Selling Away Our Oil: Protectionism and the True Threat Raised By CNOOC's Attempted Acquisition of Unocal

Kevin McGill

Follow this and additional works at: https://readingroom.law.gsu.edu/gsulr

Part of the Law Commons

Recommended Citation
Available at: https://readingroom.law.gsu.edu/gsulr/vol23/iss3/4

This Article is brought to you for free and open access by the Publications at Reading Room. It has been accepted for inclusion in Georgia State University Law Review by an authorized editor of Reading Room. For more information, please contact mbutler@gsu.edu.
SELLING AWAY OUR OIL: PROTECTIONISM AND
THE TRUE THREAT RAISED BY CNOOC’S
ATTEMPTED ACQUISITION OF UNOCAL

INTRODUCTION

On August 2, 2005 the Chinese company CNOOC, Ltd. (CNOOC) ended its pursuit of Unocal Corp. (Unocal), a large U.S.-based oil company.1 The decision to drop the bid left Chevron Corp. (Chevron), another U.S. oil company, as the sole remaining bidder for Unocal.2 The deal was to have been China’s symbolic entry into the global marketplace and would have marked the first time one of its companies successfully challenged a large U.S. counterpart in a bidding war.3 The proposed deal for Unocal, which would have been the largest foreign acquisition to-date by a Chinese company, was made less attractive by the uncertainty caused by a potentially protracted regulatory approval process and the opposition of U.S. lawmakers, who sought to delay or block a Chinese acquisition of the domestically-based oil company due to national security concerns.4 The bid became a lightning rod for U.S. concerns ranging from the loss of jobs to overseas manufacturers, to skyrocketing oil prices, to the future of our energy security.5

2. See id.
While some officials expressed deep concern over CNOOC’s bid and its effect on U.S. national security, some commentators felt this concern was misplaced and that the deal served as “a convenient grindstone for those with axes to grind.” Generally, corporate takeovers that involve competing bids are hostile, but in a case like the battle for Unocal, where oil, national security, and protectionism are thrown into the mix, the situation can become combustible.

Opposition to the CNOOC deal focused on the company’s ties to the Chinese government, the anti-competitiveness of the deal, and national security issues. This Note will examine the viability of threats raised by the acquisition attempt, the impact that the political climate and regulatory process had on the deal, and finally the potential ramifications for foreign investment in the United States. Part I will provide an overview of the takeover battle between Chevron and CNOOC and the relative strengths of each bid. Part II will begin by examining the regulatory framework for analyzing foreign acquisitions for national security implications and how U.S. access to oil should be evaluated under that framework. Part II will additionally discuss the negative congressional response to the CNOOC offer and the views of those critical of that response. Part III will discuss the major additional concerns that were raised by the CNOOC offer, including the possible transfer of dual-use technology to a hostile military power and the alleged use of unfair competitive practices by the Chinese company. Finally, Part IV will discuss the threats to free markets and economic openness raised by the response to the CNOOC transaction and its potential negative effects on future

9. See discussion infra Part II-IV.
10. See discussion infra Part I.
11. See discussion infra Part II.
12. See id.
13. See discussion infra Part III.
FOREIGN ACQUISITIONS OF U.S. COMPANIES

attempts by foreign firms to acquire U.S. companies. Accordingly, this Note concludes that any heightened scrutiny of foreign acquisitions of U.S. companies could be interpreted as protectionist behavior, which will ultimately serve to harm U.S. economic interests, both here and abroad.

I. OVERVIEW OF THE BATTLE FOR UNOCAL

A. Chevron’s Offer

Chevron originally offered the equivalent of $60.50 per share of Unocal stock on April 4, 2005, consisting of 25% cash and 75% Chevron stock, bringing the total value of the deal to approximately $16.4 billion. Chevron was looking to acquire another oil and gas producer to curb a recent decline in its reserves, which threatened future production capacity. Its reserves had declined 6% in 2004, the third largest drop for a major oil company that year.

The acquisition would not be cheap though, with the $60.50 per share offer equating to about $9.37 per Unocal reserve barrel, approximately one-third more than Chevron had paid for reserves in 2004.

B. CNOOC’s Offer

CNOOC entered the contest on June 23, 2005 with a $67 per share cash offer for Unocal. CNOOC’s offer totaled $18.5 billion, coming in at $1.5 billion more than Chevron’s offer. The offer was the

14. See discussion infra Part IV.
15. See id.
17. See Ng & Cheng, supra note 1.
18. See id.
20. Id.; Carroll & Stewart, supra note 16.
second-highest cash acquisition bid since mid-1999.\textsuperscript{22} The acquisition of Unocal would have increased CNOOC's oil and gas output by 100\% and its reserves by 79\%.\textsuperscript{23}

No other Chinese company had ever attempted a battle the magnitude of which CNOOC faced with acquiring Unocal and few had even been able to acquire sizable assets abroad.\textsuperscript{24} As of early 2005, the communist Chinese government recently allowed companies such as CNOOC to expand abroad to tap worldwide markets for raw materials and resources.\textsuperscript{25} In an effort to meet the energy demands of the world's fastest growing market, CNOOC acquired holdings in oil and gas companies in both Canada and Indonesia beginning in 2002.\textsuperscript{26}

The CNOOC bid came at a time when Chinese oil companies were scouring the globe in search of new supplies of oil and gas because domestic output failed to keep up with rising demand, which has been fueled by the country's rapid growth.\textsuperscript{27} As recently as 1995, China was wholly self-sufficient in its oil consumption, but its economic growth has caused the country to look elsewhere for new supplies, with approximately 39\% of the country's oil having been supplied from abroad in 2004.\textsuperscript{28} As of early 2005, China stood as the second largest energy consumer in the world, only trailing the United States.\textsuperscript{29}

Unocal was an attractive target for CNOOC because 70\% of the company's reserves were located in Asia and the adjacent Caspian


\textsuperscript{23} Ng & Cheng, \textit{supra note 1}.


