine that firms were complying with mitigation agreements or conditions; and a detailed discussion of all perceived adverse effects of investment transactions on the national security or critical infrastructure of the United States.

Relative to critical technologies, the annual CFIUS report would be required to include an evaluation of any credible evidence of a coordinated strategy by one or more countries or companies to acquire U.S. companies involved in research, development, or production of critical technologies in which the United States is a leading producer. The report also would include an evaluation of possible industrial espionage activities directed or directly assisted by foreign governments against private U.S. companies aimed at obtaining commercial secrets related to critical technologies. For the purposes of this section, critical technologies would be defined as technology defined in the National Science and Technology Policy Organization and Priorities Act of 1976,²⁸ or “other critical technology, critical components, or critical technology items essential to national defense of national security.”

The measure also would require the Inspector General of the Department of the Treasury to investigate any failure of CFIUS to comply with requirements for reporting that were imposed prior to the passage of this measure and to report the findings of this report to the Congress. In particular, the report would be required to

²⁸ P.L. 94-282 (May 11, 1976) which states that the priority needs of the Nation relative to investment in science and technology are: (1) promoting conservation and efficient utilization of natural and human resources; (2) protecting the oceans and coastal zones; (3) strengthening the economy and promoting full employment; (4) assuring adequate supplies of food, materials, and energy; (5) improving the quality of health care; and (6) improving the nation’s housing, transportation, and communication systems.

be sent to the chairman and ranking member of each committee of the House and the Senate with jurisdiction over any aspect of the report, including the Committee on International Relations, the Committee on Financial Services, and the Committee on Energy and Commerce of the House.

In addition, the measure would require the Secretary of the Treasury, in consultation with the Secretary of State and the Secretary of Commerce to conduct a study on investment in the United States, particularly in critical infrastructure and industries affecting national security by: 1) foreign governments, entities controlled by or acting on behalf of a foreign government, or persons of foreign countries which comply with any boycott of Israel; 2) foreign governments, entities controlled by or acting on behalf of a foreign government, or persons of foreign countries which do not ban organizations designated by the Secretary of State as foreign terrorist organizations.

The measure would require the chief executive officer of any party to a merger, acquisition, or takeover to certify in writing that the information contained in the written notification to CFIUS fully complied with the requirements of the Exon-Florio provision and that the information was accurate and complete. This written notification would also include any mitigation agreement or condition that was part of a CFIUS approval.

Conclusions

The proposed DP World acquisition of P&O, while arguably of little economic impact on the U.S. economy, could affect public policy on foreign investment that relates to issues of corporate ownership, foreign investment, and national security in the U.S. economy. The transaction revealed significant differences between Congress and the Administration over the operations of CFIUS and over the objectives the Committee should be pursuing. In addition, the transaction demonstrated that neither Congress nor the Administration has been able so far to define clearly the national security implications of foreign direct investment. This issue likely reflects differing assessments of the economic impact of foreign investment on the U.S. economy and differing political and philosophical convictions among Members and between the Congress and the Administration.

The incident also focused attention on the informal process firms use to have their investment transactions reviewed by CFIUS prior to a formal review. According to anecdotal evidence, some firms apparently believe that the CFIUS process is not market neutral, but that it adds to market uncertainty that can negatively affect a firm's stock price and lead to economic behavior by some firms that is not optimal for the economy as a whole. Such behavior might involve firms expending a considerable amount of resources to avoid a CFIUS investigation, or deciding to terminate a transaction that would improve the optimal performance of the economy in order to avoid a CFIUS investigation. While such anecdotal evidence may not serve as the basis for developing public policy, it does raise a number of concerns about the possible impact of the CFIUS process on the market and the

potential costs of redefining the concept of national security relative to foreign investment.

The recent focus by Congress on the Committee has also shown that the DP World transaction, in combination with other recent unpopular foreign investment transactions, has exacerbated dissatisfaction among some Members of Congress over the operations of CFIUS. In particular, some Members are displeased with the way the Committee uses its discretionary authority under the Exon-Florio provision to investigate certain foreign investment transactions. As a result, Congress could make a number of changes to the CFIUS process through legislation that has been proposed in the 1st Session of the 110th Congress. The changes could mandate more frequent contact between the Committee, which generally operates without much public or congressional attention, and the Congress and enhance Congress's oversight role over the Committee.

The DP World transaction also revealed that the September 11, 2001 terrorist attacks may have fundamentally altered the viewpoint of some Members of Congress regarding the role of foreign investment in the economy and over the impact of such investment on the national security framework. These observers argue that this change requires a reassessment of the role of foreign investment in the economy and of the implications of corporate ownership of activities that fall under the rubric of critical infrastructure. As a result, some Members of Congress are looking to amend the CFIUS process to enhance Congress's oversight role while reducing somewhat the discretion of CFIUS to review and investigate foreign investment transactions in order to have CFIUS investigate a larger number of foreign investment cases. In addition, the DP World transaction has focused attention on long-unresolved issues concerning the role of foreign investment in the nation's overall security framework and the methods that are being used to assess the impact of foreign investment on the nation's defense industrial base and homeland security.

Most economists agree that there is little economic evidence to conclude that foreign ownership, whether by a private entity or by an entity that is owned or controlled by a foreign government, has a measurable impact on the U.S. economy as a whole. Others may argue on non-economic grounds that such firms pose a risk to national security or to homeland security.

Similar issues concerning corporate ownership were raised during the late 1980s and early 1990s when foreign investment in the U.S. economy increased rapidly. There are little new data, however, to alter the conclusion reached at that time that there is no definitive way to assess the economic impact of foreign ownership or of foreign investment on the economy. Although some observers have expressed concerns about foreign investors who are owned or controlled by foreign governments acquiring U.S. firms, there is little confirmed evidence that such a distinction in corporate ownership has any measurable effect on the economy as whole.

For most economists, the distinction between domestic- and foreign-owned firms, whether the foreign firms are privately owned or controlled by a foreign government, is sufficiently small that they would argue that it does not warrant placing restrictions on the inflow of foreign investment. Nevertheless, foreign direct

investment does entail various economic costs and benefits. On the benefit side, such investments bring added capital into the economy and potentially could add to productivity growth and innovation. Such investment also represents one repercussion of the U.S. trade deficit. The deficit transfers dollar-denominated assets to foreign investors, who then decide how to hold those assets by choosing among various investment vehicles, including direct investment. Foreign investment also removes a stream of monetary benefits from the economy in the form of repatriated capital and profits that reduces the total amount of capital in the economy. Such costs and benefits likely occur whether the foreign owner is a private entity or a foreign government.