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Dubai or not Dubai?: A Review of Foreign Investment and Acquisition Laws in the U.S. and Canada

Chris Lalonde

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NOTES

Dubai or not Dubai?: A Review of Foreign Investment and Acquisition Laws in the U.S. and Canada

ABSTRACT

The proposed purchase of a British company that controlled several ports in the United States by Dubai Ports World could accurately be described as one of the most politically contentious acquisitions in U.S. history. The transaction raised questions not only about U.S. foreign investment laws but provoked national security concerns, as well. Similar issues were raised more recently during the acquisition of a share in Nasdaq by the Dubai stock exchange. In the same vein, Canada has seen similar issues arise during recent transactions involving domestic companies—most notably the acquisition of PrimeWest Energy by TAQA, the national energy company of Abu Dhabi. This Note attempts to address the efficacy of the foreign investment laws of both the U.S. and Canada in light of the political disputes that have surrounded a number of transactions in recent years. The Note concludes that the best result for both countries would be to maintain rigorous review standards while also establishing a climate favorable to foreign investment. To this end, this Note suggests the creation of Conciliation Committee, a bi-partisan legislative committee that would act as a mediator between the government and the parties to a contentious deal to ensure that all sides are satisfied and that the deal will ultimately go through.

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I. INTRODUCTION

Weighing in at number one on the U.S. Fortune 500, with over 6,775 retail stores is the behemoth known as Wal-Mart.[1] The company has become an international force by not only as the number one retailer in both Canada and Mexico, but also by owning a 95% stake in the Japanese retail company SEIYU and opening stores in Asia, Europe, and South America.[2] Meanwhile, topping Forbes' list of the largest Canadian companies is Royal Bank of Canada (Royal

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1. Hoovers, Wal-Mart Company Description, http://hoovers.com/wal-mart/--ID__11600--/free-co-profile.xhtml (last visited Oct. 27, 2008).
2. *Id.*

Bank), with over $20.7 billion in sales in 2007.[3] Royal Bank has also seen its fortunes grow internationally, as the Bank now has offices in over thirty countries, including the United States.[4] While both countries are undoubtedly pleased to see their homegrown companies expand internationally, this development raises a question concerning the response of each country in the face of an international corporation looking to compete with or acquire a domestic business.

In both the United States and Canada, policies directed at foreign investments and acquisitions have long been a topic of contentious debate at a volume much louder than other countries.[5] Recent events in each country have reignited the debate over the proper legal response to a foreign company looking to invest in or acquire a domestic company. With national security concerns often on the forefront of people's minds, the debates have become more political and heated in recent years. These debates have raised a number of questions in both countries as to how these cases should be handled by the law.

This Note focuses on the recent laws that emphasize government review of foreign investment and, in particular, foreign acquisitions in both the United States and Canada. Part II starts by providing a brief historical overview of the U.S. approach under the Committee on Foreign Investment in the United States (CFIUS) and the Exon–Florio Amendments. It then summarizes recent changes in the law and considers both sides of the debate over these changes. Part III examines the Canadian system under the Investment Canada Act by providing both a brief overview of the history of the law and examples of current attitudes towards the system and the debate over whether changes are necessary. Part IV focuses on recent transactions in each country that have raised foreign investment issues. These include the proposed CNOOC, Dubai Ports, and NASDAQ deals in the U.S., as well as the PrimeWest acquisition in Canada. Finally, Part V analyzes the benefits and drawbacks of each approach while offering suggestions on maintaining a standard of strict review while

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3. Forbes.com, The Largest Companies in Canada, http://www.forbes.com/lists/2005/182/Rank_1.html (last visited Oct. 27, 2008).

4. Hoovers, RBC Financial Group Company Description, http://hoovers.com/rbc-financial-group/--ID__41448--/free-co-profile.xhtml (last visited Oct. 27, 2008).