\textsuperscript{25} See Stewart & Miller, \textit{supra note 22}. China is also motivated to put its large supplies of excess capital to good use. See Joanna Hickey, \textit{Enter the Dragon as Global Predator CHINA: The Chinese Are Scouring the Globe Looking for Acquisition Targets}, FIN. TIMES (London), Oct. 5, 2005, at 2, \textit{available at LEXIS}, News Library, FNTME File. As of October 2005, the country’s current account balance was approximately $700 billion, most of which it was invested in U.S. treasury securities. \textit{See id.}

\textsuperscript{26} Ng & Cheng, \textit{supra note 1}.

\textsuperscript{27} Id.

\textsuperscript{28} See Ng & Cheng, \textit{supra note 19}.

\textsuperscript{29} Hickey, \textit{supra note 25}. 
Sea region, and further, because CNOOC believed it could unlock enormous value by more effectively developing the market potential of Unocal's reserves.  

The deal would also have been costly for CNOOC, which offered the equivalent of $10.55 per barrel of new reserves, amounting to ten times the cost for the company to acquire new reserves the previous year.

C. The Increased Offer and Decision to Sell to Chevron

On July 20, 2005 Chevron increased the value of its offer by approximately 5%, to slightly over $63 per share for Unocal. Chevron also changed the structure of its offer to increase the cash portion to 40%.

CNOOC, however, still remained, with a bid that came at a time of great tension between the United States and China over trade relations. If CNOOC would have prevailed, it would have been a historic event, representing the first time that a Chinese company was victorious in a bidding war versus a large U.S. outfit. The deal also would have made CNOOC the leader in the Asian oil market.

Many analysts felt that Unocal shareholders should have chosen Chevron over CNOOC because the uncertainty caused by the political opposition to the CNOOC deal was simply too risky and that

33. Taylor et al., supra note 32. (discussing the increased offer by Chevron which would have given Unocal shareholders a mix of $27.60 in cash and .618 of a share of Chevron stock and that the exact value of the deal was subject to the volatility of Chevron stock which closed at $57.60 per share on July 20, 2005).
34. See Powell, supra note 3.
35. See id.
36. See Is CNOOC’s Bid for Unocal a Threat to America?, supra note 30.
the potential for a six-month regulatory review would decrease the value of CNOOC's bid by more than $1.50 per share.\textsuperscript{37}

Others favored the deal with the highest financial incentive, which by most standards of measure would have been the CNOOC all-cash offer of $4 more per share.\textsuperscript{38} They also felt that free trade would eventually win out over any objections to the CNOOC bid.\textsuperscript{39}

Ultimately, CNOOC abandoned its offer for Unocal due to political opposition, leaving Chevron as the sole bidder for the company.\textsuperscript{40} Chevron’s sweetened offer had already been approved by the Unocal board of directors on July 19, 2005.\textsuperscript{41} Unocal shareholders then approved the Chevron offer on August 10, 2005, finalizing the fifth-largest acquisition of the year, at that time, and creating the fourth-largest oil company in the world.\textsuperscript{42}

II. OIL SECURITY CONCERNS RAISED BY THE CNOOC DEAL

A. Regulatory Response to the Deal

1. Regulatory Risk

Risk that the regulatory process can slow down or even kill a deal directly impacts the value of a deal to a seller.\textsuperscript{43} Political and


\textsuperscript{38} See Peter Cook et al., Cnooc May Raise Offer for Unocal as Opposition Mounts in U.S., BLOOMBERG NEWS, July 13, 2005, available at LEXIS, News Library, ALLBNN File; Taylor et al., CNOOC’s Move as Unocal Backs Chevron; U.S. Major Hikes Takeover Offer by 5%, supra note 32 (detailing CNOOC’s offer of $67 cash per share versus Chevron’s less the $63 per share offer).

\textsuperscript{39} Cook et al., supra note 38. This feeling is most likely attributable to the longstanding traditions in the United States of economic freedoms, reciprocity amongst nations, openness, and free markets. See discussion infra Part IV.

\textsuperscript{40} Ng & Cheng, supra note 1.


\textsuperscript{42} Joe Carroll & Rob Stewart, supra note 16 (stating that the newly formed company was the fourth largest oil company in the world that is not controlled by a foreign government); CNN/Money Top 25 Deals Year to Date, http://money.cnn.com/news/deals/mergers/biggest.html (last visited Nov. 17, 2005) (stating that the Chevron/Unocal merger was the fifth-largest merger of 2005).

