

2015

## The Global Colony: A Comparative Analysis of National Security-Based Foreign Investment Regimes in the Western Hemisphere

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### Recommended Citation

Colin Stapleton, *The Global Colony: A Comparative Analysis of National Security-Based Foreign Investment Regimes in the Western Hemisphere*, 92 WASH. U. L. REV. 1647 (2015).

Available at: [http://openscholarship.wustl.edu/law\\_lawreview/vol92/iss6/9](http://openscholarship.wustl.edu/law_lawreview/vol92/iss6/9)

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# THE GLOBAL COLONY: A COMPARATIVE ANALYSIS OF NATIONAL SECURITY-BASED FOREIGN INVESTMENT REGIMES IN THE WESTERN HEMISPHERE

## I. INTRODUCTION

“National security” is an ambiguous term.<sup>1</sup> This ambiguity is purposeful<sup>2</sup> as the time when warfare only consisted of guns and bullets has passed. Most anything can be turned into a weapon and the harm it may cause is not necessarily corporeal. Especially now, with the integration of local economies into the global market, nations are beginning to realize the most destructive weapon may be money.<sup>3</sup> Countries throughout the world face a pecuniary paradox as they want to not only reap the benefits of international trade but also protect themselves against economic hegemony.

The American solution to this puzzle of balancing investment with security was illustrated by the acquisition of Smithfield Foods

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1. Despite being a widely touted phrase in the post-9/11 era, there is only one definition to “national security” codified in law, which comes from an Executive Order by President Obama modifying a section of the U.S. Code devoted to the procedures involving access to classified information. Exec. Order No. 13,526 § 6.1(cc), 3 C.F.R. 324 (2009), *reprinted in* 50 U.S.C. § 3161 (Supp. I 2013–2014) (statute formerly classified to 50 U.S.C. § 435). This Order defined “national security” as “the national defense or foreign relations of the United States.” *Id.* The focus of this note, the Exon–Florio Amendment to the Omnibus Trade and Competitiveness Act of 1988, does not define “national security” explicitly, although it does imply national security involves “products, services, and technologies that are important to U.S. national defense requirements.” 50 U.S.C. app. § 2170 (2012), *as amended by* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5021, 102 Stat. 1107, 1425–26. The Exon-Florio Amendment was added to that Act under the heading “Authority to Review Certain Mergers, Acquisitions, and Takeovers.” *Id.* Together they modified the Defense Production Act, 50 U.S.C. §§ 2061–2170. *See* Paul I. Djuricic, Comment, *The Exon-Florio Amendment: National Security Legislation Hampered by Political and Economic Forces*, 3 DEPAUL BUS. L.J. 179, 199 (1991) (stating Treasury Department officials did not “define national security because the concept was too difficult to determine clearly.”); *see also* 2 L. INTL TRADE § 47:3 (1988).

2. Calls to define “national security,” at least under the Exon-Florio Amendment, were rejected by the Department of the Treasury’s Committee on Foreign Investment in the United States. Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons, 56 Fed. Reg. 58,774, 58,775 (Nov. 21, 1991) (to be codified at 31 C.F.R. pt. 800). The reason for leaving this term ambiguous is that an explicit definition “could improperly curtail the President’s broad authority to protect the national security, and, at the same time, not result in guidance sufficiently detailed to be helpful to parties.” *Id.* at 58,775.

3. For instance, Russia has accused the United States of mounting a campaign of economic warfare to “subjugate the country.” Ilya Arkipov & Henry Meyer, *Russia Says U.S. Waging Economic Warfare to Subjugate Opponents*, BLOOMBERG.COM (Nov. 17, 2014), <http://www.bloomberg.com/news/articles/2014-11-17/russia-says-u-s-waging-economic-warfare-to-subjugate-opponents>.

(“Smithfield”)<sup>4</sup> by Shuanghui International Holdings Ltd. (“Shuanghui”) in 2013.<sup>5</sup> At \$4.7 billion, this acquisition was the largest investment a Chinese company had made in the United States at the time.<sup>6</sup> While the size of the transaction alone was enough to court controversy from antitrust regulators, there were a variety of other concerns about the acquisition.<sup>7</sup> The Committee on Foreign Investment in the United States (“CFIUS”) reviewed the transaction as most of these concerns involved national security.<sup>8</sup>

CFIUS is an interagency committee meant to review and approve mergers and acquisitions of companies that have a relation, however tangential, to national security.<sup>9</sup> Most reviewed transactions involve companies that sell products and services related to the military,

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4. Smithfield is the world’s largest producer of pork goods as well as the largest producer of hogs through its subsidiary Murphy-Brown, LLC. SMITHFIELD, 2012 INTEGRATED REPORT 40, 44 (2012), available at [http://files.shareholder.com/downloads/SFD/2743828229\\_x0x590240/F33D665C-409C-4825-A50E-D7F90C10F399/smi\\_integrated\\_12.pdf](http://files.shareholder.com/downloads/SFD/2743828229_x0x590240/F33D665C-409C-4825-A50E-D7F90C10F399/smi_integrated_12.pdf), archived at <http://perma.cc/9FM7-MJH7>. In 2012, Smithfield had \$13.1 billion in revenue. *Id.* at iii. Brands owned by Smithfield include: Smithfield, Eckrich, Farmland Foods, Armour, Cook’s, Gwaltney, John Morrell, Krestchmar, Curly’s, Carando, Margherita, and Healthy Ones. *Id.* at 40–43.

5. Amrutha Gayathri, *Smithfield Foods Shareholders Approve \$4.7 Billion Acquisition by China’s Shuanghui*, INT’L BUS. TIMES (Sept. 25, 2013, 2:01 AM), <http://www.ibtimes.com/smithfield-foods-shareholders-approve-47-billion-acquisition-chinas-shuanghui-1410564>, archived at <http://perma.cc/HAB2-QTPT>. Shuanghui, renamed “WH Group” in January 2014, is a Chinese holding company based in Hong Kong. *Corporate Profile*, WH GROUP, <http://www.wh-group.com/en/about/profile.php>, archived at <http://perma.cc/4TFQ-ER7H> (last visited Feb. 24, 2015). It is a majority shareholder in Henan Shuanghui Development, China’s largest meat producer. *Id.* Shuanghui’s revenue in 2012 was \$6.2 billion. Gayathri, *supra*.

6. William Mauldin, *U.S. Security Panel Approves Smithfield Takeover*, WALL ST. J., Sept. 6, 2013, available at <http://www.wsj.com/article/SB10001424127887324577304579058770192856300>, archived at <http://perma.cc/R3PC-LVAE>. The five largest acquisitions of American companies by Chinese companies, in descending order, are: Smithfield by Shuanghui in 2013 for \$4.7 billion, International Lease Finance by Investor Group in 2012 for \$4.2 billion, AMC Entertainment by Dalian Wanda in 2012 for \$2.6 billion, IBM’s personal computing division by Lenovo in 2004 for \$1.8 billion, and InterGen by China Huaneng in 2010 for \$1.2 billion. Michael J. de la Merced & David Barboza, *Needing Pork, China Is to Buy a U.S. Supplier*, N.Y. TIMES, May 30, 2013, at A1, available at <http://dealbook.nytimes.com/2013/05/29/smithfield-to-be-sold-to-shuanghui-group-of-china/>, archived at <http://perma.cc/5XFS-WWKK>.

7. These concerns focused on the transfer of intellectual property to China as well as concerns over the supply of heparin, an anticoagulant produced from pigs. Gayathri, *supra* note 5. Food safety was another concern as China has had several incidents in the past involving the sale of food products of questionable integrity. De la Merced & Barboza, *supra* note 6. Shuanghui was involved in one of these incidents when an investigation discovered it was using clenbuterol, an additive banned in several countries due to health risks. *Id.*

8. Mauldin, *supra* note 6.

9. See Margaret L. Merrill, *Overcoming CFIUS Jitters: A Practical Guide for Understanding the Committee on Foreign Investment in the United States*, 30 QUINNIPIAC L. REV. 1, 4 (2011) (noting that the “national security standard” used in CFIUS reviews is “vague”).

information technology, or critical infrastructure.<sup>10</sup> But the Smithfield review signaled a more expansive role for CFIUS by including industries outside those commonly associated with national security, such as the meat-processing industry, within its purview.<sup>11</sup> This expansion is well within CFIUS's powers as there are virtually no limits on what it can review.<sup>12</sup> These powers are amplified by the secrecy that shrouds CFIUS reviews because most of the information analyzed is either classified government intelligence or confidential business information.<sup>13</sup> Granting CFIUS this seemingly plenary power is the answer the United States has supplied for the problem of balancing investment with national security. Although the creation of a CFIUS-like regime is one potential solution, some countries have taken a different tack while others have outright ignored the problem altogether.

This Note will survey several Latin American ("LATAM") countries and the regulatory regimes used to protect their economies to see how they compare with CFIUS. This comparison will provide insight into the differences between LATAM and American concepts of national security and the factors taken into account when deciding whether to allow a foreign investment to take place. This Note will show that these differences may have played a role in the establishment of nationalization policies in the past and that the U.S. government should encourage the development of robust regulatory regimes in LATAM to prevent future nationalizations. While these regimes may discourage some American

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10. Liz Hoffman, *\$7B Smithfield Sale Gets Antitrust Regs' OK, CFIUS Still Looms*, LAW360 (July 15, 2013, 7:53 PM), <http://www.law360.com/articles/457457/7b-smithfield-sale-gets-antitrust-regs-ok-cfius-still-looms>, archived at <https://perma.cc/L9EC-5ANM?type=source>. See *infra* Part III for examples of CFIUS reviews involving the military, information technology, and critical infrastructure.

11. See Bill Black, *U.S. Senate Hearing on Smithfield Foods Poses Challenge to CFIUS*, FORBES (July 9, 2013, 11:49 PM), <http://www.forbes.com/sites/simonmontlake/2013/07/09/u-s-senate-hearing-on-smithfield-foods-poses-challenge-to-cifus/>, archived at <http://perma.cc/432M-9VH6> (stating that making "protection of the food supply a national security issue would significantly expand the scope of CFIUS.").

12. See Exec. Order No. 13,456 § 6, 3 C.F.R. 13,456(6) (2008) (codified as amended at 50 U.S.C. app. § 2170) (outlining the CFIUS review process). The only limitations imposed on CFIUS's review powers are those provided by the President as the Committee operates under the authority of the executive branch. See JAMES K. JACKSON, CONG. RESEARCH SERV., RL 33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES 5 (2013) ("[T]he discretion CFIUS uses to review and to investigate foreign investment cases reflects policy guidance from the President."). For its power to block mergers or acquisitions, CFIUS can only "act if there was 'credible evidence' that a transaction would 'impair' national security and that the impact could not be lessened by any other legal provision." David Zaring, *CFIUS as a Congressional Notification Service*, 83 S. CAL. L. REV. 81, 93 (2010) (quoting the Exon-Florio Amendment, 50 U.S.C. app § 2170(d)(4)(A) (2006)).

13. Merrill, *supra* note 9, at 33–34 n.211.

investment in the region, they will also discourage investment from competing economic powers such as China. By reducing the ability of other countries to establish hegemonic relationships with LATAM countries, these regimes will increase the independence and security of the Western Hemisphere as a whole.

Part II of this Note provides a background on CFIUS. Part III involves an analysis of CFIUS decisions to determine the factors that are considered important to national security. Part IV provides a necessary background on the importance of natural resources in LATAM to show the effect of these resources on the region's economies. Part V provides a survey of the investment regulations of select LATAM countries, specifically Mexico, Chile, and Brazil.<sup>14</sup> Part VI is an examination of nationalization as a national security policy and its prevalence in LATAM. The Note then argues in Part VII that the United States should support the establishment of CFIUS-like legal regimes in LATAM, despite the potential limiting effect on American investment, as these regimes reduce the chance of nationalization and encourage security in the Western Hemisphere as a whole.

## II. CFIUS BACKGROUND

President Gerald Ford created CFIUS through an Executive Order<sup>15</sup> in 1975 amid concerns other nations were investing in the United States for political reasons.<sup>16</sup> In its original form, CFIUS was solely a reviewing committee since it did not have any power other than to consolidate and

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14. Mexico, Chile, and Brazil were chosen due to the size of their economies, the importance of their natural resource sectors, and the availability of information regarding their investment regimes. See *The World Factbook: Mexico*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/mx.html> (last visited Mar. 21, 2015); *The World Factbook: Chile*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/ci.html> (last visited Mar. 21, 2015); *The World Factbook: Brazil*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/br.html> (last visited Mar. 21, 2015). Additionally, they are representative of different geographic areas, as Mexico includes a large swath of Central America while Chile and Brazil both have diverse climates that are similar to those found in most South American countries. *Id.*

15. Exec. Order No. 11,858, 3A C.F.R. app. 159 (1975) (codified as amended at 50 U.S.C. app. § 2170).

16. JACKSON, *supra* note 12, at 1. A majority of these investing nations were members of the Organization of the Petroleum Exporting Countries (OPEC). *Id.* These investments came in just after the end of an oil embargo by OPEC against the United States. Zaring, *supra* note 12, at 92. Two Latin American countries, Venezuela and Ecuador, were members of OPEC during this time. *Member Countries*, OPEC, [http://www.opec.org/opec\\_web/en/about\\_us/25.htm](http://www.opec.org/opec_web/en/about_us/25.htm) (last visited Feb. 24, 2015), archived at <http://perma.cc/CXD8-TPXF>.

review information regarding a contested transaction.<sup>17</sup> The power to block a transaction was not bestowed upon CFIUS until the passage of the Exon-Florio<sup>18</sup> Amendment in 1988.<sup>19</sup> The original purpose of this Amendment was to prevent the export of technology in a bid to ensure the United States had a competitive advantage in the world economy.<sup>20</sup> The next step after granting CFIUS some teeth was to further define its role. Through the Byrd Amendment,<sup>21</sup> CFIUS was required to review transactions where “the acquirer is controlled by or acting on behalf of a foreign government; and . . . the acquisition results in control of a person engaged in interstate commerce . . . that could affect the national security of the United States.”<sup>22</sup> This Amendment turned CFIUS into an effective tool for the government to achieve national economic security in corporate transactions.<sup>23</sup> CFIUS remained untouched until 2007 when Congress passed the Foreign Investment and National Security Act (FINSAs).<sup>24</sup> This Act “required CFIUS to conduct more investigations, guided those investigations by providing more detailed congressional instruction about what to look for, authorized the Committee to impose sanctions on foreign companies that failed to comply with CFIUS requirements, and mandated that additional, extensive, and detailed reports be provided to Congress.”<sup>25</sup> Like the Byrd Amendment, FINSAs’s expansion of CFIUS’s power amplified its ability to be used as a weapon when it comes to national security. Since 2007, CFIUS’s powers have not been substantially adjusted.

