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CHINA'S OUTBOUND INVESTMENT: THE US EXPERIENCE

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Abstract

U.S. policy expressly welcomes Chinese investment, and since 2000 Chinese companies have invested nearly $50 billion in the United States. Notwithstanding those facts, the U.S. regulatory environment for Chinese investment - at least with respect to the national security reviews of certain proposed transactions - has been criticized as politicized and protectionist.

This article analyzes the experience of Chinese investors in the United States, particularly with respect to national security reviews led by the Committee on Foreign Investment in the United States (CFIUS). This article addresses a small, but significant, group of controversial U.S. transactions involving Chinese acquirers, including CNOOC, Tangshan, Northwest, Huawei, and Ralls, which have had a damaging impact on Chinese perceptions of the U.S. investment environment. At the same time, this article considers the "clear but silent majority" of Chinese investments in the United States that go forward routinely and without controversy.

To help preserve - or, some would maintain, restore - the U.S. reputation for providing an open investment environment that is free from political or protectionist influence, this article recommends that the United States aim to ensure that the "clear but silent majority" of U.S. investments by Chinese acquirers receive the public attention they deserve. The need for some $8 trillion in investment over the next 15 years to modernize U.S. infrastructure should provide many opportunities for the U.S. Government to further demonstrate that Chinese investment is indeed welcome in the United States.

Key words: Investment policy; Chinese overseas investment; American foreign investment policy; foreign direct investment

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1 Introduction

> *The pressing need for capital to modernise U.S. infrastructure is creating substantial new opportunities for Chinese investors. At a minimum, we estimate that more than $8 trillion in new investment will be needed . . . from 2013 through 2030—totalling some $455 billion per year*.[1]

To date, the United States has received a small share of China's outbound foreign direct investment (OFDI),[2] but the size of such investment flows nevertheless is substantial. In 2010, Chinese companies invested more than $5 billion in the United States on 34 acquisitions and 25 greenfield projects.[3] In 2014, such investment increased to nearly $12 billion, covering 92 acquisitions and 60 greenfield projects.[4] Since 2000, Chinese companies have invested nearly $50 billion in the United States.[5]

U.S. policy expressly welcomes Chinese investment in the United States. As stated in the Joint U.S.-China press statements following the July 2014 Strategic and Economic Dialogue between the two countries:

> The U.S. side welcomes Chinese enterprises' investment in the United States and commits to maintain open investment environment for various kinds of Chinese investors. The U.S. commits that the Committee on Foreign Investment in the United States applies the same rules and standards to each transaction that it reviews, and also commits to continue

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[1] U.S. Chamber of Commerce, 2013, *From International to Interstates: Assessing the Opportunity for Chinese Participation in U.S. Infrastructure* (U.S. Chamber of Commerce Infrastructure Report), p. 3, available at https://www.uschamber.com/sites/default/files/legacy/reports/ChinaInfrastructure_Final.pdf.

[2] *See, e.g.*, Zhang, Angela Huyue, 2014, "Foreign Direct Investment from China: Sense and Sensibility," *Northwestern Journal of International Law and Business* 34: 395, 407 (in 2011, 'less than 3% of Chinese FDI went to the United States'); Marchick, David, 2012, *Expanding Chinese Investment in the United States*, Council on Foreign Relations, Renewing America, Policy Innovation Memorandum No. 13, (February 9) ('Historically, the United States has garnered approximately 15 percent of total global OFDI flows, yet currently it receives only 2 percent of China's OFDI').

[3] Hanemann, Thilo and Daniel H. Rosen, 2011, 'Chinese FDI in the United States is Taking Off: How to Maximize its Benefits?', *Columbia FDI Perspectives* 49 (October 24). China currently ranks third in the world in OFDI flows; if including OFDI flows from Hong Kong, China ranks second. *See Investing in the SDGs: An Action Plan*, UNCTAD World Investment Report 2014, Overview, p. xv, available at http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf.

[4] *See* Rhodium Group, China Investment Monitor, All States/All Industries/2014, available at http://rhg.com/interactive/china-investment-monitor.

[5] *See* Rhodium Group, China Investment Monitor, All States/All Industries/2000 to 2014, available at http://rhg.com/interactive/china-investment-monitor.

> to discuss and explain concepts in the U.S. foreign investment review with the Chinese side.[6]

Notwithstanding the clear U.S. policy of encouraging inbound Chinese investment, as well as the significant scale of such investment, the U.S. regulatory environment for Chinese investment—at least with respect to the national security reviews of certain proposed transactions—has been criticised as politicised and protectionist.[7] Such national security reviews are led by the Committee on Foreign Investment in the United States (CFIUS)—the Committee that, as maintained by the United States in its July 2014 Joint Press Statements with China, 'applies the same rules and standards to each transaction that it reviews'.[8]

As discussed below, recent CFIUS reviews have led to the abandonment of U.S. investments by a number of Chinese companies, including Huawei Technologies Co. Ltd. (Huawei), Tangshan Caofeidian Investment Corporation (Tangshan), Northwest Nonferrous International Investment Company (Northwest), and Far East Golden Resources Investment Limited (FEGRI). One Chinese investment, by Ralls Corporation (Ralls), was blocked by the U.S. President on national security grounds; such action by a U.S. President in connection with a CFIUS investigation had occurred only once before, more than twenty years ago.[9] Opposition from Members of the U.S. Congress also has been significant for Chinese investment in the United States. Such opposition has led to the abandonment of investments by China National Offshore Oil Corporation (CNOOC) and Anshan Iron & Steel Group Corp. (Anshan). Notably, the most recent amendment to Section 721 of the Defense Production Act of 1950[10] (Section 721)—which governs U.S. national security reviews of transactions by foreign acquirers—has significantly expanded the role of the U.S. Congress in the CFIUS review process.

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[6] Joint U.S.-China Press Statements at the Conclusion of the Strategic & Economic Dialogue (July 10, 2014) ('Joint U.S.-China Press Statements'), available at http://www.state.gov/secretary/remarks/2014/07/228999.htm.

[7] *See, e.g.*, Zhang, *supra* note [ ], p. 429 ('There is an overwhelming consensus among FDI and energy experts that Congress overreacted to CNOOC's bid [for Unocal]'); Perles, Joshua, 2012, "Becoming the Goose that Lays Golden Eggs: Protecting U.S. Intellectual Property in China," *New York University Journal of International Law & Politics*, 45: 259, 282 ("[T]here is substantial evidence that 'national security' [review under CFIUS] has become a pretext for protectionist and anti-Chinese political motivations"); Feng, Yiheng, 2009, "'We Wouldn't Transfer Title to the Devil': Consequences of the Congressional Politicization of Foreign Direct Investment on National Security Grounds," *New York University Journal of International Law & Politics*, 42: 253, 271("[W]ith [the proposed] CNOOC and DP World [transactions], the levels of congressional and public interference into what should have been closed interactions between the parties and CFIUS reached unacceptable levels").

[8] Joint U.S.-China Press Statements, *supra* note [ ].

[9] *See* Rachelle Younglai, 2012, "Obama Blocks Chinese Wind Farms in Oregon Over Security," *Reuters*, September 29.

[10] Codified as amended at 50 U.S.C. App. §2170.