\textsuperscript{43} See William G. Lawlor et al., Dealmaking Remedies to Cushion the Jolt of Regulatory Rejection in a Dicey Regulatory Climate, Merger Parties Should Take Up-front Steps to Pick the Right Partner.
regulatory obstacles cannot be overcome simply by a buyer offering a higher price.\textsuperscript{44} Sellers will often trade a higher price for the certainty of regulatory approval offered by another suitor.\textsuperscript{45} The threat of a protracted regulatory process weighed heavily on the CNOOC bid from the outset, making it less attractive to Unocal and ultimately leading CNOOC to abandon its offer.\textsuperscript{46}

2. **Overview of the Regulatory Process**

Despite the economic benefits of foreign investment, national security concerns frequently counteract the general trend toward globalization and open markets, and provide a potential barrier to completing a non-domestic acquisition.\textsuperscript{47} Foreign acquisitions of U.S. companies that involve national security issues are reviewed under the Exon-Florio Amendment to the Defense Production Act of 1950 (Exon-Florio).\textsuperscript{48} Exon-Florio authorized the President to investigate proposed transactions to evaluate their impact on U.S. national security.\textsuperscript{49} President Reagan designated the authority to conduct such inquiries to the Committee on Foreign Investment in the United States (CFIUS), which includes representatives of certain U.S. agencies and is chaired by the Secretary of the Treasury.\textsuperscript{50}

\textsuperscript{44} See Taylor et al., \textit{supra} note 32.
\textsuperscript{45} See id.
\textsuperscript{46} See Cheng & Ng, \textit{supra} note 4; Ng & Habiby, \textit{supra} note 4.
\textsuperscript{47} See Christopher R. Fenton, Note, \textit{U.S. Policy Towards Foreign Direct Investment Post-September 11: Exon-Florio in the Age of Transnational Security}, 41 \textit{COLUM. J. TRANSNAT'L L.}, 195, 196-97 (2002). While there is some debate on the overall economic benefits of foreign investment, it appears that both investors and investees perceive such benefits to exist, given the increases in foreign investment and the efforts of nations to encourage it. See id. at n.3.
\textsuperscript{50} See Spiegel et al., \textit{supra} note 48. President Reagan issued an executive order that granted the Secretary of the Treasury the power to perform all functions of the President under the Defense
The President has wide latitude in determining the appropriate course of action to take under Exxon-Florio. Upon a determination by the Secretary of Treasury and CFIUS that an acquisition poses a sufficient threat to national security, the President can require modification of a deal to mitigate a threat or can even block a deal in its entirety. Such a national security threat determination requires a finding of "credible evidence that leads the President [based on a CFIUS review] to believe that the foreign interest exercising control might take action that threatens to impair the national security." Presidential action under Exxon-Florio is not subject to judicial review.

Exxon-Florio was subsequently strengthened by the Byrd Amendment, which limited the discretionary nature of the review

Production Act of 1950, relating to mergers and acquisitions that could threaten national security, including chairing CFIUS. Interim Directive Regarding Disposition of Certain Mergers, Acquisitions, and Takeovers, 53 Fed. Reg. 43,999 (Nov. 1, 1988). The Secretary of the Treasury was required to consult with the CFIUS to take actions that he deems fit under the Defense Production Act of 1950. Id. CFIUS includes representatives from the Department of Commerce, Department of the Treasury, Department of Defense, Department of State, Department of Justice, Department of Homeland Security, Council of Economic Advisers, Office of the United States Trade Representative, Office of Management and Budget, National Economic Council, National Security Council, Office of Science and Technology Policy, GOV'T ACCOUNTABILITY OFFICE, DEFENSE TRADE: ENHANCEMENTS TO THE IMPLEMENTATION OF EXON-FLORIO COULD STRENGTHEN THE LAW'S EFFECTIVENESS, REPORT NO. 05-686 (2005).

51. See Defense Production Act of 1950, 50 U.S.C. app. § 2170(d) (2000) (authorizing the President to take any action for any amount of time that he deems appropriate, including suspending or prohibiting a transaction in order to prevent a threat to national security).

52. Id. The statute does not require the Secretary of Treasury or CFIUS to make the finding, but the President has delegated this authority to them. The President can direct the Attorney General to enforce the President's determination under Exxon-Florio through judicial means, but his determination is not subject to review by the judicial branch. Id.; FOREIGN INVESTMENT ON U.S.: HEARING BEFORE THE SENATE COMM. ON BANKING, HOUS. AND URBAN AFFAIRS, 109th Cong. (2005) (statement of Robert M. Kimmit, Deputy Sec'y, U.S. Dept' of the Treasury).


54. Fenton, supra note 47, at 210. Though the judicial branch plays no role in the review of foreign acquisitions of U.S. companies, the President is required to report to Congress once CFIUS has completed an investigation, whether or not he has determined to take action. Id. at n.77. The President is also required to submit a report to Congress once every four years, which details whether there has been a coordinated effort by one or more countries to acquire United States research and development companies or producers of critical technology, or industrial espionage coordinated with the help of a foreign nation with the intent of acquiring access to U.S. critical technologies. Defense Production Act of 1950, 50 U.S.C. app. § 2170(k) (2000).

55. Defense Production Act of 1950, 50 U.S.C. app. § 2170(b) (2000). The Byrd Amendment added the language that requires the President or his designee to investigate "any instance in which an entity controlled by or acting on behalf of a foreign government seeks to engage in any... acquisition..."
Authorization by mandating that investigations be performed for transactions directly or indirectly involving a foreign government and national security. Specifically, the Byrd Amendment requires an investigation be performed when a foreign nation or company controlled by a foreign nation attempts to consummate a transaction that could affect national security.

This amendment also requires that the President submit a written report to Congress stating his determination and explaining his reasoning for either taking action or not taking any action. Previously, such reports were only required when the President decided to take affirmative action on a proposed deal.