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17. Exec. Order No. 11,858, 3A C.F.R. app. 159 (1975) (codified as amended at 50 U.S.C. app. § 2170).

18. This Amendment was named for the two Congressmen who proposed it, James Exon (D-NE) and James Florio (D-NJ). Zaring, *supra* note 12, at 92–93.

19. See Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. § 2901 (current version at 50 U.S.C. app. § 2170 (2012)). The Amendment granted the President the power “to block acquisitions of particular concern or to impose conditions on the acquisition before approving the sale.” Zaring, *supra* note 12, at 93. It was passed on August 23, 1988. Marc Greidinger, *The Exon-Florio Amendment: A Solution in Search of a Problem*, 6 AM. U. J. INT’L L. & POL’Y 111, 111 (1990–1991).

20. Greidinger, *supra* note 19, at 112.

21. This Amendment was named after the Senator who proposed it, Robert Byrd (D-WV). See Matthew R. Byrne, *Protecting National Security and Promoting Foreign Investment: Maintaining the Exon-Florio Balance*, 67 OHIO ST. L.J. 849, 868 (2006).

22. JACKSON, *supra* note 12, at 6. The Byrd Amendment required CFIUS to report to Congress on its findings. Zaring, *supra* note 12, at 94 n.60. It also expanded upon the factors that should be considered when deciding on a transaction. *Id.* at 94 n.59.

23. Despite having the power and the means to prevent foreign investment, no transactions were blocked between 1992 and 1997. *Id.* at 95.

24. Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, 121 Stat. 246 (codified at 50 U.S.C. app. § 2170 (2012)).

25. Zaring, *supra* note 12, at 95–96.

CFIUS's authorizing legislation provides guidelines for the scope of its powers, although this scope might be different in practice due to the discretion CFIUS has in ordering a review.<sup>26</sup> The Executive Order authorizing CFIUS's creation did not include any reference as to what it could review except limiting its reach to transactions involving foreign investment.<sup>27</sup> This scope became more focused with the passage of the Exon-Florio Amendment, which listed eleven factors for CFIUS to consider.<sup>28</sup> These factors include whether the business is related to national defense or the military, either through the business' industry or its downstream production; the technology the business may have; the effect of the transaction on critical infrastructure; the role of a foreign government in the transaction; and how the transaction may affect future energy and resource demand by the United States.<sup>29</sup> As is clarified in the text of the eleventh factor, these are merely guidelines,<sup>30</sup> and *any* "covered" transaction<sup>31</sup> may be reviewed at CFIUS's discretion.<sup>32</sup> The most recent amendment to the original Executive Order, made in 2008, continued the tradition of vagueness regarding CFIUS's scope as its predecessor.<sup>33</sup> Thus, the only definitive statement that can be made about CFIUS's scope is that it is limited to transactions involving foreign entities attempting to gain control over American assets.

While the authorizing legislation is vague as to CFIUS's scope, it provides more guidance on CFIUS's membership. CFIUS is composed of members from different federal executive departments. The original Executive Order authorizing the creation of CFIUS stated the members were to be representatives from the Departments of Treasury, State, Defense, and Commerce, as well as the Assistant to the President for

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26. Jennifer Cooke, Note, *Finding the Right Balance for Sovereign Wealth Fund Regulation: Open Investment vs. National Security*, 2009 COLUM. BUS. L. REV. 728, 749–50 ("The statute provides a list of factors for the President to take into consideration 'as appropriate' when evaluating covered transactions, but ultimately, the statute leaves such a determination to the discretion of the President and CFIUS on a case-by-case basis.")

27. Exec. Order No. 11,858, 3A C.F.R. app. 159 (1975) (codified as amended at 50 U.S.C. app. § 2170).

28. See § 2170(f) (listing eleven factors to be considered when evaluating a transaction's effect on national security).

29. *Id.*

30. *Id.*

31. A "covered transaction" is defined as "any merger, acquisition, or takeover that is proposed or pending after August 23, 1988, by or with any foreign person which could result in foreign control of any person engaged in interstate commerce in the United States." *Id.* § 2170(a)(3).

32. *Id.* § 2170(b).

33. Exec. Order No. 13,456, 3 C.F.R. 13,456 (2008) (codified as amended at 50 U.S.C. app. § 2170).

Economic Affairs and the Executive Director of the Council on International Economic Policy.<sup>34</sup> Later, the Exon-Florio Amendment added the Attorney General and the Director of the Office of Management and Budget to CFIUS.<sup>35</sup> Within five years, another amendment added the Director of the Office of Science and Technology Policy and the Assistant to the President for National Security Affairs.<sup>36</sup> CFIUS membership went untouched for almost fifteen years when, in 2008, another amendment added the United States Trade Representative, the Chairman of the Council of Economic Advisers, and the Assistant to the President for Homeland Security and Counterterrorism.<sup>37</sup> The Executive Order authorizing CFIUS established the Secretary of the Treasury Department as the chair and permits him or her to include other departments “as he [or she] deems appropriate.”<sup>38</sup> Although CFIUS’s core membership revolves around departments or personnel that focus mainly on national security or the economy, CFIUS has a flexible structure that permits other interested parties to be included in the review process, depending on the subject matter of the transaction.<sup>39</sup> This flexibility, when combined with its almost plenary review power, makes CFIUS a potentially effective weapon to prevent many of the significant economic threats to the United States from transpiring.

The review process itself is also structured to make CFIUS an adaptable and effective weapon. Transactions can be voluntarily submitted to CFIUS by providing written notice or CFIUS can unilaterally initiate the review.<sup>40</sup> Once CFIUS receives notice, it has thirty days to make a determination of the transaction’s effect on American national security.<sup>41</sup> The review ends once all CFIUS members decide that the transaction does not threaten national security.<sup>42</sup> But if any members decide there is a threat, CFIUS can take an extra forty-five days to investigate.<sup>43</sup> Once a review is complete, CFIUS must notify Congress and send a report with its

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34. Exec. Order No. 11,858, 3A C.F.R. app. 159 (1975) (codified as amended at 50 U.S.C. app. § 2170).

35. Exec. Order No. 12,661, § 3-201(1)(F), 3A C.F.R. app. 618 (1988) (amending Exec. Order No. 11,858, 3A C.F.R. app. 159 (1975), codified as amended at 50 U.S.C. app. § 2170).

36. Exec. Order No. 12,860, 3 C.F.R. 629 (1993) (amending Exec. Order No. 11,858, 3A C.F.R. app. 159 (1975), codified as amended 50 U.S.C. app. § 2170).

37. Exec. Order No. 13,456, 3 C.F.R. 13,456 (2008).

38. Exec. Order No. 11,858, 3A C.F.R. app. 159 (1975).

39. *Id.*

40. 50 U.S.C. app. § 2170.

41. JACKSON, *supra* note 12, at 15.

42. *Id.* at 16.

43. *Id.*

recommendation to the President.<sup>44</sup> Even if CFIUS does not recommend blocking the transaction, the President has “almost unlimited authority to take ‘such action for such time as the President considers appropriate to suspend or prohibit any covered transaction that threatens to impair the national security of the United States.’”<sup>45</sup> This procedure serves to harness the plenary review power granted to the President to ensure any questionable transaction does not affect national security.

CFIUS’s structure and scope make it a robust defensive mechanism for the U.S. government to review and block any corporate transactions that might threaten national economic security. But the use of such wide-ranging power is entirely discretionary.<sup>46</sup> An examination of CFIUS’s past decisions is necessary to understand how this power is exercised and to determine which factors CFIUS considers most important to national security.

### III. PAST CFIUS DECISIONS

CFIUS’s exercise of power is impossible to observe directly as its deliberations are kept confidential due to the sensitivity of the business information and intelligence involved.<sup>47</sup> But there are several ways to lift this veil of secrecy. This Part attempts to do so by providing an analysis of reports of CFIUS-reviewed transactions and court challenges to CFIUS decisions to highlight the types of transactions it considers threat to national security.

#### A. Reports of CFIUS-Reviewed Transactions

The main source of information on CFIUS’s decisions is publicly approved or denied transactions.<sup>48</sup> The first transaction blocked by CFIUS was Chinese military aircraft manufacturer China National Aero-Technology Import and Export Corporation’s (“CATIC”)<sup>49</sup> acquisition of

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44. 50 U.S.C. app. § 2170.

45. JACKSON, *supra* note 12, at 17 (quoting the Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, 121 Stat. 246 (codified at 50 U.S.C. app. § 2170 (2012))).

46. Cooke, *supra* note 26, at 749–50 (“The statute provides a list of factors for the President to take into consideration ‘as appropriate’ when evaluating covered transactions, but ultimately, the statute leaves such a determination to the discretion of the President and CFIUS on a case-by-case basis.”).

47. 50 U.S.C. app. § 2170.

48. JACKSON, *supra* note 12, at 9–12.

49. The China National Aero-Technology Import and Export Corporation (CATIC) is a Chinese military aircraft company based in Beijing. *About CATIC*, CHINA NAT’L AERO-TECH. IMP. & EXP.

American aircraft parts manufacturer MAMCO Manufacturing Inc. (“MAMCO”)<sup>50</sup> in 1990.<sup>51</sup> MAMCO submitted a voluntary notification for CFIUS to review the transaction.<sup>52</sup> Before CFIUS’s review was complete, CATIC acquired MAMCO by “purchas[ing] all [of] MAMCO’s voting securities.”<sup>53</sup> CFIUS’s final report to President George H.W. Bush was that the transaction posed threats to national security, namely that “CATIC had ties to the Chinese military; . . . the transaction would give CATIC ‘unique access’ to U.S. aerospace companies; and . . . some of the technology produced by MAMCO was export-controlled.”<sup>54</sup> President Bush then ordered CATIC to divest its interest in MAMCO, voiding the transaction.<sup>55</sup> As the first transaction blocked by CFIUS, the CATIC-MAMCO acquisition provided a signal to foreign investors that the United States now had a new weapon in its national security arsenal and was willing to use it, even if that meant souring foreign relations.<sup>56</sup> The blocking of the transaction also demonstrated that CFIUS decisions could be based on a variety of national security concerns, most of which revolve around the acquiring entity’s relation to foreign governments or militaries, potential to commit industrial or military espionage, or the transfer of technologies deemed essential to national security.<sup>57</sup>

After the CATIC-MAMCO acquisition, the most well-known blocked transaction is the Huawei acquisition of 3Leaf. Huawei,<sup>58</sup> a Chinese telecommunications company, acquired 3Leaf,<sup>59</sup> an American firm that

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CORP., <http://www.catic.cn/indexPortal/home/index.do?cmd=goToChannel&cid=750&language=US> (last visited Feb. 24, 2015), *archived at* <http://perma.cc/BRY3-ADHJ>.

50. MAMCO Manufacturing Inc. was “a Seattle based manufacturer of parts for commercial aircraft.” Jose E. Alvarez, *Political Protectionism and United States International Investment Obligations in Conflict: The Hazards of Exon-Florio*, 30 VA. J. INT’L L. 1, 96 (1989).

51. *Id.*

52. Maira Goes de Moraes Gavioli, *National Security or Xenophobia: The Impact of the Foreign Investment and National Security Act (“FINS”) in [sic] Foreign Investment in the U.S.*, 2 WM. MITCHELL L. RAZA J. 1, 13 (2011).

53. *Id.*

54. *Id.*

55. *Id.*

56. Alvarez, *supra* note 50, at 98 (“President Bush had been advised by some officials not to nullify the [CATIC-MAMCO] transaction to avoid angering China.”).

57. De Moraes Gavioli, *supra* note 52, at 13.

58. Huawei is an information and communications technology provider based in Shenzhen, China. *Corporate Information*, HUAWEI U.S., <http://www.huawei.com/us/about-huawei/corporate-info/index.htm> (last visited Feb. 24, 2015), *archived at* <http://perma.cc/NE79-XDCV>.