This small, but significant, group of controversial U.S. transactions involving Chinese acquirers—including CNOOC, Tangshan, Northwest, Huawei, and Ralls—has had a damaging impact on Chinese perceptions of the investment environment in the United States.[11] In addition, the number of CFIUS reviews involving Chinese acquirers has increased sharply in recent years: in both 2012 and 2013 Chinese acquirers were involved in more covered transactions than acquirers from any other country.[12]

At the same time, however, the number of CFIUS reviews involving Chinese acquirers is a small fraction of the total number of U.S. investments made by Chinese companies.[13] Unopposed transactions do not generate political controversy and thus tend to receive far less public attention than the transactions that face resistance from the U.S. executive branch and/or Members of the U.S. Congress. This clear—but relatively silent—majority of transactions reinforces the unambiguous U.S. policy that the United States is committed to maintaining an open investment environment for Chinese investors.[14] To help preserve—or, some would maintain, restore—its reputation for providing an open investment environment, the United States should aim to ensure that the clear but silent majority of U.S. investments by Chinese companies—which now go forward routinely and without controversy—receive the public attention they deserve. The need for some

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[11] *See, e.g.*, Marchick, *supra* note [ ], p. 2 ("Many Chinese executives and government officials remain frustrated by the political controversy or regulatory resistance engendered by a few investments. Conversations with Chinese executives frequently turn to the failed attempt by [CNOOC] to acquire Unocal Oil Company or to Huawei's problems with [CFIUS]"); Lucy Hornby, 2013, "China Commerce Minister Seeks Clearer U.S. Investment Guide," *Reuters*, March 8 (quoting China's Minister of Commerce, Chen Deming: "I hope CFIUS can be more open and transparent, because companies never know whether their bid meets the requirements or not"); Shayndi Rice and Andrew Dowell, 2011, "Huawei Drops U.S. Deal Amid Opposition," *The Wall Street Journal*, February 22 (quoting China's Ministry of Commerce: "'Some relevant parties in the U.S.' have used various reasons such as national security to hinder Chinese firms' trade and investment activities").

[12] Committee on Foreign Investment in the United States, *Annual Report to Congress* (2014) (CFIUS 2014 Annual Report), p. 17, available at http://www.treasury.gov/resource-center/international/foreign-investment/Pages/cfius-reports.aspx. Chinese acquirers were involved in ten, 23, and 21 covered transactions in 2011, 2012, and 2013 respectively. CFIUS 2014 Annual Report, p. 17.

[13] For example, although 21 of 97 covered transactions in 2013 involved Chinese acquirers, *see* CFIUS 2014 Annual Report, p. 17, that same year, according to Rhodium Group figures, Chinese investors entered into 51 acquisitions and 61 greenfield projects in the United States. *See* China Investment Monitor, Rhodium Group, All States/All Industries/2013, available at http://rhg.com/interactive/china-investment-monitor. http://rhg.com/interactive/china-investment-monitor. As noted above, an even greater number of US investments by Chinese companies were made in 2014 (92 acquisitions and 60 greenfield projects).

[14] *See, e.g.*, Joint U.S.-China Press Statements, *supra* note [ ].

$8 trillion in investment over the next 15 years to modernise U.S. infrastructure[15] should provide many opportunities for the United States to further demonstrate that Chinese investment is welcome in the United States.

When considering the experience of Chinese companies investing in the United States, this article will focus on three noteworthy developments: (i) the increasingly important role of the U.S. Congress with respect to national security reviews of U.S. transactions involving foreign acquirers; (ii) the emergence of two key factors that, on multiple occasions, have raised national security concerns for CFIUS: investments within the telecommunications sector and investments that would be located close to sensitive military facilities; and (iii) the recent Ralls v. CFIUS case, which has been extraordinary in two respects. First, the rare decision by a U.S. President to block a transaction on national security grounds, and second, the subsequent decision by a U.S. appeals court finding that the President's order violated the acquirer's constitutional rights. Before addressing these issues, this article first will provide an overview of the Section 721 national security review process.

2 The Section 721 national security review process

In the United States, inbound foreign direct investment is subject to a wide-ranging regulatory scheme. Potentially applicable statutes and regulations include the Foreign Corrupt Practices Act, the U.S. Commerce Department's Export Administration Regulations, the U.S. State Department's International Traffic in Arms Regulations, programs administered by the U.S. Treasury Department's Office of Foreign Asset Controls, U.S. securities law and regulations, competition review by the U.S. Federal Trade Commission and the U.S. Department of Justice, and national security review by the CFIUS.[16]

With respect to U.S. regulation of Chinese investment, it is the Section 721 national security review process that has received the most sustained and intense public attention and scrutiny. That scrutiny has arisen from a series of high-profile transactions—including the Chinese transactions mentioned above—which ultimately did not go forward amid national security concerns raised by CFIUS and/or Members of the U.S. Congress.

CFIUS, an interagency committee, was 'established by an Executive Order of President Ford in 1975',[17] in response to U.S. Congressional concerns over 'the rapid increase in investments' in American portfolio assets by OPEC[18] member states as well as the

[15] *See* U.S. Chamber of Commerce Infrastructure Report, *supra* note [ ], p. 3.
[16] For an overview of this regulatory scheme, *see* Fagan, David, 2009, "The U.S. Regulatory and Institutional Framework for FDI," in *Investing in the United States, Is the US Ready for FDI from China?*, edited by Karl P. Sauvant (Elgar).
[17] Jackson, James, 2014, *The Committee on Foreign Investment in the United States*, Congressional Research Service, March 6 ("Jackson CRS Report"), p.1.
[18] Organization of the Petroleum Exporting Countries.

potentially political—rather than economic—motivations driving those investments.[19] The executive order established the Secretary of the Treasury as the chair of the committee and provided that CFIUS 'shall have primary continuing responsibility within the Executive Branch for monitoring the impact of foreign investment in the Untied States, both direct and portfolio, and for coordinating the implementation of United States policy on such investment'.[20] Such responsibility would include the review of 'investments in the United States which, in the judgment of the Committee, might have major implications for United States national interests'.[21] Although the executive order gave CFIUS a central monitoring and coordinating role with respect to inbound foreign investment, the order did not authorize CFIUS or the President to block potential investments on grounds of national security or any other national interest.

Between 1975 and 1980, the Committee met 'only 10 times and seemed unable to decide whether it should respond to the political or the economic aspects of foreign direct investment in the United States'.[22] 'From 1980 to 1987, CFIUS investigated a number of foreign investments, mostly at the request of the Department of Defense'.[23]

One foreign investment that ultimately led to a significant shift in the nature of the CFIUS mandate was the proposed purchase, in 1986, by a Japanese company, Fujitsu, of Fairchild Semiconductor, a U.S. 'supplier of microtechnology vital to the operation of sophisticated weaponry'.[24] The proposed Fujitsu investment 'led to intense interest at virtually every federal agency, particularly Treasury, Defense, Commerce, and Justice, and at the Cabinet level'.[25] In light of the proposed Fujitsu purchase—together with an attempted takeover of Goodyear Tire and Rubber by an 'English corporate raider', Sir James Goldsmith—Senator James Exon introduced legislation designed '"to encourage the administration to protect the national interest" and to "provide the Executive with the legal means to prevent such foreign takeovers"'.[26]

The legislation, which amended Section 721, was passed as part of the Omnibus Trade and Competitiveness Act of 1988 and became known as the 'Exon-Florio Amendment'.[27]