Although CNOOC voluntarily filed a request for CFIUS to review its deal with Unocal, such a review could not begin until an offer received shareholder approval. In addition to potentially delaying an acquisition up to 90 days after a favorable shareholder vote, the CFIUS review process adds risk and uncertainty to an acquisition by a foreign entity because it fails to provide adequate guidance on what specifically falls into the realm of "national security." Exxon-Florio allows the President to define national security on an ad hoc basis.

In an effort to afford broad discretion to the President to determine which could result in control of a person engaged in interstate commerce in the United States that could affect the national security of the United States."


Defense Production Act of 1950, 50 U.S.C. app. § 2170(g) (2000) (mandating that a written report be submitted that includes the President's determination of whether or not to take any action, a detailed explanation of his findings on what credible evidence exists that leads him to believe or not believe that the foreign interest might take action that threatens national security, and any specific factors considered in his determination, including the effects on defense production requirements and the military capability of any nation that supports terrorism or is a nuclear, chemical, or biological weapon concern); Ronald D. Lee, The Dog Doesn't Bark: CFIUS, the National Security Guard Dog with Teeth, 8 M & A Law. 5, 7 (2005).

See Lee, supra note 58, at 7.


See Spiegel et al., supra note 48.

what specifically constitutes a national security issue, Congress intentionally left the term undefined.\textsuperscript{63}

However, the failure of Congress to clearly define the term "national security" has become the most controversial aspect of Exon-Florio.\textsuperscript{64} While superficially serving to protect U.S. national security, Exon-Florio's ambiguously vague use of the term opens the door for its use as a protectionist weapon.\textsuperscript{65} Because of this vagueness, Exon-Florio could be used as either a figurative shield to protect domestic industry from foreign investment or a sword to open up foreign markets traditionally resistant to U.S. competition.\textsuperscript{66}

3. \textit{Oil as a National Security Issue}

Though Exon-Florio failed to clearly define "national security" it did outline a number of factors to be considered during the review process that reveal its original aim to prevent foreign control of sensitive defense technology.\textsuperscript{67} Of the 1,520 transactions that were submitted to it from 1988 through early 2005, CFIUS conducted a full review of only 24 for national security concerns.\textsuperscript{68} Historically,

\textsuperscript{63} See Fenton, supra note 47, at 205-06.

\textsuperscript{64} See Cappucci, supra note 49, at 679. The ambiguity of this term has led to a great deal of skepticism by foreign critics, one of whom referred to the term being "as malleable as a freshly baked baguette" when considered as part of a CFIUS review. See Mark MacGann, \textit{Singling Out France Is Unfair in Silly Season of Sun and Rose}, \textit{FIN. TIMES} (London), Sept. 12, 2005, at 14, available at LEXIS, News Library, FNTME File (letter to the editor from a Belgian citizen complaining about a story that highlighted French protectionist measures undertaken in response to a bid by PepsiCo, a U.S. company, for Danon, a French outfit and comparing it to CFIUS process in the United States where "national security" is not defined).


\textsuperscript{66} Fenton, supra note 47, at 211-12.

\textsuperscript{67} See Defense Production Act of 1950, 50 U.S.C. app. § 2170(f) (2000) (detailing the following list of factors that may be considered in rendering a national security determination: national defense requirements; the ability of domestic production to meet defense needs; the extent to which foreign control of domestic activity affects defense capabilities; the effect on military equipment or technology sales to certain countries; and effects on U.S. technological leadership in an area affecting national security); see also Fenton, supra note 47, at 198 (stating that the original intent of Exon-Florio was to prevent foreign control of sensitive technologies).

\textsuperscript{68} See Lee, supra note 58, at 7.
Exxon-Florio has been interpreted narrowly, only being used to block one transaction from its enactment through early 2005. 69

CFIUS reviews have typically involved examinations of possible transfers of sensitive defense-related technologies, such as the design and production of jets, bombs, and submarines. 70 CFIUS has been reluctant to find national security an issue in acquisitions involving non-defense related technology, but as of early 2005, CFIUS reviews had begun placing greater emphasis on protecting the country’s critical infrastructure. 71 Given its broad discretionary nature, though, the term “national security” could be interpreted to include a wide range of economic policy concerns. 72

Whether access to oil constitutes a national security issue that should be reviewed under Exxon-Florio is a source of disagreement amongst lawmakers and experts. 73 Beginning in the mid-1970’s with the oil embargo, certain high-ranking U.S. officials included economic independence, and more specifically assured access to oil, under the umbrella of national security. 74

If we are to accept a broader definition of the term such as the one offered by foreign policy expert George Kennan, who defined national security as "the continued ability of this country to pursue its internal life without serious interference," then disruption in oil imports most certainly poses a threat to U.S. national security, because such a disruption could seriously interfere with the country’s ability to carry on its internal life. 75 Furthermore, the greater the

69. See Fenton, supra note 47, at 198.
71. See Graham & Marchick, supra note 62; Spiegel et al., supra note 48.
72. See Shearer, supra note 65, at 1732-33.
73. See discussion infra Parts II.A.3, II.B.
dependence on foreign sources of oil, the greater the possibility of interference and the corresponding threat to national security. However, treating oil, a commodity traded freely on the world market, as an issue of national security would constitute a clear departure from the historical scope CFIUS reviews.