59. 3Leaf Systems, Inc. was a “server virtualization solution[er]” provider based in Santa Clara, California. *3Leaf Systems, Inc.: Private Company Information*, BLOOMBERG BUSINESSWEEK, <http://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=24308298> (last visited Feb. 24, 2015), *archived at* <http://perma.cc/9CYM-4R2Q>. Server virtualization permits businesses to increase the computing power of their physical servers without increasing their amount by creating

made computer servers, in 2010 for two million dollars.<sup>60</sup> This transaction was later blocked due to Huawei's association with the Chinese government.<sup>61</sup> Although this blocking generated a lot of controversy at the time, in retrospect it was well-founded as Huawei was accused of spying for China two years later.<sup>62</sup> Like the CATIC-MAMCO acquisition, the Huawei-3Leaf acquisition demonstrates that CFIUS bases its decision to permit or block a transaction based on a foreign entity's relation with a foreign government as well as the potential for that entity to gather intelligence as a result of the transaction.

An additional example of a CFIUS-reviewed transaction within the information technology industry is the NTT Communications-Verio acquisition. In 2000, CFIUS reviewed the acquisition of Verio,<sup>63</sup> an American web hosting company, by NTT Communications,<sup>64</sup> the telecommunications subsidiary of a Japanese holding company where the Japanese government was a majority shareholder.<sup>65</sup> Initially, there were concerns the Japanese government could use its position to "access . . . information regarding wiretaps that were being conducted on email and other Web-based traffic."<sup>66</sup> But CFIUS approved the acquisition on the condition that "the Japanese government would have no role in Verio, Inc.'s day-to-day operations or involvement in wiretapping Verio's network."<sup>67</sup> Similar to the reasoning behind the Huawei-3Leaf blockage,

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virtual servers that act and can perform similar to physical servers. See *How to Set up a Virtualization Server*, PCWORLD (July 20, 2010, 6:00 PM), [http://www.peworld.com/article/201408/how\\_to\\_build\\_a\\_virtualization\\_server.html](http://www.peworld.com/article/201408/how_to_build_a_virtualization_server.html).

60. *Huawei Drops a Controversial US Takeover Bid for 3Leaf*, BBC NEWS (Feb. 21, 2011, 1:12 AM), <http://www.bbc.co.uk/news/business-12520640>, archived at <http://perma.cc/3GUV-Q4GC>.

61. *Id.*

62. *Huawei Denies Spying Allegations by Former CIA Chief*, BBC NEWS (July 19, 2013, 9:58 AM), <http://www.bbc.co.uk/news/business-23373178>, archived at <http://perma.cc/9VCV-DRYR>. The espionage accusations related to Huawei using its position to disclose to the Chinese government "intimate and extensive knowledge of the foreign telecommunications systems it is involved with." *Id.* (quoting former CIA chief Michael Hayden).

63. Verio, Inc. is web hosting company based in Orem, Utah. *Contact Verio*, VERIO, <http://www.verio.com/contact/> (last visited Feb. 24, 2015), archived at <http://perma.cc/2C7T-6JUM>.

64. Nippon Telegraph and Telephone (NTT) Communications Corporation is a telecommunications company based out of Tokyo. *About Us: Our Company*, NTT COMM'NS, [http://ntt.com/aboutus\\_e/our-company/index.html](http://ntt.com/aboutus_e/our-company/index.html) (last visited Feb. 24, 2015), archived at <http://perma.cc/NY4B-HZZC>.

65. See *About NTT Stock*, NTT GROUP, [http://www.ntt.co.jp/ir/shares\\_e/digest.html](http://www.ntt.co.jp/ir/shares_e/digest.html) (last visited Mar. 21, 2015), archived at <http://perma.cc/SEL9-JQ99> (chart showing "Government and Public Bodies" own 32.51% of the NTT Group and are therefore the largest shareholders).

66. JACKSON, *supra* note 12, at 9.

67. Kathleen A. Lacey et al., *International Telecommunications Mergers: U.S. National Security Threats Inherent in Foreign Government Ownership of Controlling Interests*, 4 TUL. J. TECH. & INTELL. PROP. 29, 49–50 (2002).

this condition shows CFIUS's concern for foreign governments using the transaction as a means to gain access to sensitive information.

Besides the defense and information technology industries, CFIUS has been active in reviewing transactions within the energy industry. An example of a CFIUS-reviewed transaction within the energy industry is the acquisition of Nexen,<sup>68</sup> a Canadian oil firm, by China National Offshore Oil Corporation Ltd. (CNOOC),<sup>69</sup> the Chinese state-run oil firm, in 2013. Although Nexen is technically a Canadian firm, it owned U.S. drilling leases in the Gulf of Mexico.<sup>70</sup> These leases served as "a primary source of U.S. oil."<sup>71</sup> CFIUS approved the transaction only after CNOOC agreed to divest itself of Nexen's assets in the Gulf, thus preventing it from gaining control over the leases.<sup>72</sup> While this transaction was successful, CNOOC was not so lucky when it tried to purchase Unocal,<sup>73</sup> an American oil and gas company, in 2005.<sup>74</sup> CNOOC abandoned the acquisition after public outcry over the Chinese government's involvement in the transaction and concerns that energy supplies would be diverted away from the United States made it clear CFIUS would never grant approval.<sup>75</sup> Understandably, transactions involving the transfer of control

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68. Nexen Inc. is an oil and gas company based in Calgary, Canada. *About Us: Office Locations*, NEXEN, <http://www.nexencnoocld.com/en/AboutUs/OfficeLocations.aspx> (last visited Feb. 24, 2015).

69. CNOOC is a Hong Kong-based holding company with subsidiaries involved in the exploration, production, and sale of oil. *CNOOC Ltd.: Profile*, WALL ST. J., <http://quotes.wsj.com/HK/XHKG/883/company-people> (last visited Feb. 24, 2015), *archived at* <http://perma.cc/3YRS-6SCN>. CNOOC is owned by the Chinese government. Chester Dawson, *Cnooc Wins Right to Build LNG Export Plant at Canadian Site*, WALL ST. J. (Nov. 12, 2013, 8:38 PM), <http://online.wsj.com/news/articles/SB10001424052702303460004579194543986768858>, *archived at* <http://perma.cc/K9KJ-6MR6>.

70. Tennille Tracy, *Cnooc Agrees to Alter U.S. Oil Leases*, WALL ST. J. (Mar. 1, 2013, 1:25 PM), <http://www.wsj.com/articles/SB10001424127887323978104578334351323478398>, *archived at* <http://perma.cc/5Q3V-6R5S>.

71. *Id.* The 200 deep-water leases had reserves of "about 205 million barrels of oil, one of the largest holdings in the Gulf." Rebecca Penty & Sara Gay Forden, *Cnooc Said to Cede Control of Nexen's U.S. Gulf Assets*, BLOOMBERG (Mar. 1, 2013, 7:43 PM), <http://www.bloomberg.com/news/articles/2013-03-01/cnooc-said-to-cede-control-of-nexen-s-u-s-gulf-assets>, *archived at* <http://perma.cc/CMC3-WGX2>.

72. Tracy, *supra* note 70. Although CNOOC gave up control of the leases, it "retain[ed] ownership of the contracts and collect[s] profits from the oil production." *Id.*

73. Unocal Corporation was an oil and gas exploration and production company based in El Segundo, California. *Unocal Corp.*, BLOOMBERG BUSINESS, <http://www.bloomberg.com/profiles/companies/UCL:US-unocal-corp> (last visited Feb. 24, 2015), *archived at* <http://perma.cc/N8NF-8UKC>.

74. JACKSON, *supra* note 12, at 9.

75. Anthony Michael Sabino, *Transactions that Imperil National Security: A Look at the Government's Power to Say "No"*, 77 N.Y. ST. B.J. 20, 21 (2005) ("Opponents of the deal proclaimed dire repercussions if an American energy company was in fact sold to an entity clearly controlled by the government of a major foreign power and, furthermore, one with its own massive energy needs.").

over U.S. energy production and supply to foreign entities would bring up national security concerns.<sup>76</sup> CFIUS decisions within this industry, as seen in the CNOOC transactions, indicate that CFIUS regards energy as an essential element of national security and will block most, if not all, transfers of control over U.S. energy to foreign entities.

Although CFIUS will generally prevent the transfer of control over American energy-related assets to foreign entities, it did permit one such acquisition. In 2012, Chinese auto-parts manufacturer Wanxiang<sup>77</sup> sought to acquire A123 Systems,<sup>78</sup> an American electric-car battery manufacturer.<sup>79</sup> The national security-based objections to the transaction revolved around the transfer of the technology owned by A123, which supposedly could be used for military applications.<sup>80</sup> CFIUS approved the transaction after Wanxiang excluded the government business portion of A123 from the acquisition.<sup>81</sup> The saving grace for the Wanxiang-A123 transaction was likely that, although it involved the sale of control over energy assets, these assets were not in the oil and gas industry like those in the CNOOC transactions. Instead, the assets involved electric car batteries, a nascent technology which had not yet gained traction in the United States.<sup>82</sup> This lack of popularity meant such an acquisition posed little

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76. The threat of a loss of control over energy was demonstrated during the 1973 oil embargo, which saw a “major transfer of wealth [from the United States] to OPEC members.” Bruce Winfield Bean, *Attack of the Sovereign Wealth Funds: Defending the Republic from the Threat of Sovereign Wealth Funds?*, 1 MICH. ST. J. INT’L L. 65, 88 (2009). This embargo was the catalyst for the creation of CFIUS. *Id.* at 90.

77. Wanxiang Group Corporation is an auto-parts manufacturer based in Hangzhou, China. Michael Bathon, *Wanxiang Wins U.S. Approval to Buy Battery Maker A123*, BLOOMBERG (Jan. 30, 2013, 12:14 AM), <http://www.bloomberg.com/news/2013-01-29/wanxiang-wins-cfius-approval-to-buy-bankrupt-battery-maker-a123.html>, archived at <http://perma.cc/PAW7-9K6R>.

78. A123 Systems Inc. was a battery manufacturer based in Waltham, Massachusetts. *A123 Systems Inc. Profile*, BLOOMBERG, <http://www.bloomberg.com/quote/AONEQ:US/profile> (last visited Nov 15, 2013), archived at <http://perma.cc/3V8X-D7EQ>. After it was sold to Wanxiang, it changed its name to B456 Systems, Inc. Kai Petainen, *Battery Company Changes Name from A123 to B456—A Fire Extinguisher?*, FORBES.COM (Mar. 28, 2013, 7:21 PM), <http://www.forbes.com/sites/kaipetainen/2013/03/28/battery-company-changes-name-from-a123-to-b456-a-fire-extinguisher/>, archived at <http://perma.cc/H34L-UR7G>.

79. Bathon, *supra* note 77.

80. Patrick Fitzgerald, *U.S. Clears Wanxiang to Buy A123 Assets*, WALL ST. J. (Jan. 29, 2013, 2:14 PM), <http://online.wsj.com/news/articles/SB10001424127887323829504578271724184629726>, archived at <http://perma.cc/S3P6-RRNP>. These objections, while involving national security concerns, were mainly focused on the fact the technologies had been developed as a result of government grants. *Id.* Thus, the transaction was viewed as selling taxpayer-owned property to a foreign entity. *Id.*

81. *Id.*

82. In 2012, the year of Wanxiang’s acquisition of A123, electric vehicles, including hybrids, only made up 3.38% of car sales in the United States. *Electric Drive Sales*, ELECTRIC DRIVE TRANSPORTATION ASSOCIATION, <http://www.electricdrive.org/index.php?ht=d/sp/i/20952/pid/20952> (last visited Mar. 7, 2015), archived at <http://perma.cc/4DA6-XP5W>.

threat to national security. The Wanxiang-A123 transaction demonstrates that CFIUS decisions are based not only on the type of threat the transaction poses to national security, but also the scale of threat. An acquisition in a critical industry such as energy will likely be approved by CFIUS if the threat to national security is minor.

CFIUS has been active in reviewing decisions beyond the energy industry. One such transaction is British software company Smartmatic's<sup>83</sup> acquisition of Sequoia Voting Systems,<sup>84</sup> an American voting machine supplier, in 2005.<sup>85</sup> Although Smartmatic is based in the United Kingdom, its management is largely Venezuelan.<sup>86</sup> This fact became quite relevant as relations between the United States and Venezuela—under Hugo Chavez at the time—could best be described as unfriendly.<sup>87</sup> Opposition to the transaction rallied under this banner, citing concerns the Venezuelan government might assert control over Smartmatic and could therefore influence U.S. elections.<sup>88</sup> The Congresswoman who initially raised the issue stated, “the integrity of our voting machines is vital to national security.”<sup>89</sup> This principle was illustrated just five years earlier when issues with voting machines in Florida troubled the 2000 presidential election.<sup>90</sup> The pressure of a CFIUS

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83. Smartmatic International Corporation is a London-based technology solution provider focused on electronic voting systems. *Smartmatic International Corporation: Private Company Information*, BUSINESSWEEK, <http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=20882341> (last visited Nov 16, 2013), *archived at* <http://perma.cc/3DZS-TQ8C>.

84. Sequoia Voting Systems, Inc. was a provider of touch-screen voting systems based in Denver, Colorado. *Sequoia Voting Systems, Inc. Profile*, BLOOMBERG, <http://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=2242029> (last visited Mar. 21, 2015), *archived at* <http://perma.cc/TA29-P494>.

85. Tim Golden, *U.S. Investigates Voting Machines' Venezuela Ties*, N.Y. TIMES (Oct. 29, 2006), <http://www.nytimes.com/2006/10/29/washington/29ballot.html>, *archived at* <http://perma.cc/7VV2-GSX9>.