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[19] Jackson CRS report, *supra* note [ ], p. 1.
[20] Executive Order 11858, (May 7, 1975), 40 FR 20263 ("1975 Executive Order").
[21] 1975 Executive Order, *supra* note [ ].
[22] Jackson CRS report, *supra* note [ ], p. 3.
[23] Jackson CRS report, *supra* note [ ], p. 3.
[24] Alvarez, José, 1989, "Political Protectionism and United States International Investment Obligations in Conflict: The Hazards of Exon-Florio," *Virginia Journal of International Law*, 30: 1, 57.
[25] Alvarez, *supra* note [ ], p. 57.
[26] Alvarez, *supra* note [ ], p. 56 (quoting statement of Senator Exon).
[27] Pub. L. No. 100-418, codified at 50 U.S.C. app. § 2170 (Supp. 1989). The Exon-Florio Amendment was named after the "chief sponsors" of the legislation in the U.S. Senate and U.S. House of Representatives, Senator James Exon (D-NE) and Congressman James Florio (D-NJ)." Zaring, David, 2009, "CFIUS as a Congressional Notification Service," *Southern California Law Review*, 83: 81, 92.

'Exon-Florio grants the President discretionary authority to block, for national security reasons, mergers, acquisitions, and takeovers which would result in "foreign control of persons engaged in interstate commerce"'.[28] '[B]efore Exon-Florio, the U.S. had no legal screening mechanism—for national security or otherwise—for foreign investments'.[29] In a 1988 executive order, President Reagan delegated his authority to administer Exon-Florio to CFIUS.[30]

A few years after the passage of Exon-Florio, Senator Robert Byrd stated that '[a]lthough Exon-Florio gives the President broad latitude to determine what constitutes a threat to national security, to date the administration has chosen to make little use of that authority'.[31] Legislation adopted in response to that concern—known as the Byrd Amendment—required investigation of certain proposed transactions involving entities 'controlled by or acting on behalf of a foreign government'[32] and required the President to provide written reports to Congress on findings and conclusions in CFIUS investigations.[33]

Notwithstanding the Byrd Amendment, 'CFIUS once again reacted to its new powers rather placidly, blocking no transactions between the passage of the Byrd Amendment and the next round of congressional legislation in 2007'.[34] That legislation—the Foreign Investment and National Security Act of 2007 (FINSA)—provided more detailed instructions to CFIUS regarding the Committee's investigative and reporting obligations. Under FINSA, CFIUS 'shall immediately conduct an investigation' of the effects of certain transactions on U.S. national security; such transactions include any 'foreign government controlled transaction'.[35] Also under FINSA, 'Congress more explicitly identified itself as the monitor of the Committee and once again increased CFIUS's reporting requirements'.[36] For example, upon request by Congress, CFIUS must 'promptly provide briefings on a covered transaction for which all action has concluded under this section'.[37]

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[28] Alvarez, *supra* note [ ], p. 4 (quoting Pub. L. No. 100-418).
[29] Alvarez, *supra* note [ ], p. 57.
[30] Jackson CRS Report, *supra* note [ ], p.5 (citing Executive Order 12661 (December 27, 1988), 54 F.R. 779).
[31] Zaring, *supra* note [ ], p. 93. "[I]n the five years following the passage of Exon-Florio, CFIUS investigated only sixteen transactions, blocking one acquisition." *Id.*
[32] Zaring, *supra* note [ ], p. 94 n. 59 (quoting National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 837, 106 Stat. 2315, 2464 (1992)).
[33] Zaring, *supra* note [ ], p. 94 and n. 59.
[34] Zaring, *supra* note [ ], p. 95.
[35] 50 U.S.C. App. §2170(b)(2)(A) and §2170(b)(2)(B). Under FINSA, the term "foreign government-controlled transaction" is defined as "any covered transaction that could result in the control of any person engaged in interstate commerce in the United States by a foreign government or an entity controlled by or acting on behalf of a foreign government." 50 U.S.C. App. §2170(a)(4).
[36] Zaring, *supra* note [ ], p. 97.
[37] 50 U.S.C. App. §2170(g)(1).

The CFIUS review process begins either by a party or parties to a proposed or completed transaction submitting a voluntary notice to CFIUS,[38] or by CFIUS itself initiating a review.[39] CFIUS is given 30 days to review the transaction to 'determine the effects of the transaction on the national security of the United States',[40] considering various factors that are set out in Section 721.[41]

If CFIUS determines, during its 30-day review, that 'the transaction threatens to impair the national security of the United States and that threat has not been mitigated during or prior to the review', or that the transaction is a 'foreign government-controlled transaction',[42] CFIUS 'shall immediately conduct an investigation of the effects of a covered transaction on the national security of the United States, and take any necessary actions in connection with the transaction to protect the national security of the United States'.[43] The investigation must be completed within 45 days.[44]

Following a national security investigation by CFIUS, the President 'may . . . suspend or prohibit any covered transaction that threatens to impair the national security of the United States',[45] but the President must announce any decision on whether to take such action 'not later than 15 days after' the completion of the investigation.[46]

Notably, in addition to the 'three-step' Section 721 review process—review by CFIUS, investigation by CFIUS, and determination by the President—in practice an informal system of review has developed in which foreign investors are able to discuss potential issues with CFIUS staff before the formal review process begins:

> Firms that are party to an investment transaction apparently have benefitted from this informal review in a number of ways. For one, it allowed firms additional time to work out any national security concerns privately with individual CFIUS members. Second, and perhaps more importantly, it provided a process for firms to avoid risking potential negative publicity that could arise if a transaction were to be blocked or

[38] 50 U.S.C. App. §2170(b)(1)(C).
[39] 50 U.S.C. App. §2170(b)(1)(D).
[40] 50 U.S.C. App. §2170(b)(1)(A).
[41] 50 U.S.C. App. §2170(f).
[42] 50 U.S.C. App. §2170(b)(2)(B). For the definition of 'foreign government-controlled transaction', *see* note [ ], *supra*. A national security investigation also is required in certain instances when 'the transaction would result in control of any critical infrastructure of or within the United States by or on behalf of any foreign person'. 50 U.S.C. App. §2170(b)(2)(B).
[43] 50 U.S.C. App. §2170(b)(2)(A).
[44] 50 U.S.C. App. §2170(b)(2)(C).
[45] 50 U.S.C. App. §2170(d)(1).
[46] 50 U.S.C. App. §2170(d)(2).

otherwise labeled as impairing U.S. national security interests.[47]

In several instances CFIUS findings have led Chinese acquirers to abandon U.S. investments, and on two occasions the Section 721 review process has resulted in a decision by the U.S. President to block a Chinese investment. A number of other Chinese acquirers have faced resistance not from the executive branch of the U.S. Government, but rather from Members of the U.S. Congress.

As discussed below, the role of the U.S. Congress in the review of proposed transactions involving foreign acquirers is particularly noteworthy, for three reasons. First, Members of the U.S. Congress have played a central role in a few of the most high-profile and controversial episodes involving U.S. investments that have been abandoned by Chinese acquirers. Second, one clear trend in the development of the Section 721 review process—through Exon-Florio, the Byrd Amendment, and FINSA—has been the consistently expanding role for the U.S. Congress in national security reviews of foreign acquisitions. Third, unlike CFIUS review of proposed acquisitions, which is limited to national security concerns, Members of the U.S. Congress can—and indeed have—considered factors beyond the scope of national security when evaluating proposed transactions involving foreign acquirers.