B. Political Response to the Deal

1. CNOOC Finds Opposition in Washington

Congressional efforts to prevent a narrow interpretation of "national security" were a cause of concern for many foreign investors. When CNOOC submitted a bid higher than Chevron, members of Congress quickly objected to the deal, displaying concern over the security risks posed by a CNOOC purchase. Those skeptical of the deal felt that the oil market is changing, with supplies tightening and demand rising, especially in emerging markets such as China and India, leading to the argument that oil is now a national security issue. These concerns display the growing friction amongst the world's largest economies over increased competition for energy resources.

CNOOC’s biggest problem was that its bid coincided with growing concern in Congress over the relationship with China on a number of economic and policy fronts. The United States has recently held an ambivalent view towards China, undecided as to whether the country should be treated as a Communist enemy or as a business partner,
with whom ties are certain to grow stronger as business relationships continue to bridge the gap between the two nations.\textsuperscript{83}

Critics of the deal felt that CNOOC would shift control of Unocal’s strategic energy assts to the Chinese government.\textsuperscript{84} The idea of a company with significant support from the Chinese government purchasing an American oil company united many members of Congress into opposing the bid and characterizing it as a threat to national security.\textsuperscript{85} Many members echoed the concerns of Representative Bob Ney who felt it “imperative that the United States protect its access to Unocal’s energy resources in order to protect our economy and our national security.”\textsuperscript{86} It can be deduced that many members of Congress certainly felt reduced access to oil, specifically CNOOC’s proposed purchase of Unocal, posed a serious risk to U.S. national security.\textsuperscript{87}

As another example, Representative Joe Barton, chairman of the House Energy and Commerce Committee, and a vocal opponent of the deal, rallied support for its rejection because he felt it “would be a mistake under almost any circumstance, but it would be especially egregious at a time when energy markets are so tight and the United States is becoming even more dependent on foreign sources of energy.”\textsuperscript{88}

Testifying before the House Armed Services Committee, Joe Gafney, former Assistant Secretary of Defense in the Reagan administration and then President of the Center for Security Policy, stated that the CNOOC deal was a move by the Chinese government

\begin{footnotesize}
\begin{enumerate}
\item See Is CNOOC’s Bid for Unocal a Threat to America?, supra note 30.
\item See id.
\item Mouawad & Barboza, supra note 24.
\item 151 CONG. REC. H5570, 5571 (daily ed. June 30, 2005) (statement of Rep. Ney). The House debated House Resolution 344, which would have required the President to immediately review any takeover by CNOOC. Id.; see also Efshathou, supra note 6 (discussing other Congress members echoing the concerns of Rep. Ney).
\item See discussion infra Part II.B.
\end{enumerate}
\end{footnotesize}
to control energy resources for its own economic and military benefit.\textsuperscript{89}

Implied in the sentiments of some in Congress that it was necessary to “protect American business”\textsuperscript{90} or “send a much needed strong signal to China,”\textsuperscript{91} is the implementation of both the metaphorical shield (protect domestic industry) and sword (open up the Chinese market) of protectionism.\textsuperscript{92} Arguably attempting to further strengthen these weapons, Congress passed a bill to delay any potential acquisition and considered a proposal that would prevent such a deal altogether.\textsuperscript{93} The House also adopted a resolution that required an immediate review of a possible purchase of Unocal by CNOOC upon consummation of an agreement between the two.\textsuperscript{94}

Some congressional advisory groups had also pushed for CFIUS review of national security to include issues of economic concern, such as access to oil supplies.\textsuperscript{95} However, given the reluctance of CFIUS to find issues of national security absent a transfer of defense-related technology, this would be a serious departure for the Committee.\textsuperscript{96}

2.Opponents of Congressional Action

\textsuperscript{89} Efstatiou, supra note 6.
\textsuperscript{91} Id. at 5572 (statement of Rep. Hayes).
\textsuperscript{92} See Fenton, supra note 47, at 211-12. Using Exxon-Florio as a shield would occur if the CFIUS national security review was to include economic or technological interests, utilizing those factors to prevent foreigners from acquiring domestic companies. Id. at 211-12. Using Exxon-Florio as a sword would occur if the United States used it to force open foreign markets or cure anti-competitive practices by other countries or foreign companies, by “deploying” its own protectionist measures in response to the actions of these foreign actors. Id. at 212.
\textsuperscript{93} See Ng & Cheng, supra note 1 (requiring in an amendment to the Energy Policy Act of 2005 that the Secretaries of Defense, Energy and Homeland Security review any Chinese acquisition of a U.S. oil company for 120 days and stating clearly in Senate Bill 1412 that a sale of Unocal to CNOOC should be prohibited because of concerns mirroring those discussed infra Parts II.B, III.A-B).
\textsuperscript{94} H.R. Res. 344, 109th Cong. 344 (2005) (resolving that CNOOC through its control of Unocal could take action that would threaten national security, and if an agreement is reached between the two companies that the President should immediately initiate a review of the transaction).
\textsuperscript{95} Lohr, supra note 70 (discussing attempts by a bipartisan congressional advisory group to have Exxon-Florio amended to specifically include economic security matters, including oil and energy as considerations during the review process).
\textsuperscript{96} See id.; Spiegel et al., supra note 48.
Many opposed to congressional action felt that the CNOOC deal was a “convenient grindstone for those with axes to grind,” and that those opposing it were basing their opposition on concerns not related to the deal itself. In contrast to the beliefs of many in Congress, most energy experts felt that the risk to the nation's oil supply simply did not exist. They argued that many critics of the deal painted a misleading picture of its consequences by failing to mention that the majority of Unocal's assets were located abroad and further that CNOOC promised to sell off all of Unocal’s U.S.-based assets, leaving the Company with access to assets primarily based in Asia.