86. *Our Team*, SMARTMATIC, <http://www.smartmatic.com/about/our-team/> (last visited Mar. 7, 2015), *archived at* <http://perma.cc/CQW5-9V39>.

87. *See* Golden, *supra* note 85 (“Officials of both Smartmatic and the Venezuelan government strongly denied yesterday that President Chávez’s administration, which has been bitterly at odds with Washington, has any role in Smartmatic.”).

88. *Id.* Additional concerns over the transaction were that, even if there were no attempts at electoral fraud by another country in the United States, the Sequoia purchase would legitimize Smartmatic and enable it to commit such fraud in other countries “where safeguards against fraud are weaker.” *Id.*

89. Rep. Carolyn Maloney, *Smartmatic Announces It Will Sell Sequoia Voting Systems, Withdraw from CFIUS Review*, CAROLYN B. MALONEY (Dec. 22, 2006), <http://maloney.house.gov/media-center/press-releases/smartmatic-announces-it-will-sell-sequoia-voting-systems-withdraw-cfius-review>, *archived at* <http://perma.cc/V7XE-CUF4>.

90. Abby Goodnough, *Voting Machines Giving Florida New Headache*, N.Y. TIMES (Oct. 13, 2007), <http://www.nytimes.com/2007/10/13/us/politics/13voting.html>, *archived at* <http://perma.cc/Y6W7-MZ6L>.

review proved to be too much for Smartmatic as it sold its ownership of Sequoia even before CFIUS made its decision.<sup>91</sup> This move all but confirmed the position of the transaction's opponents.<sup>92</sup> Like the Huawei-3Leaf transaction, the death knell for the Smartmatic-Sequoia transaction was the acquirer's relationship with a foreign government.<sup>93</sup> This questionable relationship was amplified by the politically sensitive nature of the asset being sold, as voting machines play an essential role in American democracy.<sup>94</sup> Although CFIUS did not have the chance to issue its recommendation, it is likely the transaction would have been blocked. Not only was there potential for the acquiring company to be influenced by a foreign government, but any foreign influence over American voting machines would naturally pose a threat to national security.

The most controversial CFIUS-approved transaction was the Dubai Ports World<sup>95</sup> acquisition of the Peninsular and Oriental Steam Navigation Company ("P&O")<sup>96</sup> in 2005,<sup>97</sup> just before the Smartmatic-Sequoia transaction.<sup>98</sup> At the time of the transaction, P&O controlled six U.S. ports.<sup>99</sup> These ports formed only a small part of P&O's business as its operations stretched across the world.<sup>100</sup> Despite the insignificance of the ports to P&O's overall business, both Dubai Ports and P&O agreed it was probably significant to the U.S. government and voluntarily submitted the transaction for a CFIUS review.<sup>101</sup> Also weighing towards the need for a CFIUS review was the fact Dubai Ports is wholly owned by the United

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91. Maloney, *supra* note 89.

92. *See id.* ("But now it seems the company could not overcome the cloud of doubt surrounding this deal—had they been able to, we would not be talking about a sale of Sequoia today.")

93. To be clear, no definitive evidence was presented connecting Smartmatic to the Venezuelan government. *See id.* ("For a few years, questions have surrounded Smartmatic about its ownership and its possible ties to the Venezuelan government."). The deal fell apart merely because of speculation there was a connection. *See id.*

94. *See id.* ("[T]he integrity of [U.S.] voting machines is vital to national security").

95. Dubai Ports World is a marine terminal operator based in Dubai. *Company Profile for DP World Ltd.*, BLOOMBERG, <http://www.bloomberg.com/quote/DPW:DU/profile> (last visited Mar. 7, 2015), archived at <http://perma.cc/9V8R-PL2J>.

96. Peninsular and Oriental Steam Navigation Company (P&O) was a port operator based in London. *Company Overview of Peninsular and Oriental Steam Navigation Company Limited*, BLOOMBERG, <http://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=410998> (last visited Mar. 7, 2015), archived at <http://perma.cc/5FJA-SDH3>.

97. De Moraes Gavioli, *supra* note 52, at 20.

98. *See supra* notes 84–94 and accompanying text.

99. De Moraes Gavioli, *supra* note 52, at 20.

100. Thomas E. Crocker, *What Banks Need to Know About the Coming Debate over CFIUS, Foreign Direct Investment, and Sovereign Wealth Funds*, 125 *BANKING L.J.* 457, 459 (2008) ("[T]he U.S. port assets of the Peninsular and Oriental Steam Navigation Company Limited [were] a minor part of a global acquisition of P&O.").

101. De Moraes Gavioli, *supra* note 52, at 20.

Arab Emirates (UAE) government.<sup>102</sup> Regardless, CFIUS approved the transaction, as Dubai Ports would never actually assume control of the ports themselves.<sup>103</sup> This approval proved moot as political outcry over the transaction eventually pushed Dubai Ports to divest its interest in the U.S. ports.<sup>104</sup> The controversy over this approval, which made it appear as if CFIUS was too soft on national security, spurred Congress to pass the FINSA legislation, thus “broadening the interpretation of national security.”<sup>105</sup> Under FINSA, CFIUS would have blocked the Dubai Ports-P&O transaction as it threatened national security by ceding control of “critical infrastructure”<sup>106</sup> to a foreign entity that was controlled by a foreign government.<sup>107</sup> As seen in the previous examples, CFIUS blocks transactions involving the transfer of control over assets within a national security-sensitive industry, especially when the acquirer is connected to a foreign government.

Although the Dubai Ports-P&O transaction created controversy, protests were reserved to persons and entities that had an interest only in the national security aspect of the transaction.<sup>108</sup> But the companies involved have a more vested interest in the financial aspect of the transaction as CFIUS approval may be the difference between billions of dollars and nothing.<sup>109</sup> As these companies attempt to capture the value resulting from a merger or acquisition, they might protest a CFIUS decision through judicial challenge, which, in turn, provides more insight into CFIUS’s decision-making process.

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102. *Id.*

103. *Id.* (“CFIUS did not identify national security issues in this transaction because DPW would neither be in charge of the ports themselves nor port security. Rather, it would manage terminal port operations without acquiring the ports themselves.”).

104. Robert S. LaRussa, Lisa Raisner & Thomas B. Wilner, *New Law Heightens Scrutiny of Foreign Acquisitions of U.S. Companies*, 4 N.Y.U. J.L. & BUS. 285, 290 (2007).

105. De Moraes Gavioli, *supra* note 52, at 21

106. “Critical infrastructure” is defined as “systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems or assets would have a debilitating impact on national security.” 50 U.S.C. app. § 2170(a)(6) (2012). Ports would fall under this category. LaRussa, Raisner & Wilner, *supra* note 104, at 291.

107. *See* De Moraes Gavioli, *supra* note 52, at 25–27 (discussing the FINSA definition of “covered transaction”).

108. *See supra* note 104 and accompanying text.

109. For instance, CNOOC bid \$18 billion in cash to acquire Unocal but dropped this bid once a CFIUS review was initiated. JACKSON, *supra* note 12, at 9.

## B. Court Challenges

There has only been one judicial challenge to a CFIUS decision: *Ralls Corp. v. Committee on Foreign Investment in the U.S.*<sup>110</sup> *Ralls Corp.* involved the acquisition of a windmill farm in Oregon by a Chinese company.<sup>111</sup> The Ralls Corporation, a subsidiary of a Chinese company,<sup>112</sup> bought a wind farm in north-central Oregon from U.S. Innovative Renewable Energy, LLC, an American company.<sup>113</sup> CFIUS blocked the transaction because the farm was located close to a naval installation and several turbines were located in restricted airspace.<sup>114</sup> Proximity to the naval base was enough for the transaction to be considered a threat to national security and to require divestiture.<sup>115</sup> While common sense would dictate that CFIUS should block the acquisition of any companies involved with the U.S. military, the *Ralls Corp.* case illustrates that even proximity to military facilities might pose a threat to national security. Thus, CFIUS decisions depend on not only what the target company does, but also where it is.

These examples demonstrate the manner in which CFIUS interprets and applies the concept of national security in corporate transactions. While they do little to provide a comprehensive definition of “national security,” these examples suggest certain industries such as energy and critical infrastructure have a close relation to national security. They also hint at the complexity of determining a transaction’s relation to national security. CFIUS considers factors beyond just the identity of the bidder or target companies and the industry in which they operate, such as the allegiance of management and location of the target company’s facilities. More importantly, these examples show that one of the main threats to

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110. See generally *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 926 F. Supp. 2d 71 (D.D.C. 2013). The dearth of judicial challenges to CFIUS decisions may be due to a clause in the authorizing statute that prevents such action. § 2170(e) (“The actions . . . and the findings of the President . . . shall not be subject to judicial review.”). The *Ralls Corp.* case was submitted to the court alleging not that the decision was wrong, but that the President was acting beyond his powers in blocking the transaction. *Ralls Corp.*, 926 F. Supp. 2d at 83–91.

111. *Ralls Corp.*, 926 F. Supp. 2d at 75.

112. The Ralls Corporation is a Delaware-incorporated subsidiary of SANY Group Co., Ltd. *Ralls Corporation: Private Company Information*, BUSINESSWEEK, <http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=206889484> (last visited Nov 14, 2013), archived at <http://perma.cc/KT6V-3EDD>. SANY Group Co., Ltd. is a Chinese construction machinery manufacturer. *Corporate Overview*, SANY GROUP, <http://www.sanygroup.com/group/en-us/about/group.htm> (last visited Mar. 7, 2015), archived at <http://perma.cc/6DTH-V6T2>.

113. *Ralls Corp.*, 926 F. Supp. 2d at 78.

114. *Id.* at 76, 78.

115. *Id.* at 76.

U.S. national security is a foreign interest gaining control over these industries. But these concerns are not just limited to the United States. Many countries in LATAM have similar concerns despite having a different economic structure than the United States.

#### IV. BACKGROUND ON NATURAL RESOURCES AND LATAM ECONOMICS

Natural resources<sup>116</sup> play an important role in the economies of many LATAM countries. Both Venezuela and Ecuador are members of the Organization of the Petroleum Exporting Countries (OPEC), meaning they have “a substantial net export of crude petroleum.”<sup>117</sup> Additionally, Brazil was invited to join OPEC but declined.<sup>118</sup> Beyond hydrocarbons, LATAM has large reserves of other minerals. Chile alone accounts for “35 per cent of global copper production.”<sup>119</sup> LATAM as a whole produces 21% of the world’s gold, 48% of the world’s nickel, and 45% of the world’s copper.<sup>120</sup>

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116. This Note adopts the OECD’s broad definition of “natural resources,” which is “natural assets (raw materials) occurring in nature that can be used for economic production or consumption.” *Glossary of Statistical Terms: Natural Resources*, OECD, <http://stats.oecd.org/glossary/detail.asp?ID=1740> (last updated Dec. 2, 2005), *archived at* <http://perma.cc/G8V5-24KC>. This definition includes mining, fishing, forestry, fossil fuel, and agricultural products. *See id.*

117. *Member Countries*, OPEC, [http://www.opec.org/opec\\_web/en/about\\_us/25.htm](http://www.opec.org/opec_web/en/about_us/25.htm) (last visited Mar. 7, 2015), *archived at* <http://perma.cc/A8E2-WZR4>.

118. *Brazil Declines Opec Invitation*, BBC NEWS (Sept. 5, 2008, 1:14 AM), <http://news.bbc.co.uk/2/hi/americas/7599362.stm>, *archived at* <http://perma.cc/XKE9-5Z6L>.

119. P.A.J. LUSTY, BRITISH GEOLOGICAL SURVEY, SOUTH AMERICA MINERAL PRODUCTION 1997–2006 vi, (2008).

120. STEVEN T. ANDERSON ET AL., U.S. GEOLOGICAL SURVEY, THE MINERAL INDUSTRIES IN LATIN AMERICA AND CANADA 25–26, Table 4 (2013). LATAM as a whole also produces 21% of the world supply of bauxite, 15% of the world supply of iron ore, 13% of the world supply of lead, 14% of the world supply of silver, 23% of the world supply of tin, 21% of the world supply of zinc, 12% of the world supply of salt, 12% of the world supply of gypsum, 19% of the world supply of phosphate, and 16% of the world supply of coal. *Id.*

Bolivia provides an interesting illustration of the wealth of resources found in LATAM. Bolivia is the poorest country in South America with a GDP per capita of \$5,000. *The World Factbook*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2004rank.html> (last visited Jan 15, 2014), *archived at* <http://perma.cc/JN3W-8UA7>. But the country was once famed for its large silver deposits, particularly those found in a mountain located near the city of Potosí, colloquially addressed as “Cerro Rico,” or “Rich Mountain.” *City of Potosí*, UNESCO WORLD HERITAGE CENTRE, <http://whc.unesco.org/en/list/420> (last visited Mar. 7, 2015), *archived at* <http://perma.cc/PFK3-YNKR>. In fact, the phrase “rich as Potosí,” which entered the common vernacular by way of Miguel de Cervantes Saavedra’s classic *Don Quixote*, was once used to express vast wealth. RICHARD L. KAGAN, URBAN IMAGES OF THE HISPANIC WORLD, 1493–1793 101 (2000). Bolivia might once again become a center of wealth as it contains the world’s largest deposit of lithium, an essential component of batteries and thus an increasingly important resource as the world shifts away from hydrocarbon fuels towards electric-powered renewables. *See* Lawrence Wright, *Lithium Dreams*, THE NEW YORKER, Mar. 22, 2010, <http://www.newyorker.com/magazine/2010/03/22/lithium-dreams>, *archived at* <http://perma.cc/QMB6-N89F> (describing the potential of Bolivia’s lithium deposits to rejuvenate its economy).