3 Proposed transactions by foreign acquirers: the increasingly significant role of the U.S. Congress

Two particularly high-profile and controversial transactions preceded the enactment of FINSA. In both instances, the publicity, and the controversy, arose not from actions by CFIUS, but rather from actions by Members of the U.S. Congress. Both events illustrate the increasingly significant role played by the U.S. Congress with respect to proposed transactions involving foreign acquirers, which has been reinforced by the provisions of FINSA.

The first transaction concerned the planned acquisition of a UK company, Peninsular and Oriental Steam Navigation Company (P&O), by Dubai Ports World, a state-owned company based in the United Arab Emirates.[48] The second concerned the planned acquisition of the U.S. energy company Unocal by CNOOC. Members of the U.S. Congress, not CFIUS, voiced opposition to both the Dubai Ports World and CNOOC transactions: 'The Dubai Ports World and CNOOC-Unocal deals are recent examples of how Congress, essentially sitting in review of CFIUS, reversed transactions that the Committee either had already approved or might have approved'.[49]

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[47] Jackson CRS Report, *supra* note [ ], p. 7-8.

[48] Feng, *supra* note [ ], at 277. For discussion of the planned, but ultimately abandoned, Dubai Ports World acquisition—which generated controversy because a U.S. subsidiary of P&O held leases to operate several U.S. ports—*see* Feng, *supra* note [ ], at 277; Zhang, *supra* note [ ], at 411-413, 420-421.

[49] Zaring, *supra* note [ ], at 98.

With respect to CNOOC's planned acquisition of Unocal, CNOOC withdrew its US$18.5 billion bid—following sharply negative responses by Members of the U.S. Congress—before CFIUS considered the transaction. Before withdrawing its bid, 'CNOOC took steps to pass a CFIUS review'.[50] Specifically:

> [CNOOC stated] that it had made assurances to Unocal to "address concerns relating to energy security and ownership of Unocal assets located in the United States" . . . [and that] CNOOC also was open to discussing with CFIUS placing non-exploration and production assets under American management through arrangement that it claimed CFIUS had approved often in the past.[51]

Before CFIUS investigated the proposed transaction, however, Members of the U.S. Congress took steps that ultimately led CNOOC to abandon its bid:

> The Executive Branch was virtually silent on the proposed CNOOC bid. In Congress, however, the attempted acquisition generated considerable concern—both for the implications of the deal itself and because it coincided with other issues and policies related to China. Congressional activity took two tracks. The first was to generate public awareness, discussion, and analysis that would highlight the implications of the proposed deal and put pressure on CNOOC to alter or withdraw it . . . The other track was through letters to the Secretary of Treasury (as chair of CFIUS) and legislation aimed at CFIUS.[52]

In response to this activity by Members of the U.S. Congress,[53] CNOOC withdrew its bid for Unocal, stating that '[t]he unprecedented political opposition . . . was regrettable and unjustified'.[54]

CNOOC's experience with the U.S. Congress in 2005 contrasts sharply with the company's more recent experience with regulators in Canada, the United Kingdom, and the United States, which approved, in 2012 and 2013, the largest foreign investment to date by a Chinese corporation[55]—CNOOC's $15 billion purchase of the Canadian energy

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[50] Nanto, Dick, *et al*., 2005, *China and the CNOOC Bid for Unocal: Issues for Congress*, Congressional Research Service Report, September 15 ("Nanto CRS Report"), p. 13.
[51] Nanto CRS Report, p. 13-14.
[52] Nanto CRS Report, p. 14.
[53] For detailed accounts of actions taken by Members of Congress in opposition to the CNOOC-Unocal transaction, *see* Zhang, *supra* note [ ], pp. 425-432; Institute for International Economics, *The CNOOC Case* (December 2012), available at http://www.piie.com/publications/chapters_preview/3942/05iie3942.pdf.
[54] Francesco Guerrera and Joe Leahy, 2005, "CNOOC Shares Jump after Unocal Bid Dropped," *Financial Times*, August 3.
[55] *See* Simon Hall, Edward Welsch, and Ryan Dezember, 2012, "China Push in Canada is Biggest Foreign Buy," *The Wall Street Journal*, July 24 ("Cnooc Ltd. swept into Canada

company Nexen.[56]

Two distinguishing factors between the Unocal and Nexen transactions were the presence of a competing bidder (for Unocal but not Nexen)[57] and target company approval of the takeover (by Nexen but not Unocal).[58] In addition, commentators have observed that CNOOC had updated its regulatory approval strategy in light of its Unocal experience.[59] At the same time, however, any mitigation commitments made by CNOOC and Nexen to CFIUS are not publicly known.[60]

In addition to CNOOC's decision to withdraw its bid for Unocal, another Chinese

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with China's biggest overseas acquisition yet, a $15.1 billion deal to buy one of that country's largest energy producers").

[56] Approval of the transaction by US and UK regulators had been required because Nexen controls assets in the Gulf of Mexico and the North Sea. *See* Carolyn King, 2013, "Cnooc Purchase of Nexen is Approved by U.S.," *The Wall Street Journal*, February 12.

[57] The U.S. energy company Chevron had lobbied Congress in connection with CNOOC's proposed acquisition of Unocal and "ended up acquiring [Unocal] for a lower price than the Chinese bidder had offered." Zaring, *supra* note [ ], p. 99.

[58] *See* CNOOC Limited, Press Release, (July 23, 2012) ("The [Nexen] transaction has received the unanimous approval of Nexen's and CNOOC Limited's Boards of Directors"), available at http://www.cnoocltd.com/encnoocltd/newszx/news/2012/2062.shtml; Loretta Ng and Wing-Gar Cheng, 2005, "Cnooc Drops $18.5 Bln Unocal Bid Amid U.S. Opposition," *Bloomberg*, August 2 ("Unocal's board approved a sweetened bid from Chevron, the second-biggest U.S. oil company, on July 19. Unocal said the higher price from Cnooc didn't offset the risk that the bid would be delayed or blocked").

[59] *See, e.g.*, Zachary R. Mider and Andrew Mayeda, 2012, "Cnooc Studies History to Plot Nexen Strategy," *Bloomberg*, July 25 ("lessons" from failed bids by CNOOC for Unocal and by BHP Billiton Ltd. for Potash Corp. of Saskatchewan, Inc. "encouraged" CNOOC "to pledge to Nexen executives during negotiations never the pursue a hostile offer" and "prompted" CNOOC and Nexen "to phone Canadian political leaders in a weekend blitz"); Wenran Jiang, 2012, "CNOOC Learned from Rebuff When it Tried to Buy Unocal," *Financial Post*, July 25 (contrasting the Unocal transaction, which "was initiated with little understanding among Americans of [CNOOC's] intensions, plans, and potential benefits, with the Nexen transaction, when "CNOOC has been in Canada with a subsidiary since 2005, and the press interviews given by its president and vice-president on the Nexen takeover have been reassuring to the Canadian public."); *see also* "Challenges Ahead as CNOOC Acquires Nexen," 2013, *Xinhua*, February 26 ("In order to obtain approval, CNOOC made commitments regarding transparency, disclosure, commercial orientation, employment, and capital investment that 'demonstrate a long-term commitment to the development of the Canadian economy,' Canadian authorities said.").