Jerry Taylor, an analyst at the Cato Institute, for instance, felt that CNOOC’s purchase of Unocal would not have posed a threat to the United States in the oil market, because it would not have had a noticeable impact on the supply of oil available for purchasers, including the United States. Supporting this notion is the fact that Unocal only holds 1.20–1.75 billion barrels of oil-equivalent (oil and natural gas) reserves, or approximately 1 – 1.5% of the world market. Additionally, almost two-thirds of Unocal’s annual output is natural gas, rather than oil.

Others pointed out the shortsightedness of congressional criticism of the deal, stating that, in fact, Chinese investment in global resources could ultimately increase production capacity, thereby benefiting the United States with lower oil prices. Further, many experts agreed that owning oil is not vital to national security and that controlling reserves does not provide additional security, so long as it

97. Efstatiiou, supra note 6.
98. See Powell, supra note 79.
100. See Ng & Cheng, supra note 1.
101. See Jay Newton-Small et al., CNOOC 'Prepared' to Persuade U.S. to Allow $18.5 Bln Unocal Bid, supra note 31; Lawmaker Pledges to Kill CNOOC/Unocal Deal, GAS DAILY, July 14, 2005, available at LEXIS, News Library, GASDLY File.
102. Efstatiiou, supra note 6.
103. How to Converse with China, BUS. WK., Sept. 12, 2005, at 112.
is a commodity available on the worldwide market.\textsuperscript{104} Therefore, even if a CNOOC acquisition of Unocal would have caused more oil to be directed to China, it would have had no net effect on U.S. interests, because such imports would only replace oil China would otherwise obtain from other sources.\textsuperscript{105}

The minority of those in Congress not opposed to the deal, such as Representative Mark Kirk, pleaded with the rest of the House to let market forces work themselves out and to let freedom prevail in the acquisition of companies.\textsuperscript{106} He further warned the other members of the repercussions that could be caused by a decision to block the deal, such as the potential termination of certain cancelable U.S. investments in China, which, at the time, amounted to approximately $25 billion.\textsuperscript{107}

Laura D’Andrea Tyson, Dean of the London School of Business, reiterated this warning by suggesting that China could curtail the inflow of U.S. capital into its borders, a scenario that could shift the balance of the current tilt in favor of U.S. investment in China, which amounts to $60 billion versus the mere $2 billion that the Chinese have invested here.\textsuperscript{108} Another financial concern was that the vehement opposition to the deal came not from the owners of either of the companies but rather from the “economic patriots” who never inquired of management or shareholders whether protection from foreign investment was warranted.\textsuperscript{109}

Finally, even if access to oil was determined to be a national security issue and subjected to a CFIUS review, some argue that the CNOOC deal would have almost assuredly passed.\textsuperscript{110} They reasoned

\textsuperscript{104} Lohr, supra note 70. But see Ebel, supra note 75 (stating that United States national security is in more danger now than at the time of the Arab oil embargo, because of increased dependence on foreign sources of oil).
\textsuperscript{105} Efstathiou, supra note 6.
\textsuperscript{107} Id.
\textsuperscript{109} See Guerrera & McGregor, supra note 99, at 21.
that because Unocal was clearly not large enough to influence the world market price of oil, the acquisition should not have been a concern for the United States.\footnote{See id. at 1-2.}

In short, many believed the fear that the United States is potentially providing China with an oil weapon that could be used to harm our national security was simply ill-founded, because oil is readily accessible by the United States on the world market, Unocal’s reserves were not sufficient to impact global prices, and any attempt to use such a weapon would backfire on the Chinese by driving up prices worldwide and harming its own economy more than that of the United States.\footnote{See id.}

III. ADDITIONAL CONCERNS RAISED BY CNOOC’S ATTEMPTED ACQUISITION

A. Dual-Use Technology

Much of the concern raised by lawmakers surrounded “dual-use” technology, which is defined as items that could have both potential civilian and military capabilities.\footnote{Ron Orol, House Makes New Move to Block CNOOC, DAILY DEAL, July 1, 2005, available at LEXIS, News Library, DADEAL File.} Such dual-use technology is frequently examined as part of a CFIUS review.\footnote{Lohr, supra note 70.} Specifically, lawmakers who expressed their concerns in this area focused on certain oil and gas captivation equipment, which is used to locate deep-ocean energy deposits, but could also be used to map submarine movements.\footnote{See Orol, supra note 113.}

Congressmen such as Joe Barton and Ralph Hall felt that control of such technology was particularly important given the threat that China poses to U.S. allies in Asia and our own national security interests.\footnote{Orol, supra note 88.} Lawmakers had previously considered further restricting

reasons why, even if oil is a national security issue and CNOOC purchased Unocal, America will still be able to purchase all the oil it needs).
the flow of dual-use technology to China, by tightening U.S. export controls and attempting to limit the sale of such technology to China by other countries.\textsuperscript{117} Both CNOOC and Unocal attempted to allay these fears by pointing out that the technology in question was owned by third-party service providers that assist Unocal and other big oil companies in their seismic and drilling techniques.\textsuperscript{118} CNOOC also pointed out that such technology was readily available on the open market for purchase.\textsuperscript{119}