But minerals are not the only natural resource dominated by LATAM. Peru's extensive coastline enables it to be "the world's largest producer and exporter of fishmeal and fish oil by volume."<sup>121</sup> The expansive grasslands of Argentina and southern Brazil support large amounts of crops and livestock. Brazil is poised to become the world's top producer of soybeans<sup>122</sup> and Argentina is already "the world's largest exporter of soybean meal and oil."<sup>123</sup> Brazil and Argentina are also second and sixth, respectively, in terms of beef production.<sup>124</sup> Other agricultural products prevalent in the region include coffee,<sup>125</sup> sugar cane,<sup>126</sup> and fruit.<sup>127</sup> As indicated by these examples, natural resources play an integral role in LATAM economies, providing a major source of revenue through domestic consumption as well as exports.

But the importance of natural resources is not just limited to LATAM; natural resources account for twenty percent of global trade.<sup>128</sup> Many economies are dependent on the importation of natural resources to satiate domestic demand.<sup>129</sup> Natural resources are the raw material from which

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121. P.R. Venkat & Chun Han Wong, *Chinese Firm Is Lured to Peru's Fishing Industry*, WALL ST. J. (Feb. 26, 2013, 2:56 PM), <http://online.wsj.com/news/articles/SB10001424127887323384604578327943718904284>, archived at <http://perma.cc/PQ44-TBAJ>. Peru's coastline and fishing industry was at the center of a border dispute with Chile from the late 1800s until 2014, when it was settled by an International Court of Justice decision. *Peru–Chile Border Defined by UN Court at the Hague*, BBC NEWS (Jan. 28, 2014, 8:46 PM), <http://www.bbc.co.uk/news/world-europe-25911867>, archived at <http://perma.cc/VJD2-UB3B>. As a result of this decision, Peru gained fishing rights worth over \$200 million annually. *Id.*

122. Whitney McFerron, *Brazil Soybean Planting Progresses as Argentina Needs More Rain*, BLOOMBERG (Nov. 5, 2013, 9:30 AM), <http://www.bloomberg.com/news/2013-11-05/brazil-soybean-planting-progresses-as-argentina-needs-more-rain.html>, archived at <http://perma.cc/RFD2-H2LQ>.

123. *Soybean and Oil Crops: Trade*, U.S. DEP'T OF AGRIC., ECON. RESEARCH SERV., <http://www.ers.usda.gov/topics/crops/soybeans-oil-crops/trade.aspx#.UocUhPlwqi8> (last updated Oct. 10, 2012), archived at <http://perma.cc/FNN3-XCT7>.

124. U.S. DEP'T OF AGRIC., FOREIGN AGRIC. SERV., LIVESTOCK AND POULTRY: WORLD MARKETS AND TRADE 9 (2013).

125. Brazil is the world's top producer of coffee while Colombia is third. Justin Doom, *World's Top 10 Coffee-Producing Countries in 2010–2011*, BLOOMBERG (Aug. 19, 2011, 11:29 AM), <http://www.bloomberg.com/news/2011-08-19/world-s-top-10-coffee-producing-countries-in-2010-2011-table-.html>, archived at <http://perma.cc/4URY-NSME>.

126. Brazil is the world's largest producer of sugar cane. Blair Euteneuer, *World's Top 10 Sugar-Producing Countries in 2010–2011*, BLOOMBERG (Oct. 6, 2011, 2:45 PM), <http://www.bloomberg.com/news/2011-10-06/world-s-top-10-sugar-producing-countries-in-2010-2011-table-.html>, archived at <http://perma.cc/T6TG-U297>.

127. Brazil is the world's largest producer of oranges and Mexico is the world's largest producer of lemons. U.S. DEP'T OF AGRIC., FOREIGN AGRIC. SERV., CITRUS: WORLD MARKETS AND TRADE 3, 7 (2013).

128. Michele Ruta & Anthony J. Venables, *International Trade in Natural Resources: Practice and Policy* 1 (World Trade Org., Working Paper No. ERSD-2012-07, 2012), available at <https://ideas.repec.org/p/oxf/oxcrwp/084.html>.

129. In 2008, the United States imported over \$583 billion worth of natural resources. WORLD

many consumer goods are produced and also help feed billions of people across the world. Certain resources are dwindling as the global population increases and the flush of money going to developing nations has increased their demand for these resources.<sup>130</sup> Increased demand leads to increased competition.<sup>131</sup> But this competition is not just between companies; it is also between nations. The more resources a nation controls, the more readily it can satisfy domestic demand.<sup>132</sup> A nation gains control through territorial claims<sup>133</sup> or by acquiring an interest in a business that controls a natural resource.<sup>134</sup> As the days of warfare over natural resources are hopefully over,<sup>135</sup> the latter method is how countries now gain control over natural resources.

The capital-intensive nature of the natural resource sector<sup>136</sup> facilitates the acquisition of companies operating in this sector by foreign interests. To extract a resource such as oil, billions of dollars must be spent on exploration, production, distribution, and management.<sup>137</sup> Even then there

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TRADE ORG., WORLD TRADE REPORT 2010: TRADE IN NATURAL RESOURCES 59 (2010). During the same year, Japanese imports were \$350 billion, Chinese imports were \$330 billion, and European Union imports were \$766 billion. *Id.*

130. KLAUS SCHWAB, WORLD ECON. FORUM, THE GLOBAL COMPETITIVENESS REPORT 2012–2013, at 1, 49 (2012). *See also* OECD, NATURAL RESOURCES AND PRO-POOR GROWTH: THE ECONOMICS AND POLITICS 72 (2008) (“Many emerging economies are major importers of natural resources.”).

131. The assumption inherent in this statement is that the supply of goods is being outpaced by demand. Only a portion of the demand can be satisfied when demand is more than supply, leading to a shortage and thus competition among consumers. MICHAEL PARKIN, ECONOMICS 74 (8th ed. 2008). This competition is reflected in an increase in price of the good. *Id.* Normally, the market would respond to this increase in price by increasing output, but natural resources face a variety of constraints, such as depletion. *Id.* at 468. Depletion is common with nonrenewable natural resources, which are resources like coal and oil that “nature does not replenish.” *Id.* at 403. As the supply of nonrenewable natural resources decreases due to increased consumption of these resources, more consumer demand leads to increased competition.

132. *See* Ruta & Venables, *supra* note 128, at 12 (“Resource exporting countries can, potentially, control both the quantity of the resource exported and the overall quantity produced.”). Resource-rich nations can satiate domestic demand through imposing export taxes. *Id.* The effect of these taxes “is to reduce the domestic price of the resource, since producers adjust supply until they are indifferent between exporting and selling in the domestic market.” *Id.*

133. *See* Anna Spain, *Beyond Adjudication: Resolving International Resource Disputes in an Era of Climate Change*, 30 STAN. ENVTL. L.J. 343, 352–53 (2011) (discussing the relation between resource scarcity and international conflict over control of these resources).

134. Tracy, *supra* note 70 (discussing CNOOC’s relinquishing of Nexen’s Gulf Coast leases as it would effectively give China control over American oil wells).

135. *See supra* note 133.

136. Thomas Gunton, *Natural Resources and Regional Development: An Assessment of Dependency and Comparative Advantage Paradigms*, in 79(1) ECON. GEOGRAPHY 67, 69 (2003).

137. In 2009 alone, thirty major energy companies spent a combined \$166 billion on “exploration, development, property acquisition, and production.” U.S. ENERGY INFO. ADMIN., PERFORMANCE PROFILES OF MAJOR ENERGY PRODUCERS 2009 vii (2011).

is no assurance these costs will be recovered as initial estimates might be wrong.<sup>138</sup> For nations without the ability to obtain this capital domestically, foreign direct investment might be necessary.<sup>139</sup> The OECD defines foreign direct investment as “cross-border investment by a resident entity in one economy with the objective of obtaining a lasting interest in an enterprise resident in another economy.”<sup>140</sup> Essentially, this investment is in illiquid assets such as property as opposed to the liquid assets of portfolio investment.<sup>141</sup> This need for foreign investment creates an opportunity for an investing country to exert influence over the target country.<sup>142</sup> With more control over the target country’s natural resources, the investing country can exert more control over the target country’s economy, simultaneously increasing its political influence. This situation—where the government serves merely as a puppet for foreign interests—creates a national security risk and is what CFIUS was created to avoid.

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138. The saga of Eike Batista best illustrates the risk inherent in the natural resource sector. Batista is a Brazilian entrepreneur who owned oil, logistics, and mining companies. *Eike Batista-Owned OSX Files for Bankruptcy*, BBC NEWS (Nov. 11, 2013, 4:50 PM), <http://www.bbc.co.uk/news/business-24905669>, archived at <http://perma.cc/G44L-7BB7>. At one point, he was one of the richest men in the world, valued at \$30 billion. *Id.* His empire fell apart when his oil company only produced “a quarter of its initial forecast, resulting [in] a huge decline in its share price.” *Id.* The oil company went bankrupt and Batista’s fortune fell to less than a billion dollars. Anderson Antunes, *Brazil’s Eike Batista, Onetime the World’s 7th Richest, Is No Longer a Billionaire*, FORBES (Sept. 2, 2013, 6:00 AM), <http://www.forbes.com/sites/andersonantunes/2013/09/02/brazils-eike-batista-onetime-the-worlds-7th-richest-is-no-longer-a-billionaire/>, archived at <http://perma.cc/A74B-R55T>. His precipitous fall from grace was accelerated further when he was put on trial for insider trading. *Brazilian Billionaire on Trial for Insider Trading*, BBC NEWS (Nov. 18, 2014, 6:00 PM), <http://www.bbc.com/news/world-latin-america-30109481>, archived at <http://perma.cc/LSK9-HH8T>.

139. Cf. Jessica Ball, Note, *A Step in the Wrong Direction: Increasing Restrictions on Foreign Rural Land Acquisition in Brazil*, 35 FORDHAM INT’L L.J. 1743, 1744 (2012) (describing the need for foreign direct investment when there is “a lack of domestic capital from private and governmental sources” in the context of agriculture in developing countries).

140. OECD, *Foreign Direct Investment*, OECD FACTBOOK 2013: ECONOMIC, ENVIRONMENTAL AND SOCIAL STATISTICS 86 (2013), available at [http://www.oecd-ilibrary.org/economics/oecd-factbook-2013\\_factbook-2013-en](http://www.oecd-ilibrary.org/economics/oecd-factbook-2013_factbook-2013-en).

141. UNITED NATIONS, ECON. COMM’N FOR LATIN AMERICA & THE CARRIBBEAN, FOREIGN DIRECT INVESTMENT IN LATIN AMERICA AND THE CARIBBEAN: 2012 24 n.1 (2013) (“Portfolio investments are transactions in marketable securities—public or private—such as stock and bonds, as well as money market instruments.”).

142. An example of a country using foreign investment as a political tool is a situation that transpired in the midst of the 2008 financial crisis. According to former Treasury Secretary Hank Paulson, Russia attempted to conspire with the Chinese government to flood the market with Fannie Mae and Freddie Mac securities, which would have made a government bailout of those firms more costly and “maximize[d] the turmoil on Wall Street.” Robert Peston, *Russia ‘Planned Wall Street Bear Raid’*, BBC NEWS (Mar. 17, 2014, 4:26 AM), <http://www.bbc.com/news/business-26609548>, archived at <http://perma.cc/6QMV-7VCA>.

Given the prevalence of natural resources in LATAM and its underdeveloped capital markets, foreign investment plays an important role in supplying capital to extract these resources.<sup>143</sup> In turn, this investment raises questions of national security as foreign countries might try to exert influence over the LATAM countries in which they invest. These LATAM countries have to rely on regulations and other policies to prevent the loss of their sovereignty yet still encourage investment. Several countries in the region have responded to this issue by establishing regulatory regimes for foreign investment similar to CFIUS.

## V. LATAM CFIUS COUNTERPARTS

Mexico, Chile, and Brazil have instituted laws to restrict foreign direct investment. These laws reduce the possibility of foreign influence over their government. This Part is a survey of these laws and how they compare to the legal regime that empowers CFIUS.

### A. Mexico: *Comisión Nacional de Inversiones Extranjeras*

The Mexican government implemented a three-level system under the 1993 *Ley de Inversión Extranjera* (“LIEX”) to prevent the acquisition of nationally important industries by foreigners.<sup>144</sup> The first level creates a state monopoly in industries such as energy, telecommunications, infrastructure, and the coinage of money.<sup>145</sup> The second tier limits investment solely to Mexican nationals in the industries of land transportation, energy and communications distributions, and development banking.<sup>146</sup> The final tier, where foreign investment is allowed in minute amounts which are highly regulated, includes production cooperatives, air transport, banking, weapons, news media, freshwater fishing, administration of ports, sea navigation, and combustibles for

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143. UNITED NATIONS, ECON. COMM’N FOR LATIN AMERICA & THE CARRIBBEAN, *supra* note 141, at 38. LATAM financial depth, which is “total regional debt and equity outstanding divided by regional GDP,” is 148%, which is less than a third of U.S. financial depth and the second-lowest of any region in the world. CHARLES ROXBURGH, SUSAN LUND & JOHN PIOTROWSKI, MCKINSEY GLOBAL INST., *MAPPING GLOBAL CAPITAL MARKETS 2011: UPDATED RESEARCH 4 Exhibit E2* (2011).