5. *See* Gaurav Sud, Note, *From Fretting Takeovers to Vetting CFIUS: Finding a Balance in U.S. Policy Regarding Foreign Acquisitions of Domestic Assets*, 39 VAND. J. TRANSNAT'L L. 1303, 1315 (2006) (discussing the importance of monitoring foreign investment); *see also* Matthew R. Byrne, Note, *Protecting National Security and Promoting Foreign Investment: Maintaining the Exon–Florio Balance*, 67 OHIO ST. L.J. 849, 856 (2006) (describing the creation of the Committee on Foreign Investment in the United States). *See generally* Jean Raby, *The Investment Provisions of the Canada-United States Free Trade Agreement: A Canadian Perspective*, 84 AM. J. INT'L L. 394 (1990) (discussing the negotiations and reasoning behind the Free Trade Agreement).

simultaneously promoting foreign investment and sustaining a pro-investment image globally.

II. THE U.S.: CFIUS AND THE EXON–FLORIO AMENDMENTS

A. *History of CFIUS and the Exon–Florio Amendments*

Gerald Ford created CFIUS in 1975 with the signing of Executive Order 11,858.[6] At the time, CFIUS consisted of six members and was tasked with "monitoring the impact of foreign investment in the United States" and "coordinating the implementation of United States policy on such investment."[7] It has been posited that the major external motivation for the creation of CFIUS was the earlier establishment of the Organization of Petroleum Exporting Countries (OPEC), which gave oil exporting nations extra capital that could have been used to purchase U.S. assets.[8]

Fears of such transactions were realized in cases such as the 1981 proposed transaction between the Kuwait Petroleum Company and the U.S.-based Santa Fe International Company.[9] The U.S. government did not approve of the transaction; however, under the original Executive Order, neither CFIUS nor the President possessed the authority to block foreign takeovers of U.S. companies. Instead, the committee and the President could only generally review such transactions.[10] The government managed to stall the transaction by invoking antitrust law until a more suitable agreement came along.[11] The perceived sense of helplessness of the executive branch in the face of such transactions led to the passage of legislation to ensure that such cases would not happen again.

In 1988 Congress passed the Exon–Florio Amendments (Exon–Florio) to the Defense Production Act of 1950.[12] Much like the creation of CFIUS, external forces may have prompted the passage of the measure. As opposed to OPEC, the inspiration for CFIUS rested in the number of large purchases of U.S. business by Japanese firms in the 1980s, including well-known New York buildings, Hollywood

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6. Exec. Order No. 11,858, 3 C.F.R. 990 (1971–1975); Byrne, *supra* note 5, at 856.
7. Byrne, *supra* note 5, at 856–57.
8. Sud, *supra* note 5, at 1315.
9. *Id.*
10. Byrne, *supra* note 5, at 857; *see also* Sud, *supra* note 5, at 1315 (explaining that the executive branch was helpless in the proposed transaction between Kuwait Petroleum Company and Santa Fe International Company because of the liberal U.S. statutory framework regarding merger activity).
11. Sud, *supra* note 5, at 1315.
12. *Id.* at 1315–16.

movie studios, and a large U.S. semi-conductor business.[13] Before the passage of Exon–Florio, many in Congress believed that the President only could block the foreign acquisition of a U.S. company by declaring a national emergency.[14] Exon–Florio explicitly addressed these concerns by empowering the President to "investigate and, if necessary, block foreign takeovers of American businesses on national security grounds."[15] More explicitly, Exon–Florio allowed the President to look at the potential national security implications of all "mergers and acquisitions involving foreign persons which could result in foreign control of persons engaged in interstate commerce in the United States."[16]

The President delegated his authority under Exon–Florio to CFIUS through Executive Order 12,661.[17] CIFUS currently consists of twelve interagency members and is housed in and chaired by the Treasury Department.[18] The expanded panel has representatives from across the government, including:

> [T]he Secretaries of State, Treasury, Defense, Homeland Security, and Commerce; the United States Trade Representative; the Chairman of the Council of Economic Advisors; the Attorney General; the Director of the Office of Management and Budget; the Director of the Office of Science and Technology Policy; the Assistant to the President for National Security Affairs; and the Assistant to the President for Economic Policy.[19]

CFIUS is also overseen by the Senate Banking, Housing, and Urban Affairs Committee currently chaired by Senator Christopher Dodd of Connecticut with ranking member Richard Shelby of Alabama.[20] CFIUS now exercises the President's power under Exon–Florio and executes the explicit mandate given to CFIUS to consider foreign investment issues.[21]

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13. Joshua W. Casselman, Note, *China's Latest "Threat" to the United States: The Failed CNOOC-UNOCAL Merger and Its Implications for Exon–Florio and CFIUS*, 17 IND. INT'L & COMP. L. REV. 155, 169 (2007).

14. *Id.* at 157.

15. Sud, *supra* note 5, at 1316.

16. Byrne, *supra* note 5, at 854.

17. Exec. Order No. 12,661, 3 C.F.R. 618 (1988); Casselman, *supra* note 13, at 157–58.

18. Casselman, *supra* note 13, at 158.

19. *Id.*

20. *Id.*

21. *See id.* at 157–58 (describing the president's authority under Exon–Florio and then stating that the president delegated his authority to CFIUS).

B. *The Functioning of CFIUS Under Exon–Florio*

CFIUS under Exon–Florio follows a fairly straight-forward process for addressing potential purchases of U.S. companies by foreign buyers. The four-step process involves:

> (1) [V]oluntary notice by the companies, (2) a 30-day review to identify whether there are any national security concerns, (3) a 45-day investigation to determine whether those concerns require a recommendation to the President for possible action, and (4) a Presidential decision to permit, suspend, or prohibit the acquisition.[22]

Since Exon–Florio's inception, CFIUS has received over 1,500 notifications from parties looking to transact with foreign buyers.[23] Either or both parties provide notice of a transaction by filing documentation with the Committee that a deal is being contemplated.[24] The notice must contain details about both the foreign buyer and the U.S. target company.[25] The notices must disclose information such as "business the target company does with US government agencies having national security responsibilities, the target company's technology having national security significance, the business plan of the proposed acquirer for the target company and its technology, including any plans to move technology or jobs offshore."[26] The chair of the Committee also maintains the right to reject any notice as incomplete and ask for additional information before moving on to the next step in the process.[27]

Parties have a strong incentive to file notice voluntarily with the Committee because the President can require companies to divest deals that represent a threat to national security when completed without a notification filing.[28] Moreover, the absence of a voluntary filing of notice does not preclude a member of CFIUS to ask the Committee to review an unreported transaction.[29]

After a party files voluntary notice and receives Committee approval to proceed, there is a preliminary thirty day review of the transaction by CFIUS.[30] During its review, the Committee decides whether it possesses jurisdiction to conduct a comprehensive review of the transaction to determine if approving the transactions raises a threat to national security.[31] CFIUS may consider the following

22. Sud, *supra* note 5, at 1316.
23. Casselman, *supra* note 13, at 159.
24. Byrne, *supra* note 5, at 854–55.
25. Barry E. Cohen & Alan WH Gourley, *Heightened Security*, INT'L FIN. L. REV., Sept. 2007, at 24.
26. *Id.*
27. *Id.*
28. Casselman, *supra* note 13, at 159.
29. Byrne, *supra* note 5, at 855.
30. Cohen & Gourley, *supra* note 25.
31. *Id.*

factors in its determination of the potential threat to national security:

> (1) [D]omestic production needed for projected national defense requirement, (2) the capability and capacity of domestic industries to meet national defense requirements, including the availability of human resources, products, technology, materials, and other supplies or services, [and] (3) the control of domestic industries and commercial activity by foreign citizens as it affects the capability of the United States to meet the requirements of national security . . . .[32]