Furthermore, any additional restrictions on the transfer of dual-use technology were likely to be ineffective, primarily because there are fewer dual-use items uniquely held by the United States, and because other nations do not consider transferring such technologies to China to be a security threat.\textsuperscript{120} By restricting access to its own dual-use technologies, the United States jeopardizes its own access to any future technologies that might be developed elsewhere.\textsuperscript{121} Given the likelihood that many future scientific innovations will occur in foreign countries rather than the United States, such a risk could prove costly.\textsuperscript{122}

B. Unfair Competition

U.S. lawmakers also questioned the financing arranged for CNOOC’s purchase of Unocal, which included $7 billion in low and zero interest loans from its parent corporation, a state-controlled company.\textsuperscript{123} Such financing was estimated to save CNOOC

\begin{footnotesize}
\begin{enumerate}
\item[118. ] Bill Holland et al., \textit{House Voices Opposition to CNOOC-Unocal; Resolution Calls Deal Threat to US Energy Supply, National Security}, PLATTS OILGRAM NEWS, July 1, 2005, at 1, \textit{available at LEXIS, News Library, PONEWS File; Orol, supra note 113}.
\item[119. ] Holland et al., \textit{supra} note 118.
\item[120. ] Segal, note 117.
\item[121. ] \textit{See id.} \textsuperscript{118}
\item[122. ] \textit{See id.} \textsuperscript{119}
\item[123. ] \textit{See Ng & Cheng, supra} note 1. Although CNOOC was listed on both the New York and Hong Kong stock exchanges, a state-owned company controlled approximately 70\% of CNOOC’s total outstanding stock. \textit{See} Francesco Guerrera & Richard McGregor, \textit{CNOOC Willing to Ask Beijing to}
\end{enumerate}
\end{footnotesize}
anywhere from $700 million to $5 billion over the 30-year terms of the loans.\textsuperscript{124} That translated into a potential discount of up to $18 per share off of the purchase price for Unocal.\textsuperscript{125} Many individuals saw these savings as nothing more than direct subsidies from the Chinese government.\textsuperscript{126}

CFIUS reviews did not take into specific account such economic concerns.\textsuperscript{127} Many lawmakers have sought to enhance the CFIUS process to ensure that economic national security is included in all reviews.\textsuperscript{128} In a letter to the President, Senators Charles Grassley and Max Baucus requested that any CFIUS review of the CNOOC deal examine the potential impact of what they believed to be these unfair loans.\textsuperscript{129}

Critics characterized the proposed deal as a strategic move by the Chinese rather than a normal business transaction.\textsuperscript{130} Some believe that Chinese companies, such as CNOOC, do not operate as normal commercial enterprises, but rather as extensions of government-owned parent companies which follow the political will of the Chinese government, and are bound by such state-financing and control structures.\textsuperscript{131} They contend that the CNOOC bid was prompted by the Chinese government as part of its “go out” policy to shore up its energy resources for the future.\textsuperscript{132}


\textsuperscript{124} See Allan Sloan, Parent's Help Puts CNOOC Bid in a Different Light, WASH. POST, July 26, 2005, at D02, available at LEXIS, News Library, WPOST File.

\textsuperscript{125} Id.

\textsuperscript{126} See id.

\textsuperscript{127} See Defense Production Act of 1950, 50 U.S.C. app. § 2170(f) (2000) (detailing the following list of factors that may be considered in rendering a national security determination: national defense requirements, the ability of domestic production to meet defense needs, the extent to which foreign control of domestic activity affects defense capabilities, the effect on military equipment or technology sales to certain countries, and effects on U.S. technological leadership in an area affecting national security).


\textsuperscript{129} See Holland & Loveless, supra note 8.

\textsuperscript{130} See id.

\textsuperscript{131} See id.; Sloan, supra note 124.

\textsuperscript{132} See Powell et al., supra note 79, at 24. The Chinese government adopted this “go-out” strategy, under which it encouraged Chinese companies to seek out new business opportunities that would fuel
Such criticisms were a cause of concern for top management at CNOOC, so much so that the company’s Chairman and CEO stated that he was willing to ask the Chinese government to reduce its ownership interest in the company, in order to change the perception that CNOOC is government-run.\textsuperscript{133} However, such financing arrangements are certainly not illegal and it would be somewhat ironic to criticize them, given that Chevron, like any large American corporation, has financially benefited from any number of U.S. government programs and aid over the years.\textsuperscript{134}

Critics also believed that the deal was not proceeding on a level playing field, as a U.S. energy company could not have similarly purchased a Chinese company.\textsuperscript{135} The Chinese government in fact does not allow foreigners to hold more than 50% of most energy companies, but does allow full foreign control of exploration companies.\textsuperscript{136} China’s import barriers are also some of the lowest in the history of the modern geopolitical economy.\textsuperscript{137} However, it would appear hypocritical of the United States to prevent certain types of investment from outside its borders, while openly accepting many others, such as the Chinese government’s multi-billion dollar investment in U.S. treasury securities, which, at the time, made China the second-largest foreign creditor to the United States government.\textsuperscript{138}

\begin{footnotesize}
\begin{enumerate}
\item[133.] See Guerrera & McGregor, supra note 99. CNOOC’s chairman and chief executive officer stated that it was very likely that the company would ask the Chinese government to reduce its ownership stake in order to change the perception that because the Chinese government owns a majority stake in the company that the company is run by the government. \textit{Id.}
\item[134.] Sloan, \textit{supra} note 124.
\item[135.] Powell et al., \textit{supra} note 79, at 24.
\item[138.] See \textit{Is CNOOC’s Bid for Unocal a Threat to America?}, \textit{supra} note 30; Major Foreign Holders of Treasury Securities, http://www.ustreas.gov/tic/mfh.txt (last visited Nov. 17, 2005) (listing by the U.S. Treasury Department of the major foreign holders of U.S. treasury securities).
\end{enumerate}
\end{footnotesize}
IV. THE TRUE THREAT RAISED BY CNOOC’S BID AND ITS FUTURE IMPACT ON FOREIGN ACQUISITIONS