144. *Ley de Inversión Extranjera [LIEX] [Foreign Investment Law]*, *as amended*, Diario Oficial de la Federación [DO], 16 de Febrero de 1995, *translated in* TAX LAWS OF THE WORLD (Foreign Tax Law Publishers 1994).

145. *Id.* art. 5.

146. *Id.* art. 6.

transportation.<sup>147</sup> This three-level system permits the government to control the penetration of foreign investment into certain industries.

LIEX is administered by the Comisión Nacional de Inversiones Extranjeras (CNIE).<sup>148</sup> The CNIE is similar to CFIUS as it “may reject applications to acquire Mexican companies for national security reasons” and “has 45 working days to make a decision.”<sup>149</sup> Title 6 of LIEX provides the structure for the CNIE.<sup>150</sup> The CNIE is composed of the Minister of the Economy, who acts as president; Deputy Minister for Competitiveness and Regulation, who acts as the executive secretary; the General Director of Foreign Investment, who acts as technical secretary; the Deputy Ministers of each Ministry, who act as representatives; and the General Director of Legal Affairs, who provides legal advice on the CNIE’s decisions.<sup>151</sup> This composition is similar to CFIUS in that the CNIE draws from a variety of subject-matter experts to examine an acquisition from several different viewpoints to ensure it will not adversely affect Mexican national security.

While the purpose and form of the CNIE are similar to CFIUS, the CNIE differs in one major respect: it can legislate.<sup>152</sup> Even though CFIUS has the power to review and recommend or reject any covered transaction, it cannot go beyond this power to make recommendations applicable beyond a specific transaction.<sup>153</sup> In contrast, the CNIE can perform the same functions as CFIUS as well as issue general resolutions and policy guidelines for foreign investment.<sup>154</sup> This attribute arguably makes CNIE decisions more predictable than CFIUS decisions. This predictability serves to encourage more investment but potentially at the cost of decreasing national security. Foreign investors can attempt to increase the probability of success of their acquisition by structuring a transaction in

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147. *Id.* art. 7.

148. See U.S. DEP’T OF STATE, 2013 INVESTMENT CLIMATE STATEMENT: MEXICO, <http://www.state.gov/e/eb/rls/othr/ics/2013/204693.htm> (2013) (“The National Foreign Investment Commission under the Secretariat of Economy determines whether investments in restricted sectors may go forward.”).

149. *Id.* art. 28.

150. LIEX, *as amended*, tit. 6, DO, 16 de Febrero de 1995, translated in TAX LAWS OF THE WORLD (Foreign Tax Law Publishers 1994).

151. CNIE: *Estructura Orgánica*, SECRETARÍA DE ECONOMÍA, <http://www.economia.gob.mx/comunidad-negocios/competitividad-normatividad/inversion-extranjera-directa/comision-nacional-de-inversiones-extranjeras> (last visited Mar. 22, 2015), archived at <http://perma.cc/4BDN-B7QB>.

152. CNIE: *Atribuciones*, SECRETARÍA DE ECONOMÍA, <http://www.2006-2012.economia.gob.mx/comunidad-negocios/inversion-extranjera-directa/comision-nacional-de-inversiones-extranjeras/atribuciones> (last visited Mar. 22, 2015), archived at <http://perma.cc/26V8-YH5B>.

153. See *supra* notes 39–44 (describing the CFIUS review process as being limited to reviewing individual transactions).

154. CNIE: *Atribuciones*, *supra* note 152.

line with previously issued CNIE policies. Foreign investors might also structure a transaction that threatens national security in a manner to obfuscate this threat, permitting a transaction which otherwise would have been blocked to go through. The predictability of CNIE's decisions shifts the balance towards emphasizing investment and away from national security. The stringent restrictions of LIEX act as a counterbalance to even the scale as they completely prevent foreign investment in some of the most important Mexican natural resources, especially those related to energy.<sup>155</sup>

The energy industry is important to the Mexican economy, and as such it sits in the first tier of LIEX, where foreign investment is completely prohibited since the government has a monopoly over the industry.<sup>156</sup> The petroleum industry alone “accounted for about 32 % of total government revenues in 2013.”<sup>157</sup> As stated above, the Mexican government's tight hold over this critical industry might offset CNIE's predictability to create equilibrium between foreign investment and national security. But this balance may be threatened by the opening of the energy industry to foreign investment.<sup>158</sup> The purpose of this loosening of control was to help revitalize the Mexican economy by injecting capital into the flagging energy industry,<sup>159</sup> which has seen a decrease in oil production “from 3.4 million barrels per day in 2004 to the . . . rate of 2.5 million barrels per day [in 2013].”<sup>160</sup> While the benefit of such reforms may be to enable Mexico to grow faster,<sup>161</sup> this growth likely will be at the expense of national

155. LIEX, *as amended*, art. 5, DO, 16 de Febrero de 1995, *translated in* TAX LAWS OF THE WORLD (Foreign Tax Law Publishers 1994).

156. *Id.*

157. U.S. ENERGY INFO. ADMIN., *Mexico: Analysis*, <http://www.eia.gov/countries/cab.cfm?fips=MX> (last updated Apr. 24, 2014), *archived at* <http://perma.cc/J6TS-RCHQ>.

158. *Mexican Congress Approves Controversial Oil and Gas Bill*, BBC NEWS (Dec. 13, 2013, 7:39 PM), <http://www.bbc.co.uk/news/world-latin-america-25350993>, *archived at* <http://perma.cc/5JPT-84VD>. Although the reforms passed, they were not without controversy. *Id.* There was strong opposition against opening up the energy sector, culminating in physical altercations between politicians and disruptions of proceedings by protestors. *Id.* One politician even stripped down to his underwear while giving a speech in the legislative chambers as a form of protest. *Id.*

159. Dolia Estevez, *Mexico Reverses History and Allows Private Capital into Lucrative Oil Industry*, FORBES (Dec. 11, 2013, 3:00 PM), <http://www.forbes.com/sites/doliaestevez/2013/12/11/mexico-reverses-history-and-allows-private-capital-into-lucrative-oil-industry/>, *archived at* <http://perma.cc/9ZJ2-CF6H>.

160. *Mexican Congress Approves Energy Bill*, BBC NEWS, *supra* note 158.

161. The Finance Minister of Mexico, Luis Videgaray, claimed that the opening of the energy sector as well as other reforms would contribute to Mexico having a five percent growth rate in 2016. Dave Graham, *Mexican Economy Should Be Growing 5 Percent by 2016—Videgaray*, REUTERS (Jan. 9, 2014, 10:40 AM), <http://www.reuters.com/article/2014/01/09/mexico-economy-videgaray-idUSL2N0KJ19820140109>, *archived at* <http://perma.cc/Q87T-LAZM>.

security as control over the energy industry shifts away from the Mexican government to foreign interests.<sup>162</sup>

### B. Chile: *Comite de Inversiones Extranjeras*

In contrast to the strict restrictions imposed by Mexico's LIEX, Chile's Ley 600 permits investment in almost all industries.<sup>163</sup> Ley 600 only restricts foreign investment in industries such as "nuclear energy, defense, maritime transportation, real estate, and mining."<sup>164</sup> Most of these restrictions are justified on the basis of national security. For instance, mining concessions are permitted except in certain cases, such as if the concession was to occur in an area important to national security like border or coastal areas.<sup>165</sup> Yet most of these exceptions can be disregarded through presidential authorization.<sup>166</sup> This flexible structure weighs toward encouraging foreign investment over protecting national security concerns as it creates a system of exceptions to the exceptions, demonstrating that foreign investment may have priority over national security.

Ley 600 is administered by the Comité de Inversiones Extranjeras (CIE).<sup>167</sup> The CIE encourages as well as reviews foreign investment into Chile.<sup>168</sup> The CIE is composed of "the Ministers of Economy, . . . Finance, Foreign Relations and Planning as well as the president of the Central Bank. Other ministers responsible for specific economic sectors are also

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162. The intense interest of foreign investors in the Mexican energy sector was quite apparent as an Italian company signed a deal less than one month after the reforms were passed, barely giving enough time for the ink to dry. Jude Webber, *Enel and Mexico Sign Energy Deal*, FIN. TIMES (Jan. 14, 2014, 1:23 AM), <http://www.ft.com/cms/s/0/65f84118-7caa-11e3-9179-00144feabdc0.html#axzz2qdQMeYI>, archived at <http://perma.cc/A68G-Y9V4>.

163. Law No. 600, Septiembre 3, 1993, DIARIO OFICIAL [D.O.], translated in LATIN AMERICAN LAWS REGULATING FOREIGN INVESTMENT, SB04 ALI-ABA 323, 334 (1996).

164. U.S. DEP'T OF STATE, 2011 INVESTMENT CLIMATE STATEMENT: CHILE, <http://www.state.gov/e/eb/rls/othr/ics/2011/157257.htm> (2011).

165. Rodrigo Polanco Lazo, *Legal Framework of Foreign Investment in Chile*, 18 LAW & BUS. REV. AM. 203, 207 (2012). Although the law does not specify which areas are considered important to national security, another law prohibits foreign investment in real estate "in the area comprised 10 kilometres along the borders and 5 kilometres along the coast" for national security reasons. OECD, ACCESSION OF CHILE TO THE OECD: REVIEW OF INTERNATIONAL INVESTMENT POLICIES (2009), available at <http://www.oecd.org/chile/49846624.pdf>. Assumedly, the same national security concerns apply for mining concessions.

166. See Lazo, *supra* note 165, at 207 (quoting World Trade Organization Secretariat, *Trade Policy Review: Chile* para. 24, WT/TPR/S/220 (Sept. 2, 2009)) ("However, both national and foreign firms can participate in these sectors in certain circumstances, subject to presidential authorization.").

167. MINISTERIO DE ECONOMÍA, FOMENTO Y TURISMO, COMITÉ DE INVERSIONES EXTRANJERAS, CHILE: LAND OF OPPORTUNITIES (2d ed. 2012), available at <http://www.ciechile.gob.cl/wp-content/uploads/2010/10/Chile-land-of-opportunities12.pdf>.

168. U.S. DEP'T OF STATE, *supra* note 164.

invited to participate in meetings whenever deemed necessary.”<sup>169</sup> The composition of the permanent members of the CIE emphasizes the importance of the economic aspect of foreign investment as the Minister of Foreign Relations is the only minister whose position does not directly involve the economy. This composition is a stark contrast to that of CFIUS, whose permanent membership includes the Department of Defense, the Assistant to the President for National Security Affairs, and the Assistant to the President for Homeland Security and Counterterrorism.<sup>170</sup> Also, while CFIUS’s decisions can be justified on a variety of factors and are not judicially reviewable,<sup>171</sup> the CIE’s “authority to reject a foreign investment is severely limited by the Chilean Constitution”<sup>172</sup> and “can be appealed if an investment is rejected.”<sup>173</sup> By establishing these limits and permitting review, the Chilean government is essentially shifting power from the CIE to foreign investors. Giving more power to foreign investors indicates that the Chilean government wants to furnish them with every opportunity to invest in Chile, thus underscoring the importance of foreign investment. The CIE, while serving a similar function to CFIUS, is structured in a manner such that it is apparent the Chilean government favors foreign investment over national security.

### C. Brazil: Conselho de Defesa Nacional

Unlike Mexico and Chile, Brazil has a more complex regulatory regime regarding foreign investment. Instead of being condensed into a single comprehensive law, the regime is splintered across Brazil’s Federal Constitution and various pieces of legislation.<sup>174</sup> When cobbled together, these laws amount to a prohibition on investment in the nuclear, healthcare, postal services, and aerospace industries.<sup>175</sup> These laws also limit foreign investment in financial institutions, land located in rural areas or near national borders, domestic aviation, and telecommunications

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169. MINISTERIO DE ECONOMÍA, FOMENTO Y TURISMO, *supra* note 167.

170. For more information on the composition of CFIUS, see discussion *supra* Part II.

171. See 50 U.S.C. app. § 2170(e) (2012) (“The actions . . . and the findings of the President . . . shall not be subject to judicial review.”).

172. U.S. DEP’T OF STATE, *supra* note 164.

173. *Id.*

174. For more on the specific laws and Constitutional articles involving the restrictions and limitations of foreign investment in Brazil, see Quinn Smith & Olavo Franco Bernardes, *Mechanisms of Control on the Circulation of Foreign Capital, Products and People in Brazil*, 44 U. MIAMI INTER-AM. L. REV. 219 (2013).

175. TERRENCE F. MACLAREN, 2 ECKSTROM’S LICENSING: JOINT VENTURES § 9:66 (2013).

companies.<sup>176</sup> Additionally, there are limitations on investment in the mining industry.<sup>177</sup> Most of these limitations permit foreign investment upon government authorization or if certain domestic ownership requirements are met.<sup>178</sup> This foreign investment regulatory regime sits in the middle of the spectrum between the strict Mexican LIEX on one side and the lenient Chilean Ley 600 on the other. By completely prohibiting foreign investment in certain industries, the Brazilian regulatory regime is more akin to LIEX. Yet as the regime permits foreign investment upon government authorization in other industries, it is more like the case-by-case system established by Ley 600. By striking this balance, Brazil appears to have established an equilibrium between national security and foreign investment.