[60] David Gelles, 2013, "US Approves $18bn Cnooc Bid for Nexen," *Financial Times* February 12 ("Nexen did not disclose if it had agreed to any mitigation agreements in order to win Cfius approval").

investor, Anshan Iron & Steel Group Corp., ultimately decided to abandon a U.S. transaction following opposition by Members of the U.S. Congress and notwithstanding the absence of any unfavorable determination by CFIUS.

In 2010, 50 Members of the U.S. Congress, representing the Congressional Steel Caucus, wrote a letter to the Secretary of the U.S. Treasury, Timothy Geithner, requesting that CFIUS review a planned investment by Anshan, a state-owned Chinese steel manufacturer, in steel plants owned by Steel Development Co., a U.S. company.[61] In the letter, the Members of Congress stated:

> We believe that this investment allows the full force and financing of the Chinese government to exploit the American steel market from American soil . . . [We] are concerned that [the transaction] may pose national security risks as well. For example, Anshan could have access to new steel production technologies and information regarding American national security infrastructure projects.[62]

Notably, in its letter to Secretary Geithner, the Congressional Steel Caucus raised both national security (access to national security infrastructure information) and competition (foreign government support will "exploit the American steel market") concerns. In response, Anshan announced that it had decided, given the opposition from Members of Congress, to put its investment on hold.[63]

As illustrated by the Dubai Ports World, CNOOC, and Anshan transactions, Members of the U.S. Congress in certain instances have played a very significant role in the decisions of foreign acquirers to abandon U.S. investments. In addition, the role of the U.S. Congress in national security reviews has been further strengthened by the provisions of FINSA:

> FINSA increases CFIUS's reporting to Congress concerning the work it has undertaken pursuant to section 721 . . . CFIUS . . . must provide annual reports on its work, including a list of the transactions it has reviewed or investigated in the preceding 12 months, analysis related to foreign direct investment and critical technologies, and a report on foreign direct investment from certain countries.[64]

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[61] "U.S. Lawmakers Seek Anshan Steel Probe," 2010, *Dow Jones*, July 5.

[62] Letter from Members of the Congressional Steel Caucus to Secretary Timothy Geithner (July 2, 2010), available at https://www.steel.org/~/media/Files/AISI/Public%20Policy/pp_china_geithner_070210.pdf.

[63] Doug Palmer, 2010, "U.S. Lawmakers Cheer as China Steel Firm Backs Out," *Reuters*, August 19.

[64] Department of the Treasury, Office of Investment Security, Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons, 73 Fed. Reg. 70703 (November 21, 2008).

Members of the U.S. Congress also have been outspoken with respect to potential threats to U.S. national security posed by the Chinese telecommunications companies Huawei and ZTE. Specifically, in 2011, the Permanent Select Committee on Intelligence in the U.S. House of Representatives initiated an investigation 'into the counterintelligence and security threat posed by Chinese telecommunications companies doing business in the United States',[65] which led to a report that focused on Huawei and ZTE, 'the top two Chinese telecommunications equipment manufacturers'.[66]

The Committee's investigation had been initiated at Huawei's request. In 2008 and 2011, Huawei abandoned transactions involving, respectively, the U.S. technology companies 3Com and 3Leaf Systems, following negative responses to both transactions from CFIUS.[67] Following its decision to abandon the 3Leaf Systems transaction, Huawei published an open letter, stating: '[w]e sincerely hope that the United States government will carry out a formal investigation on any concerns it may have about Huawei'.[68]

With respect to Huawei, the Committee report made several findings, including the recommendation that CFIUS 'must block acquisitions, takeovers, or mergers involving Huawei . . . given the threat to U.S. national security interests'.[69] In support of that recommendation, the House Intelligence Committee Report identified several factors: (1) Huawei's failure to provide documentation or full responses to questions in support of its claim that the company's products did not pose a national security threat to the United States;[70] (2) U.S. critical infrastructure, in particular U.S. telecommunications networks, 'depend on trust and reliability';[71] (3) 'the U.S. government must pay

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[65] Chairman Mike Rogers and Ranking Member C.A. Dutch Ruppersberger, 2012, *Investigative Report on the U.S. National Security Issues Posed by Chinese Telecommunications Companies Huawei and ZTE*, House Permanent Select Committee on Intelligence, October 8 ("House Intelligence Committee Report"), Executive Summary.

[66] House Intelligence Committee Report, *supra* note [ ], Executive Summary.

[67] The proposed 3Com and 3Leaf Systems transactions are discussed below.

[68] Ken Hu, Deputy Chairman of Huawei Technologies and Chairman of Huawei USA, "Huawei Open Letter," available at http://www.huawei.com/ilink/en/about-huawei/newsroom/press-release/HW_092875.

[69] House Intelligence Committee Report, *supra* note [ ], Executive Summary.

[70] In the report, the House Intelligence Committee stated that it was "disappointed" that Huawei "neither answered fully nor chose to provide supporting documentation for their claims" and that the Committee "simply cannot rely on the statements of company officials that their equipment's presence in U.S. critical infrastructure does not present a threat, and that [Huawei is] not, or would not be, under pressure by the Chinese government to act in ways contrary to United States interests." House Intelligence Committee Report, p. 12.

[71] House Intelligence Committee Report, p. 1.

particular attention to products produced by companies with ties to regimes that present the highest and most advanced espionage threats to the U.S., such as China';[72] and (4) 'Chinese telecommunications firms, such as Huawei and ZTE, are rapidly becoming dominant global players in the telecommunications market . . . When those companies seek to control the market for sensitive equipment and infrastructure that could be used for spying and other malicious purposes, the lack of market diversity becomes a national concern for the United States and other countries'.[73]

Given the above factors, the House Intelligence Committee Report—which merely sets out recommendations, rather than binding determinations—can be read as reflecting the following policy: for Chinese companies with significant global operations in the telecommunications sector seeking to acquire sensitive U.S. assets, there should be a presumption that the company poses a threat to U.S. national security, which can be overcome if the company provides sufficient evidence supporting the claim that its investments would not threaten U.S. national security.

While Huawei has faced similar obstacles to investment in Australia due to national security concerns,[74] the investment environment in the UK has been less restrictive: in 2012 Huawei announced, following meetings with British government officials, that it would invest £1.3 billion in the UK.[75] In 2013, a Huawei representative stated that the company 'has adjusted our priority focus to markets that welcome competition and investment, like Europe'.[76]

The experiences of Chinese investors such as Huawei, CNOOC, and Anshan illustrate how the U.S. Congress, on multiple occasions, has played a significant role in the investment decisions of foreign acquirers. Regarding future transactions involving Chinese acquirers, the potential role of the U.S. Congress must be considered, in connection with both national security issues (particularly given the consistently expanding role for the U.S. Congress reflected in Exon-Florio, the Byrd Amendment, and FINSA) and broader economic concerns (as illustrated by the response of the Congressional Steel Caucus to the proposed Anshan investment as well as the weight accorded by the House Intelligence Committee to a perceived 'lack of market diversity' in the telecommunication sector).