A. The True Threat

In the end, economic nationalism in the form of U.S. political opposition prevented Unocal shareholders from obtaining the highest possible price for the deal and did not address any valid national security concerns.\(^{139}\) Expansive review of foreign acquisitions under Exxon-Florio contravenes a longstanding policy of encouraging foreign direct investment in this country.\(^{140}\) Reciprocity has long been the foundation of U.S. trade policy.\(^{141}\) In the future, national security concerns will create increased opportunities to restrict foreign investment in this country.\(^{142}\)

As a more recent example, in response to the CNOOC bid, a bill was referred to the Senate Banking, Housing and Urban Affairs Committee that would give Congress greater oversight of the review process, setting up a mechanism for Congress to effectively override any recommendation by CFIUS or decision of the President related to foreign merger approval.\(^{143}\) The measure would allow committees in the House and Senate to mandate a CFIUS review of a transaction, even if CFIUS itself has initially determined that the deal poses insufficient national security concerns to merit a full review.\(^{144}\) The bill would also lengthen the review process by 30 additional days and list “the long-term projections of United States requirements for sources of energy and other critical resources and materials and for economic security” as factors that the President or CFIUS may consider in assessing national security risk.\(^{145}\)

\(^{139}\) See Guerrera & McGregor, supra note 99, at 21.
\(^{140}\) See Rosen, supra note 74, at 85.
\(^{141}\) Id. at 87.
\(^{142}\) Fenton, supra note 47, at 249.
However, increasing the scope of the review process will undoubtedly be characterized as protectionist behavior by U.S. trading partners and could deprive the country of critical foreign investment.\(^\text{146}\) Such changes would certainly hamper foreign investment in the United States, which should be a paramount concern given the country’s need to reduce its current account imbalance.\(^\text{147}\)

**B. Future of Foreign Acquisitions of U.S. Companies**

If regulatory review is made more expansive, companies in countries such as China, whose economic expansion will likely continue, might divert investment dollars to nations other than the United States, including nations that are not overly amicable with this country such as Iran and Sudan.\(^\text{148}\) The CFIUS review process serves as a sufficient means to examine foreign acquisitions and should be allowed to work as intended, without intervention by Congress.\(^\text{149}\) Politicizing the process through congressional pressure would set a dangerous precedent going forward.\(^\text{150}\) It could very easily lead to politicians blindly thwarting any acquisitions that would negatively impact their own districts or states.\(^\text{151}\) In the words of one analyst, “[i]f our process is . . . subject to political intervention, and not a true national security review, then we ought to be prepared for that to happen when a U.S. company wants to make an investment in China.”\(^\text{152}\)

146. Rosen, supra note 74, at 86.
147. See Graham & Marchick, supra note 62. China’s rise in the global economy has resulted in the United States running a large deficit in its current account. Id. This deficit, which is caused by China exporting more goods and services than it imports from the United States, is likely to continue for many years into the future. Id.
148. See Bradsher, supra note 5.
150. See id.
CFIUS should be permitted to operate in a politically impartial environment, applying a clear framework that leads to predictable results. The committee should continue to operate under the presumption that foreign investment benefits both the foreign investor and the United States. Changes to the review process, such as those suggested by lawmakers, should not be made because they would switch this presumption to one that discourages foreign deals. The United States should continue to prevent acquisitions that truly threaten national security, but should be mindful that any changes to the current system could have a significantly damaging impact on this country's economic interests both here and abroad. The United States benefits tremendously from its economic openness to foreign takeovers and should continue to set the example for freedom by which other nations will follow.

CONCLUSION

Though the CNOOC bid for Unocal ultimately failed because of political pressure applied by members of Congress and the uncertainty of a protracted regulatory approval process, its withdrawal is unlikely to discourage either CNOOC or the Chinese government from continuing their attempt to expand abroad and search for new sources of energy supplies. While opponents of the deal quickly pointed to national security concerns, unfair competitive practices, and an evaporating oil supply as reasons it should be prevented, the true threat raised by the bid is the possibility of increased use of

155. See id.
158. See Bradsher, *supra* note 5; Cheng & Ng, *supra* note 4; Lague, *supra* note 81; Ng & Cheng, *supra* note 1; Ng & Habiby, *supra* note 4.
protectionist trade barriers, which would lead to a decrease in beneficial foreign investment in the United States.\textsuperscript{159}

The United States should continue to review foreign acquisitions for issues that concern the security of this nation, but should do so while maintaining the proper balance between this country's longstanding tradition of encouraging foreign investment and the need to address issues that truly constitute threats to our national security.\textsuperscript{160}

\textit{Kevin McGill}

\textsuperscript{159} See discussion infra Parts II-IV.
\textsuperscript{160} See discussion infra Parts IV.B.