The administration of the Brazilian foreign investment regulatory regime is scattered across a variety of government agencies<sup>179</sup> and the Brazilian National Congress grants most authorization for foreign investment in limited industries.<sup>180</sup> Although this structure is unsuitable for direct comparison to CFIUS, the regime maintains a slight parallel to CFIUS in regards to the Conselho de Defesa Nacional (CDN).<sup>181</sup> The CDN is a government council with the purpose of advising the President of Brazil about national sovereignty and defense.<sup>182</sup> This broad purpose includes the specific task of creating criteria and conditions for the use of areas indispensable to the national security of Brazil, especially border areas and those related to the preservation and exploitation of natural resources.<sup>183</sup> As a result, foreign investment in border areas requires the approval of the CDN.<sup>184</sup> Even though the CDN's authorizing law also

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176. *Id.*

177. MINISTRY OF EXTERNAL RELATIONS, LEGAL GUIDE FOR FOREIGN INVESTORS IN BRAZIL 33 (2012).

178. Foreign investment in financial institutions and land located in rural areas or near national borders requires authorization by the government while such investment in the domestic aviation or telecommunications industry requires a clear majority of capital voting stock to be held by Brazilian citizens. MACLAREN, *supra* note 175. Foreign investment in mining requires permission to be granted by the government. MINISTRY OF EXTERNAL RELATIONS, *supra* note 177.

179. For a list of some of the regulating government agencies, see Smith & Bernardes, *supra* note 174, at 254.

180. MACLAREN, *supra* note 175.

181. The CDN is also referred to as the Conselho de Segurança Nacional (CSN), although this term is antiquated. Smith & Bernardes, *supra* note 174, at 243 n.129. The CSN was the original name of the council, but its name was changed and structure reformed upon the adoption of 1988 Brazilian Constitution. *Id.*

182. Lei No. 8.183, art. 1, de 11 de Abril de 1991, DIÁRIO OFICIAL DA UNÃO [D.O.U.] de 12.4.1991, available at [http://www.planalto.gov.br/ccivil\\_03/leis/L8183.htm](http://www.planalto.gov.br/ccivil_03/leis/L8183.htm).

183. *Id.*

184. MINISTRY OF EXTERNAL RELATIONS, *supra* note 177.

provides it with the right to regulate Brazil's natural resources, subsequent laws appear to have given this power to other administrative agencies.<sup>185</sup> Regardless, the CDN parallels CFIUS as it regulates foreign investment to ensure it does not conflict with national security, albeit in a much more limited capacity than CFIUS.

The CDN is composed of members of the executive branch of the government as well as ministers from various departments. The permanent members of the CDN are the President, who serves as Chair; the Vice President; the Senate President; the President of the Chamber of Deputies; the Minister of Justice; the Minister of the Navy; Minister of the Army; Minister of Foreign Affairs; Minister of the Air Force; and the Minister of Economy and Finance.<sup>186</sup> The President may appoint other members to assist with the matter under consideration.<sup>187</sup> In contrast to the Chilean CIE, where the subject-matter expertise of the members revolves around the economy,<sup>188</sup> the CDN's permanent members are mainly involved in political or military matters, with the exception of the Minister of Economy and Finance.<sup>189</sup> This composition hints that the CDN might be more interested in the effect of a foreign investment on national security than the economy. Thus, the CDN seems to approach the problem of balancing national security with foreign investment differently than CFIUS, emphasizing national security instead of attempting to find equilibrium between the two factors.

#### *D. CFIUS and Its LATAM Counterparts*

CFIUS and its LATAM counterparts, CNIE, CIE, and CDN, are similar as all of these regimes attempt to solve the paradox of encouraging foreign investment while also promoting national security. But these regimes differ in that CFIUS tries to create equilibrium between foreign investment and national security, whereas its LATAM counterparts seemingly favor one goal over another. CNIE and CIE favor encouraging foreign investment at the expense of national security while the CDN takes the

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185. For example, Lei No. 9.478 of 1997 created the National Oil Agency, which is "responsible for the regulation of the local oil and natural gas industry, as well as its derivatives and related products." Smith & Bernardes, *supra* note 174, at 234 n.81 (citing Lei No. 9.478, ch. IV, de 8 de Junho de 1997, DIÁRIO OFICIAL DA UNÃO [D.O.U.] de 07.08.1997, available at [http://www.planalto.gov.br/ccivil\\_03/leis/19478.htm](http://www.planalto.gov.br/ccivil_03/leis/19478.htm)).

186. Lei No. 8.183, art. 2, de 11 de Abril de 1991, DIÁRIO OFICIAL DA UNÃO [D.O.U.] de 12.4.1991, available at [http://www.planalto.gov.br/ccivil\\_03/leis/L8183.htm](http://www.planalto.gov.br/ccivil_03/leis/L8183.htm).

187. *Id.*

188. See *supra* note 169 and accompanying text.

189. See *supra* note 186 and accompanying text.

opposite approach, ensuring national security at the expense of foreign investment. The difference between CFIUS and its LATAM counterparts might be due to the options available to address this paradox. While CFIUS is the main weapon for ensuring national security when it comes to foreign investment in the United States, LATAM countries have two means to protect their national security. The first, as already discussed, is a legal regime similar in form and function to CFIUS. The second and more controversial option is nationalization.

#### VI. NATIONALIZATION AS A NATIONAL SECURITY TOOL IN LATAM

Nationalization is defined as “[t]he act of bringing an industry under governmental control or ownership.”<sup>190</sup> It may be performed for a variety of reasons, including national security.<sup>191</sup> For example, Argentina’s President Cristina Fernandez de Kirchner justified nationalizing the Spanish-run oil firm YPF in 2012 as “it was a matter of Argentina’s national security, because the country . . . had to start importing fuel.”<sup>192</sup> Similar to a CFIUS-like legal regime, nationalization assures control of a country and its economy stays within the hands of its government, thus promoting national security. But there is a major difference between these methods. Whereas a CFIUS-like legal regime evaluates the effect of foreign investment before it takes place, nationalization occurs after this investment has already been made. This ex post analysis of a foreign investment creates difficulties not encountered with an ex ante analysis, making nationalization less efficient than a CFIUS-like legal regime.

An ex post analysis of a foreign investment’s effect on national security is less efficient than a CFIUS-like regime for three main reasons. First, assuming there is compensation for such nationalization, there might

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190. BLACK’S LAW DICTIONARY 1129 (9th ed. 2009).

191. Other reasons for nationalization include controlling the income of a nationalized industry, reaping a political benefit, promoting a certain political ideology, or limiting or prohibiting the investment of private capital. Richard J. Hunter, Jr., *Property Risks in International Business*, 15 CURRENTS: INT’L TRADE L.J. 23, 31 (2006).

192. Corey Flintoff, *Ignoring Critics, Argentina to Nationalize Oil Firm*, NPR (Apr. 19, 2012, 5:13 PM), <http://www.npr.org/2012/04/19/150959215/ignoring-critics-argentina-to-nationalize-oil-firm>, archived at <http://perma.cc/ZB63-HTXM>. But this nationalization occurred at the same time Kirchner’s approval rating was in the midst of a precipitous drop to 34%, almost half of what it was the year before. *Kirchner’s Popularity Is in Freefall amid New Mass Protests*, BUSINESS INSIDER (Nov. 21, 2012, 7:49 AM), <http://www.businessinsider.com/kirchners-popularity-is-in-freefall-2012-11>, archived at <http://perma.cc/556W-852C>. Additionally, it occurred just as Argentina’s growth rate dropped from 9% to 2.2%. *Id.* Given the coincidence of these events, commentators have speculated there may have been more nefarious reasons for the nationalization. One columnist even hypothesized that the purpose was actually to provide the government with much-needed money. Flintoff, *supra*.

be negotiating over the amount. In terms of international law on the issue, UN Resolution 1803 states that compensation should be “appropriate,”<sup>193</sup> although this term is ambiguous.<sup>194</sup> Furthermore, the Resolution itself is not binding.<sup>195</sup> The United States typically asserts the Hull formula in nationalization cases, which requires that compensation be “prompt, adequate and effective.”<sup>196</sup> Yet this formula is only marginally less ambiguous than that of Resolution 1803.<sup>197</sup> Nationalization will likely result in extensive litigation due to this lack of a concrete methodology to evaluate compensation, especially when the procedural issues of suing a sovereign are considered.<sup>198</sup> Thus, nationalization is less efficient than an *ex ante* national security review as it will likely be more costly in terms of time and money.

The second and more important reason why nationalization is less efficient than a CFIUS-like regime is that such an action might harm the country’s reputation in regards to foreign investment. There would likely be capital flight as investors try to protect themselves.<sup>199</sup> In the long term, there would be a decrease in foreign investment as investors might perceive the risk of nationalization as too great and may decide to not invest in the country at all.<sup>200</sup> Nationalization deters foreign investment

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193. G.A. Res. 1803 (XVII), U.N. GAOR, 17th Sess., Supp. No.17, U.N. Doc. A/5217, at 15 (Dec. 14, 1962). The relevant portion of the text states, “In such cases [of nationalization] the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law.” *Id.*

194. *See id.* (stating that “appropriate” is determined by both local and international law without providing further guidance).

195. Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1117 (1999) (“United Nations General Assembly Resolutions and other nonbinding statements and resolutions by multilateral bodies are often viewed as evidence of [customary international law.]”).

196. Bernard Kishoiyian, *The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law*, 14 NW. J. INT’L L. & BUS. 327, 358 (1994)

197. *See supra* note 191.

198. For a discussion of the difficulties involving suing a sovereign for expropriation, see Ronald Mok, Comment, *Expropriation Claims in United States Courts: The Act of State Doctrine, the Sovereign Immunity Doctrine, and the Foreign Sovereign Immunities Act. A Road Map for the Expropriated Victim*, 8 PACE INT’L L. REV. 199 (1996). For a discussion of the difficulties of suing a sovereign in LATAM specifically, see Claudio Grossman, *Suing the Sovereign from the Latin American Perspective*, 35 GEO. WASH. INT’L L. REV. 653 (2003).

199. *See, e.g.*, Natalie Huls et al., *International Legal Updates*, 14 HUM. RTS. BRIEF 38, 38 (“Further pressure on the currency comes from capital flight as rich Venezuelans try to take money out of the country because of fears that President Chávez will nationalize more private companies.”); Joseph J. Norton, *Doing Business Under the FTAA: Reflections of a U.S. Business Lawyer*, 6 NAFTA: L. & BUS. REV. AM. 421, 424 (2000) (“The ensuing nationalization of the Mexican banking system added further erosion to public confidence, leading to increased capital flight.”).

200. *See, e.g.*, Judith Richards Hope & Edward N. Griffin, *The New Iraq: Revising Iraq’s Commercial Law Is a Necessity for Foreign Direct Investment and the Reconstruction of Iraq’s*

across all sectors, limiting a country's growth.<sup>201</sup> Meanwhile, a CFIUS-like legal regime may only deter investment in certain sectors related to national security, and even then does not stop attempts by foreign interests to invest in these sectors. As nationalization lowers a country's growth compared to what it would be without nationalization,<sup>202</sup> it is less efficient than a CFIUS-like legal regime.

Finally, the third and most important reason nationalization is less efficient than a CFIUS-like legal regime is the potential for international incidents stemming from the nationalization. If a foreign government has enough of an interest in an investment, it might use force to prevent the country from nationalizing it or to reverse the nationalization. One of the most infamous examples of this foreign interference is Operation Ajax in 1953, which saw the overthrow of Iranian Prime Minister Mohammed Mossadegh by American and British clandestine services due to his nationalization of the Anglo-Iranian Oil Company.<sup>203</sup> This operation set the scene for U.S. clandestine activities over the next few decades, which included the overthrow of Guatemalan President Jacobo Arbenz for threatening to nationalize land belonging to the United Fruit Company<sup>204</sup> as well as the attempted assassination of Cuban dictator Fidel Castro for his socialist political stance, which threatened U.S. political and economic interests.<sup>205</sup> In this manner, nationalization might counteract its own

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*Decimated Economy*, 11 CARDOZO J. INT'L & COMP. L. 875, 890–91 (2004) (describing how nationalization and confiscation “frighten and deter investors.”). Economists have stated that calls for the nationalization of South Africa's mines might have similar effects. One economist stated, “Demands for the nationalization of South African mines are deterring investment and would make the country ‘off limits’ to investors if it was put into effect.” Franz Wild, *Mine Nationalization Would Kill Investment in South Africa*, *Chamber Says*, BLOOMBERG (Aug. 4, 2011, 6:41 AM), <http://www.bloomberg.com/news/2011-08-04/mine-nationalization-would-kill-investment-in-south-africa-chamber-says.html>, archived at <http://perma.cc/3YL6-ZVTD>.

201. Less investment will result in lower growth, as investment is “one of the determinants of the rate at which production grows.” PARKIN, *supra* note 131, at 486. See also Eric Allen Grasberger, Note, *MacNamara v. Korean Air Lines: The Best Solution to Foreign Employer Job Discrimination Under FCN Treaty Rights*, 16 N.C. J. INT'L L. & COM. REG. 141, 159–60 (1991) (“The United States, as well as other nations, encourages foreign investment because it creates jobs, broadens capital markets, and contributes to overall productivity and economic growth.”).

202. This wedge between a country's actual GDP and its potential GDP is known as the output gap. Anthony Garratt et al., *Real-Time Representations of the Output Gap*, 90(4) REV. ECON. & STAT. 792, 792 (2008).

203. Saeed Kamali Dehghan & Richard Norton-Taylor, *CIA Admits Role in 1953 Iranian Coup*, THE GUARDIAN (Aug. 19, 2013, 2:26 PM), <http://www.theguardian.com/world/2013/aug/19/cia-admits-role-1953-iranian-coup>, archived at <http://perma.cc/3ACZ-JPJX>.