In addition to the potential role of the U.S. Congress, Chinese acquirers must also, of

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[72] House Intelligence Committee Report, p. 2.
[73] House Intelligence Committee Report, *supra* note [ ], p. 2.
[74] *See, e.g.*, "New Australian government upholds ban on China's Huawei," 2013, *Reuters*, October 29 ("Australia's newly elected conservative government is upholding a ban on China's Huawei Technologies Co Ltd from bidding for work on the country's $38 billion National Broadband Network").
[75] Daniel Thomas, 2012, "Huawei Unveils New UK Investments," *Financial Times* September 11.
[76] Shane Harris and Isaac Stone Fish, 2013, "Accused of Cyberspying, Huawei is 'Exiting the U.S. Market,'" *Foreign Policy*, December 2.

course, consider potential national security reviews by CFIUS. Key national security factors, which appear to have been given substantial weight by CFIUS in recent reviews of proposed investments, are discussed below.

4 Key CFIUS national security factors

As discussed above, the U.S. Congress has played a significant role in the decisions of several foreign companies not to go forward with U.S. transactions. At the same time, CFIUS findings have led many other companies, including several Chinese acquirers, to abandon U.S. investments. When CFIUS has played a significant role in the decision-making of foreign acquirers, one of two key factors frequently has been present: investments within the telecommunications sector and investments that would be physically located close to sensitive military facilities. Each of those factors is discussed below.

4.1 Investments within the telecommunications sector

Within the telecommunications sector, one apparently negative CFIUS determination concerned a proposed joint venture between Emcore Corp., a U.S. fiber optics and solar panel manufacturer, and China's Tangshan Caofeidian Investment Corporation. In 2010, '[a]mid rumours that CFIUS was prepared to recommend [to] U.S. President Barack Obama to block the deal, the companies abandoned the venture'.[77] Two commentators have observed that '[t]he Emcore-Tangshan deal likely raised concerns because of the role of Emcore's fiber optics products in highly strategic and espionage-vulnerable U.S. communications systems'.[78]

On two occasions, as noted above, Huawei has abandoned investments in light of negative responses from CFIUS. In 2008, a proposed investment by Huawei in the U.S. company 3Com 'was called off a month after it became clear the US would block the transaction as originally structured . . . Alarm bells were set off in Washington by 3Com's involvement in networking security software, a field in which it is a supplier to the US military'.[79] More recently, in 2011, Huawei abandoned plans to purchase assets from 3Leaf Systems, an insolvent U.S. technology company, after CFIUS 'recommended against the deal'.[80]

In response to Huawei's abandonment of the 3Leaf purchase:

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[77] Stewart A. Baker and Stephen R. Heifetz, 2010, "Addressing National Security Concerns," *Insight*, September, p. 21, available at http://www.steptoe.com/assets/attachments/4149.pdf.
[78] Baker and Heifetz, *supra* note [ ], p. 22.
[79] Richard Waters and James Politi, 2008, "Huawei-3Com Deal Finally Collapses," *Financial Times*, March 21.
[80] Shayndi Rice and Andrew Dowell, 2011, "Huawei Drops U.S. Deal Amid Opposition," *The Wall Street Journal*, February 22.

> China's Ministry of Commerce said . . . that it hopes "relevant parties" in the U.S. would 'abandon prejudice, avoid adopting protectionist measures and treat properly investments from China and other countries' with a fair and open attitude [and that] 'Some relevant parties in the U.S.' have used various reasons such as national security to hinder Chinese firms' trade and investment activities.[81]

Huawei itself issued an open letter addressing the 3Leaf matter, which included the following:

> The allegation that Huawei somehow poses a threat to the national security of the United States has centred on a mistaken belief that our company can use our technology to steal confidential information in the United States or launch network attacks on entities in the U.S. at a specific time. There is no evidence that Huawei has violated any security rules. Not only that, in the United States we hire independent third-party security companies, such as EWA [Electronic Warfare Associates, a Virginia-based company], to audit our products in order to certify the safety and reliability of the products at the source code level.[82]

Given the reported findings of CFIUS in the Tangshan-Emcore, Huawei-3Com, and Huawei-3Leaf transactions, together with the recommendations set out in the House Intelligence Committee Report, it appears likely that investments within the telecommunications sector, particularly those involving Chinese acquirers, will be closely scrutinized in a U.S. national security review.

4.2 Geographic proximity to sensitive military facilities

In addition to investments within the telecommunications sector, geographic proximity to sensitive military facilities has led CFIUS, on several occasions, to find a threat to national security arising from a proposed Chinese investment.[83] The first transaction concerned a Chinese mining company, Northwest Nonferrous International Investment Company, which planned to purchase a 51 per cent share in a Nevada-based mining company, Firstgold, and to help develop the Relief Canyon mine in Nevada.[84] CFIUS 'was expected to send President Obama its recommendation . . . that the deal be rejected',

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[81] Rice and Dowell, *supra* note [ ].
[82] Ken Hu, Huawei Open Letter (Feb. 22, 2011), available at http://pr.huawei.com/en/news/hw-092875-huaweiopenletter.htm#.U989uxZD3dk.
[83] *See* Thilo Hanemann and Daniel Rosen, 2012, "Ralls v. CFIUS: What are the Implications for Chinese Investment?", Council on Foreign Relations, Renewing America, October 5, available at http://blogs.cfr.org/renewing-america/2012/10/05/ralls-vs-cfius-what-are-the-implications-for-chinese-investment/ (the CFIUS finding in the Ralls transaction "demonstrates continuity with regard to espionage concerns related to geographic proximity of assets to defense installations").
[84] "Chinese Miner Backs out of US Deal," 2009, *Reuters*, December 22.

at which point Northwest withdrew from the transaction.[85] According to a recent Congressional Research Service report, the Northwest withdrawal occurred 'due to objections by the U.S. Department of the Treasury that Firstgold had properties near sensitive military bases'.[86]

The second CFIUS review involving proximity to a sensitive military facility concerned an investment by a Hong Kong-based company, Far East Golden Resources Investment Limited (FEGRI). FEGRI had purchased more than 88 per cent of the common stock of Nevada Gold, a U.S. company.[87] Following notification by CFIUS that the proximity of certain Nevada Gold property to a U.S. naval air station raised national security concerns, FEGRI agreed to divest its interests in Nevada Gold.[88]

CFIUS identified national security concerns arising from proximity to a U.S. military facility for a third time in the Ralls transaction, which has given rise to two extraordinary developments. First, the rare decision by a U.S. President to block a transaction on national security grounds, and second, the subsequent decision by a U.S. appeals court finding that the President's order violated Ralls' constitutional rights.

The investment in Ralls concerned the acquisition of four wind farm projects located in Oregon by a Chinese-owned Delaware company (Ralls) and a Chinese affiliate of Ralls (Sany Group). The wind farm projects were located 'in and around the eastern region of a restricted airspace and bombing zone maintained by the United States Navy'.[89]

The transaction ultimately led, in September 2012, to a Presidential Order requiring Ralls to, among other actions, 'divest all interests in' the wind farm projects.[90] In the order, the President found that '[t]here is credible evidence that leads me to believe that Ralls . . . might take action that threatens to impair the national security of the United States'.[91] Only once before had a U.S. President blocked a transaction under a Section 721 review: in 1990, 'when then President George H.W. Bush stopped a Chinese aero-technology company from acquiring a U.S. manufacturing firm'.[92]

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[85] "Chinese Miner Backs out of US Deal," *supra* note [ ].
[86] Jackson CRS report, *supra* note [ ], p. 9.
[87] *See* Nevada Gold Holdings, Inc., Form 8-K (June 11, 2012), p. 2, available at http://www.sec.gov/Archives/edgar/data/1369203/000107878212001648/f8k061512_8k.htm.
[88] Nevada Gold Holdings, Inc., Form 8-K, *supra* note [ ], p. 2.
[89] *Ralls Corp. v. Committee on Foreign Investment in the United States*, 758 F.3d 296, 304 (D.C. Cir. 2014).
[90] Order Signed by the President Regarding the Acquisition for Four U.S. Wind Farm Project Companies by Ralls Corporation (Sept. 28, 2012) ("Ralls Presidential Order"), available at http://www.whitehouse.gov/the-press-office/2012/09/28/order-signed-president-regarding-acquisition-four-us-wind-farm-project-c.
[91] Ralls Presidential Order, *supra* note [ ].
[92] Rachelle Younglai, 2012, "Obama Blocks Chinese Wind Farms in Oregon Over Security," *Reuters*, September 29. The 1990 transaction concerned the proposed

Prior to the Presidential Order, CFIUS had issued two orders concerning the Ralls transaction. First, in July 2012, CFIUS determined that Ralls' acquisition of the wind farm projects threatened national security and ordered Ralls to take certain measures to mitigate the threat.[93] Specifically, CFIUS ordered Ralls to cease construction and operations at the wind farm sites, remove all stockpiled or stored items from the sites, and to cease all access to the sites.[94] In August 2012, CFIUS issued an amended order, placing additional restrictions on Ralls, specifically prohibiting Ralls from completing any sale of the wind farm projects or their assets without first removing all items from the wind farm sites, notifying CFIUS of any sale, and giving CFIUS ten business days to object to the sale.[95] Neither of the two CFIUS orders 'disclosed the nature of the national security threat the transaction posed'.[96] In addition, 'neither CFIUS nor the President gave Ralls notice of the evidence on which they respectively relied nor an opportunity to rebut that evidence'.[97]

A few weeks before the Presidential Order issued, Ralls sued CFIUS in U.S. court, seeking to invalidate CFIUS' amended order on several grounds, including an alleged deprivation of Ralls' property interests in violation of the due process clause of the Fifth Amendment of the U.S. Constitution.[98] Following the issuance of the Presidential Order, Ralls amended its complaint, adding claims challenging the Presidential Order and naming the President as a defendant.[99]

At the trial court level, the U.S. court dismissed Ralls' due process claim on grounds that Ralls had no property interest in the wind farm projects that was protected by the U.S. Constitution. As found by the court, although Ralls held property rights in the wind farm projects that were valid under state law, Ralls had acquired those state property rights '"subject to the known risk of a Presidential veto"' and had '"waived the opportunity . . . to obtain a [national security] determination from CFIUS and the President before it entered into the transaction"'.[100] The court then found that even if Ralls did hold a property right protected by the U.S. Constitution, CFIUS had accorded Ralls due process by informing Ralls that the transaction had to be reviewed and by giving Ralls an opportunity to submit evidence in its favour in its CFIUS filing and in follow-up

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acquisition of MAMCO Manufacturing, Inc. by China National Aero-Technology & Export Corp. *See* David McLaughlin, 2014, "Chinese-Owned Ralls Can Question U.S. on Project Denial," *Bloomberg News*, July 15.

[93] *Ralls Corp.*, 758 F.3d at 305.

[94] *Id.*, p. 305.

[95] *Id.*, p. 305.

[96] *Id.*, p. 305.

[97] *Id.*, p. 306.

[98] *Id.*, p. 306.

[99] *Id.*, p. 306.

[100] *Id.*, p. 307 (quoting *Ralls Corp. v. Comm. on Foreign Inv. in the United States*, 987 F. Supp. 2d 18, 27 (D.D.C. 2013)).

conversations with CFIUS officials.[101]

On appeal, however, the U.S. Court of Appeals for the District of Columbia Circuit found that Ralls did hold property rights in the wind farm projects that were protected by the U.S. Constitution and that the Presidential Order had taken that property without due process, in violation of the Fifth Amendment.[102]

As a threshold matter, the appeals court addressed whether it had jurisdiction over Ralls' claim, given that under a Section 721 national security review, a determination by the President to block a transaction 'shall not be subject to judicial review'.[103] To decide the issue, the court applied an established rule under U.S. law: 'a statutory bar to judicial review precludes review of constitutional claims only if there is 'clear and convincing' evidence that Congress so intended'.[104] The court did not find such clear and convincing evidence, instead finding that the 'most natural reading' of the statutory bar was to preclude review of a President's decision to suspend or prohibit a transaction, but not review of a constitutional claim 'challenging the *process* preceding such Presidential action'.[105]

Turning to the merits of the due process claim, the court found that 'the Federal Government cannot evade the due process protections afforded to state property by simply "announcing that future deprivations of property may be forthcoming"'.[106] Furthermore, the court found that Ralls did not waive its protected property interest by failing to seek pre-approval from CFIUS for its investment in the wind farm projects; as observed by the court, the Section 721 regulatory scheme 'expressly contemplates that a party to a covered transaction may request approval—if the party decides to submit a voluntary notice at all—either before or *after* the transaction is completed'.[107]

After resolving the issues of statutory bar and waiver, the court addressed the core constitutional question in the case: 'what process is due?'.[108] Following discussion of U.S. Supreme Court and D.C. Circuit Court of Appeals precedent, the court concluded that 'due process requires, at the least, that an affected party be informed of the official action, be given access to the unclassified evidence on which the official actor relied and be afforded an opportunity to rebut that evidence . . . Ralls was not given any of these procedural protections at any point'.[109] Notably, the court found that the opportunity to present evidence to, and 'interact with', CFIUS was 'plainly not enough to satisfy due process because Ralls never had the opportunity to tailor its submission to [CFIUS']

[101] *Id*., p. 307
[102] *Id*., p. 319.
[103] 50 U.S.C. App. §2170(e).
[104] *Ralls Corp*., *supra* note [ ], p. 308.
[105] *Id*., p. 311 (emphasis in original).
[106] *Id*., p. 316 (quoting Brief for Ralls (February 7, 2014), p. 21).
[107] *Id*., p. 317 (emphasis in original).
[108] *Id*., p. 317.
[109] *Id*., p. 320.

concerns or rebut the factual premises underlying the President's action'.[110] Accordingly, the court concluded that 'the Presidential Order deprived Ralls of constitutionally protected property interests without due process of law' and remanded the case to the lower federal court 'with instructions that Ralls be provided the requisite process set forth herein'.[111]

There has been a strong international reaction to the *Ralls* decision, which has been characterized as a 'landmark judgment'[112] that could 'shake up',[113] or lead to '[b]ig changes'[114] in, how the U.S. government conducts national security reviews of foreign investments. At the same time, however, the *Ralls* decision carefully distinguished national security determinations by the President (which cannot be reviewed under the Section 721 statutory bar) from constitutional challenges to the *process* preceding such Presidential determinations (which can be reviewed notwithstanding the Section 721 statutory bar). Providing acquirers with an opportunity to review and rebut evidence does not suggest in any way that there will be corresponding changes in the outcomes of CFIUS reviews.