204. David M. Barrett, *Sterilizing a Red Infection: Congress, the CIA, and Guatemala, 1954*, CIA (May 8, 2007, 8:59 AM), <https://www.cia.gov/library/center-for-the-study-of-intelligence/kent-csi/vol44no5/html/v44i5a03p.htm> (last updated Aug. 03, 2011, 2:53 PM).

205. DAVID BELIN, ROCKEFELLER COMMISSION STAFF REPORT, SUMMARY OF FACTS: INVESTIGATION OF CIA INVOLVEMENT IN PLANS TO ASSASSINATE FOREIGN LEADERS 6 (1975).

purpose of ensuring national security as it might make foreign governments more likely to intervene. This potential ineffectiveness could create problems on an international scale, possibly leading to armed conflict or, at the very least, the violation of the nationalizing country's sovereignty. A CFIUS-like legal regime limits the justifications for a foreign country to interfere in a country's politics, making it more efficient than nationalization and a more effective tool to ensure national security.

These three reasons, among others, demonstrate that a CFIUS-like legal regime is more preferable to nationalization because it is more efficient. A CFIUS-like legal regime does not incur the costs associated with litigation, protects national security while encouraging foreign investment, and prevents scenarios from occurring where foreign governments might intervene to protect their interests. Yet, despite its inefficiencies, nationalization is still prevalent within LATAM.<sup>206</sup> Thus, LATAM countries should be encouraged to develop a CFIUS-like regime as it will promote efficiency and may also have positive effects on the security of the region as a whole.

## VII. SUPPORTING CFIUS-LIKE REGIMES IN LATAM

It is important that the United States work with LATAM countries to encourage the creation of robust CFIUS-like legal regimes since nationalization is not only inefficient, but it may harm U.S. investors. Investment in LATAM formed 10.8% of the United States' investments into other countries in 2012.<sup>207</sup> While this number may seem small, it amounts to \$42 billion, or twenty-four percent of the \$175 billion invested into LATAM during that year.<sup>208</sup> There is already a risk that these

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206. Nationalization continues to occur in several LATAM countries, namely, Venezuela, Bolivia, Ecuador, and Argentina. See Veronica Espinosa & Daniel Cancel, *Bolivia Following Argentine Takeover Deepens Regional Divide*, BLOOMBERG (May 2, 2012, 12:00 PM), <http://www.bloomberg.com/news/2012-05-02/bolivia-following-argentine-takeover-deepens-regional-divide.html>, archived at <http://perma.cc/7KR8-FBDW> ("Bolivia, Venezuela, Argentina and Ecuador have taken over energy, cement, airline, pension and mining companies in the past five years."). During his rule, Hugo Chavez was known for hosting a weekly talk show where one of his catchphrases was "Nationalize it!" due to his on-air nationalization of various companies. Esther Bintliff, *Venezuela: Six Challenges for Chávez's Successor*, FIN. TIMES (Apr. 11, 2013, 3:15 PM), <http://blogs.ft.com/the-world/2013/04/venezuela-six-challenges-for-chavez-s-successor/>, archived at <http://perma.cc/27NA-Q5EP>.

207. OECD, FDI IN FIGURES: OCTOBER 2013 4 Table 2 (2013).

208. UNITED NATIONS, ECON. COMM'N FOR LATIN AMERICA & THE CARRIBBEAN, *supra* note 141, at 21 Table I.1, 37 (2013). The United States was the largest individual country to invest in LATAM in 2012. *Id.*

investments may not succeed due to business-related factors.<sup>209</sup> This risk is only amplified by adding in the potential for nationalization.<sup>210</sup> To counteract such a risk, the United States might take action to protect its interests.<sup>211</sup> But these actions only add to an ongoing cycle by breeding contempt for the United States among the local population.<sup>212</sup> The population then votes for leaders who have anti-American views, such as Venezuela's Hugo Chavez and Argentina's Cristina Fernandez de Kirchner.<sup>213</sup> These leaders then use the United States as a scapegoat to distract the population from the problems caused by their own mismanagement of their countries.<sup>214</sup> Desperate to find sources of income and regain control of the economy, they nationalize corporations or sectors of the economy where foreign investment is concentrated to prevent the

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209. These risks are usually referred to as nonsystematic risks and include factors such as the potential for bad management. *Managing Investment Risk*, FINRA, <http://www.finra.org/Investors/SmartInvesting/AdvancedInvesting/ManagingInvestmentRisk/> (last visited Feb. 10, 2014), *archived at* <http://perma.cc/VQG3-575R>.

210. Nationalization is considered a sociopolitical risk, which is a subset of systematic risks. *Id.*

211. For more on actions taken by the United States to protect its interests, see *supra* notes 203–04 and accompanying text.

212. The best example of this contempt is the book *Open Veins of Latin America* by Eduardo Galeano. In his book, Galeano describes the history of LATAM, specifically emphasizing the exploitation of its resources by the Spanish at first, followed by the United States. See generally EDUARDO GALEANO, *OPEN VEINS OF LATIN AMERICA: FIVE CENTURIES OF THE PILLAGE OF A CONTINENT* (Cedric Belfrage trans., Monthly Review Press 1997) (1971). This book has become so popular in LATAM as an expression of the perceived injustices committed by the United States that Venezuela's Hugo Chavez, known for his anti-American stance, gave President Barack Obama a copy during a regional summit. *Chavez's Gesture Turns Book into Bestseller*, CNN (Apr. 19, 2009, 12:50 AM), <http://www.cnn.com/2009/SHOWBIZ/books/04/18/latin.america.chavez.book/>, *archived at* <http://perma.cc/PUV5-XZDP>.

213. These leaders, as well as Bolivia's Evo Morales, Brazil's Luiz Lula da Silva and his successor Dilma Rousseff, Ecuador's Rafael Correa, and Nicaragua's Daniel Ortega, are known as part of the "pink tide," a term for leftist leaders who have enacted policies aimed at decreasing dependence on the United States and building relations with other countries. *South America's Leftward Sweep*, BBC (Mar. 2, 2005, 4:03 PM), <http://news.bbc.co.uk/2/hi/americas/4311957.stm>, *archived at* <http://perma.cc/PJ63-M7HN>.

214. At one point, Hugo Chavez blamed the United States for giving cancer to him and several other South American leaders. Daniel Cancel, *Chavez Says U.S. May Be Behind Leaders' Cancer*, BLOOMBERG (Dec. 28, 2011, 2:49 PM), <http://www.bloomberg.com/news/2011-12-28/chavez-u-s-may-be-behind-s-america-leaders-cancer.html>, *archived at* <http://perma.cc/NMC2-KY9M>. His successor, Nicolas Maduro, was quick to follow this strategy, blaming the United States for everything from electoral violence to power outages to economic hardship. Charles Shapiro, *In Venezuela, It's Still "Yankee Go Home"*, L.A. TIMES (Oct. 8, 2013), <http://articles.latimes.com/2013/oct/08/opinion/la-oe-shapiro-venezuela-diplomacy-20131008>, *archived at* <http://perma.cc/ET7C-JR5G>. He even accused the United States of deliberately causing a recession in Venezuela by "flooding the markets with oil." *Venezuela Recession Confirmed as Maduro Attacks US 'Oil War'*, BBC NEWS (Dec. 31, 2014, 2:14 AM), <http://www.bbc.com/news/world-latin-america-30638770>, *archived at* <http://perma.cc/B2NZ-E6ZQ>.

outflow of money to other countries.<sup>215</sup> Without sufficient legal recourse available to foreign investors,<sup>216</sup> the U.S. government will take action to protect the interests of its citizens, starting the cycle over again. A CFIUS-like legal regime breaks this cycle of nationalization and U.S. government involvement by limiting investment into areas that are important to national security, such as the natural resource sector. Although such a limitation would have the effect of preventing some U.S. investors from investing in LATAM, it would reduce the risk of nationalization, thus encouraging economic stability and the longevity of U.S. investments in other sectors.

Besides benefitting U.S. investors, a CFIUS-like legal regime also would likely promote regional security and support the sovereignty of individual LATAM countries. Such a regime would prevent other countries from gaining control of LATAM natural resources and using this control to exert influence over LATAM governments. One country in particular that poses such a threat is China. As China's demand for natural resources grows in leaps and bounds,<sup>217</sup> it will look to LATAM to provide these natural resources.<sup>218</sup> Due to the large size of its population as well as its huge cash reserves,<sup>219</sup> China does not just invest to control a portion of a country's natural resources; it seeks to control everything.<sup>220</sup> This

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215. For an example of such a situation, see the discussion of Argentina's nationalization of Spanish oil firm YPF, *supra* note 192 and accompanying text. Coincidentally, the three countries that have continued to implement policies involving the nationalization of foreign firms, Venezuela, Bolivia, and Argentina, also have some of the highest inflation rates in LATAM. *The World Factbook: Inflation Rate (Consumer Prices)*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/fields/2092.html#ar> (last visited Feb. 10, 2014).

216. For more on the complications associated with litigation resulting from nationalization, see *supra* notes 193–98 and accompanying text.

217. See Kevin P. Gallagher, *Why Latin America Should Not Squander the China Boom*, BBC NEWS (Jan. 27, 2015), <http://m.bbc.com/news/world-latin-america-30982544>, archived at <http://perma.cc/7QHR-XHE8> (noting that the growth experienced by Latin America from 2003 to 2013 was mostly the result of increased demand for natural resources by China).

218. See Barbara Kotschwar, Theodore H. Moran & Julia Muir, *Chinese Investment in Latin American Resources: The Good, the Bad, and the Ugly* 3 (Peterson Inst. for Int'l Econ., Working Paper No. 12-3, 2012), available at <http://www.iie.com/publications/wp/wp12-3.pdf> (“Over half of Chinese investment in natural resources is in Latin American countries.”). According to analysts, the purpose of a July 2014 visit to Latin America by Chinese President Xi Jinping was “to secure more natural resources from Latin American countries to fuel China's long term economic expansion.” *China's President Xi Jinping Signs Venezuela Oil Deal*, BBC NEWS (July 21, 2014, 8:44 PM), <http://www.bbc.com/news/world-latin-america-28414623>, archived at <http://perma.cc/J2Z8-MC88>.

219. China's cash reserves were estimated to be \$3.8 trillion in 2013. *The World Factbook: China*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/ch.html> (last visited Mar. 22, 2015). China's population was estimated to be 1.3 billion as of 2014. *Id.*

220. See, e.g., Joshua Schneyer & Nicolas Medina Mora Perez, *Special Report: How China Took Control of an OPEC Country's Oil*, REUTERS (Nov. 26, 2013, 7:03 AM), <http://www.reuters.com/>

absolute control over an integral part of a country's economy leaves that country open to influence. Influence of a LATAM country by a foreign power would conflict with the Monroe Doctrine, the "long-standing pillar of U.S. policy in the [Western] [H]emisphere."<sup>221</sup> The Monroe Doctrine, in its modern form, is the policy that "any effort to extend . . . political influence into the [Western Hemisphere] would be considered by the United States 'as dangerous to our peace and safety.'"<sup>222</sup> Given this policy, Chinese influence in LATAM is a security threat to the United States. A CFIUS-like regime would neutralize this threat by preventing China, or any other country, from gaining control of important areas of a LATAM country's economy and using this control to exert influence over the country's government. Without the threat of outside influence, LATAM countries would maintain their sovereignty and the economic security of the Western Hemisphere as a whole would be enhanced.

The United States would promote security within the Western Hemisphere and ensure the economic well-being of its own investors by encouraging LATAM countries to adopt a CFIUS-like legal regime. Such a regime would prevent investment in national security-sensitive industries, thus removing the need for nationalization as well as any potential for foreign influence. Essentially, a CFIUS-like legal regime would leave the fate of a country and its economy up to its government and people.

### VIII. CONCLUSION

CFIUS is an efficient weapon in defending the United States' national security. From its flexibility to its wide-ranging membership, CFIUS's structure permits it to evaluate transactions from a variety of perspectives to determine any possible threats to national security. But security concerns should not be limited just to the United States. Instead, the

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article/2013/11/26/us-china-ecuador-oil-special-report-idUSBRE9AP0HX20131126 (explaining how China gained "near monopoly control" of Ecuador's oil exports).

221. Peter Hakim, *Is Washington Losing Latin America?*, 85 FOREIGN AFF. 39, 45 (2006).

222. Olumide K. Obayemi, *Legal Standards Governing Pre-Emptive Strikes and Forcible Measures of Anticipatory Self-Defense Under the U.N. Charter and General International Law*, 12 ANN. SURV. INT'L & COMP. L. 19, 42 n.78 (2006). The original Monroe Doctrine was a warning directed specifically at European powers to prevent them from making any further attempts to colonize territory in the Western Hemisphere. *Id.* The Monroe Doctrine was later expanded with the declaration of the Roosevelt Corollary, which was "a policy of unilateral military intervention by the U.S. Government in the domestic affairs of states throughout [Latin America]." Francis A. Boyle, *U.S. Relations with Central American Nations: Legal and Political Aspects*, 78 AM. SOC'Y INT'L L. PROC. 144 (1984).

United States should look to its southern neighbors and encourage LATAM countries to develop their own CFIUS-like legal regimes. By doing so, the inefficiencies of nationalization will be avoided, U.S. investments in LATAM will face lower risk, and LATAM countries will enhance their sovereignty. Not only would these regimes promote national security in their respective countries, together they would make the Western Hemisphere as a whole more secure.

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