Providing acquirers with an opportunity to review and rebut evidence will, however, place considerable pressure on the existing timetable for Section 721 reviews (30-day review, 45-day investigation, and 15-day Presidential determination).[115] Thus, while it is unlikely that the *Ralls* decision will affect the outcomes of CFIUS reviews, the decision might ultimately require that adjustments be made to the existing Section 721 review timetable.

Taken together, the Northwest, FEGRI, and Ralls transactions clearly illustrate that an investment's geographic proximity to sensitive military facilities will be accorded significant weight under a Section 721 review. A similar amount of scrutiny likely will be applied to proposed transactions within the telecommunications sector, given the reported findings of CFIUS in the Tangshan-Emcore, Huawei-3Com, and Huawei-3Leaf transactions.[116] With respect to investment by Chinese companies in the United States

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[110] *Id*., p. 320.
[111] *Id*., p. 325.
[112] Frank Ching, 2014, "US Court Overrules Investment Ban," *The China Post*, August 6.
[113] William Mauldin and Brent Kendall, 2014, "Appeals Court Faults Government Order Prohibiting Ralls Corp. Wind Farm Deal," *The Wall Street Journal*, July 15.
[114] Bien Perez, 2014, "Ralls Legal Victory May Impact US Review of Foreign Investments," *South China Morning Post*, July 18.
[115] For example, following the *Ralls* decision, the U.S. Government produced nearly 3,500 pages of unclassified documents. *See* Keeler, Timothy J., Simeon M. Kriesberg, and Jing Zhang, 2014, "U.S. Government Produces Unclassified Documents in Litigation Regarding CFIUS Review of Chinese Investment," *Mayer Brown*, Legal Update, December 5.
[116] For a discussion of factors beyond the scope of national security that could lead to US political opposition to Chinese acquisitions, *see* Tingley, Dustin, Christopher Xu, Adam Chilton, and Helen Milner, 2015, "The Political Economy of Inward FDI: Opposition to

generally, however, most transactions have gone forward without controversy, as discussed below.

5 Conclusion

As detailed above, a number of Chinese transactions in the United States have met resistance from CFIUS and/or Members of the U.S. Congress, which in many instances has resulted in the high-profile and controversial abandonment of investments. At the same time, however, hundreds of U.S. investments by Chinese companies—including some very large transactions—have gone forward with little or no controversy. For example, in 2013 CFIUS cleared, notwithstanding 'vocal complaints from members of Congress about risks to the national food supply', the 'biggest purchase ever of a U.S. company by a Chinese firm'—the $4.7 billion acquisition of Smithfield Foods Inc. by Shuanghui International Holdings.[117] In 2012, the Chinese firm Dalian Wanda Group became 'the largest theater owner in the world' with its $2.6 billion purchase of AMC Entertainment, which owns and operates hundreds of movie theatres in the United States.[118] In 2015, CFIUS cleared the $1.95 billion purchase of the Waldorf Astoria hotel—which 'serves as the home-away-from-home for presidents visiting New York and provides a residence for the U.S. ambassador to the United Nations'—by the Beijing-based Anbang Insurance Group Co.[119] In addition, greenfield investments—which Chinese companies have been making on a increasing scale in the United States[120]—are

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Chinese Mergers & Acquisitions," *The Chinese Journal of International Politics*, 8(1):27. In that article, the authors 'built an original dataset of 569' transactions, announced between 1999 and 2014, 'in which a China-based firm attempted to acquire a company operating or headquartered in the United States'. *Id*. at 29. Working from that dataset, the authors ultimately conclude, with respect to 'M&A attempts by Chinese firms in the United States', that factors of (i) 'Economic Distress' (underperforming industries in the US economy) and (ii) 'Reciprocity' (industries in which US M&A attempts in China have been unsuccessful) have statistically significant relationships with US political opposition. *Id*. at 18, 48, 51.

[117] Mauldin and Kendall, *supra* note [ ].

[118] Jackson CRS Report, *supra* note [ ], p. 9.

[119] James Rosen, 2015, 'U.S. Clears Chinese Purchase of Famed NYC Home to Presidents, Envoys, Celebs', *Miami Herald*, February 4.

[120] According to Rhodium Group figures, from 2000 to 2014, Chinese firms invested more than $5.1 billion in 618 greenfield projects. Rhodium Group, China Investment Monitor, All States/All Industries/2000 to 2014, available at http://rhg.com/interactive/china-investment-monitor. In a report on the second quarter of 2014, Rhodium Group noted 'a recent increase in greenfield investments [by Chinese companies in the United States] and growing average capital expenditures for such projects'. Thilo Hanemann and Cassie Gao, 2014, 'Chinese FDI in the United States: Q2 2014 Update', Rhodium Group, July 25, available at http://rhg.com/notes/chinese-fdi-in-the-united-states-q2-2014-update.

beyond the scope of CFIUS review.[121]
Although the number of covered transactions involving Chinese acquirers has increased sharply in recent years, such covered transactions are a small fraction of the total number of U.S. investments made by Chinese companies.[122] Such unopposed transactions do not generate political controversy and thus tend to receive far less public attention than the transactions that face resistance from the U.S. executive branch and/or the U.S. Congress. This clear—but relatively silent—majority of transactions reinforces the unambiguous U.S. policy that Chinese investment is welcome in the United States and that the United States is committed to maintaining an open investment environment for Chinese investors.[123]

At the same time, however, the obstacles experienced by CNOOC, Tangshan, Northwest, Huawei, Ralls, and other Chinese companies can sharply affect perceptions regarding the extent to which the screening of foreign investment in the United States is free from protectionist and/or political influences. This handful of controversial cases has had a negative impact on Chinese perceptions of the investment environment in the United States. Although the U.S. appeals court decision in the *Ralls* case can mitigate some of that reputational harm, improvements in transparency and due process do not suggest any corresponding changes in the outcomes of CFIUS reviews. Blocking Ralls' ability to participate in wind farm projects in Oregon—with or without due process—will almost certainly have a negative impact on perceptions in China of the regulatory environment for foreign investors in the United States.

The reputational challenge for the United States will be to ensure that the clear, but relatively silent, majority of Chinese investments that now go forward in the United States routinely and without controversy receive the attention they deserve. The need for some $8 trillion in investment over the next 15 years to modernise U.S. infrastructure should provide many opportunities for the U.S. Government to further demonstrate that Chinese investment is welcome in the United States.

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[121] '[C]overed transaction[s]' under [Section 271] are limited to certain 'merger[s], acquisition[s], or takeover[s]'. 50 U.S.C. app. §2170(a)(3).
[122] For example, CFIUS reported 21 covered transactions involving Chinese acquirers in 2013; that same year, according to Rhodium Group figures, Chinese investors entered into 61 greenfield projects and 51 acquisitions in the United States. *See* China Investment Monitor, Rhodium Group, All States/All Industries/2013, available at http://rhg.com/interactive/china-investment-monitor. Notably, only 12 per cent of 569 proposed acquisitions of U.S. targets by Chinese investors announced between 1999 and 2014 faced U.S. political opposition. *See* Tingley, Xu, Chilton, and Milner, *supra* note [ ], p. 39.
[123] *See*, *e.g.*, Joint U.S.-China Press Statements, *supra* note [ ].