If the Committee determines that further review is necessary, it then expands its consideration of the transaction by an additional forty-five days.[33] During this time, CFIUS may request additional information from the parties to complete the process.[34] In fact, foreign state-run firms acquiring control over U.S companies require expanded review.[35] Otherwise, extending the allotted time seldom occurs—only twenty-five cases have extended beyond the thirty day period, of which the foreign acquirer withdrew thirteen proposals while the remaining twelve proceeded to the final step of review.[36]

Upon receipt of the CFIUS report, the President decides whether to exercise the powers given to him under Exon–Florio. The President has fifteen days to decide whether to permit, suspend, or prohibit the transaction.[37] If the President finds "credible evidence" that the transaction may threaten or impair national security and that laws other than Exon–Florio and the International Emergency Economic Powers Act are insufficient to protect national security, he may prohibit the transaction.[38] The prohibition power is largely discretionary because Exon–Florio never explicitly defines "national security" other than to list several instances in which the power should not be invoked, including proposals in certain industries (toys, hotels, food products, legal services) or involving a purchase of stock amounting to less than ten percent of an entity.[39] The veto provision was used only once by President George H.W. Bush over the proposed acquisition of a U.S. aircraft parts manufacturer by a Chinese aerospace company in 1990, which indicates that this requirement has largely been a mere formality to approval.[40]

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32. Sud, *supra* note 5, at 1316–17.
33. Byrne, *supra* note 5, at 855.
34. Cohen & Gourley, *supra* note 25.
35. Byrne, *supra* note 5, at 855.
36. Casselman, *supra* note 13, at 159–60.
37. Sud, *supra* note 5, at 1317.
38. *Id.*
39. *Id.* at 1317–18.
40. *Id.* at 1317.

C. *The Debate over Recent Additions to Exon–Florio and CFIUS*

The most recent addition to the Exon–Florio and CFIUS catalog has come in the form of the Foreign Investment and National Security Act of 2007 (FINSA).[41] Like many of the attempts at reforming CFIUS in recent years, FINSA was a response to a Government Accountability Office (GAO) report assessing the operations of CFIUS.[42] The GAO found that CFIUS's use of Exon–Florio limited its effectiveness by: (1) using the Treasury's narrow definition of a "threat to national security"; and (2) being reluctant to initiate forty-five-day investigations out of fear of their potential negative impact on foreign investment conflicting with the general U.S. policy of open investment.[43]

Addressing the GAO concerns, the avowed purpose of FINSA is to "ensure national security while promoting foreign investment and the creation and maintenance of jobs, [and] to reform the process by which such investments are examined for any effect they may have on national security."[44] There has been an ongoing debate, however, over whether this Act will be effective in achieving its purpose.

FINSA implements a number of small changes aimed at making government review of potential acquisitions by foreign buyers "more transparent and predictable without making the business climate less friendly to foreign investors."[45] One of the features involves the creation of specific standards to consider in evaluating a transaction.[46] These standards encompass stricter review of transactions involving state-run businesses as well as those involving "critical infrastructure and critical technologies," including acquisitions of power plants, ports, toll roads, and other such businesses.[47]

FINSA extends review of transaction beyond those conducted by CFIUS and the President. The Act requires that both the Director of National Intelligence and the Secretary of the Treasury conduct their own reviews of such transactions.[48] It also requires a greater level of disclosure to Congress regarding CFIUS's review of foreign

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41. Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, 112 Stat. 246 (2007).

42. *See* Sud, *supra* note 5, at 1321 (explaining the findings of the GAO report).

43. Casselman, *supra* note 13, at 170–71.

44. H.R. Res. 556, 110th Cong. (2007) (enacted).

45. Andrzej Zwaniecki, *U.S. Department of State, Foreign Investment in U.S. To Get More Transparent Scrutiny*, AMERICA.GOV, July 20, 2007, http://www.america.gov/st/washfileenglish/2007/July/20070720172524saikceinawz0.2031519.html.

46. USLaw.com, Foreign Investment and National Security Act of 2007, http://www.uslaw.com/us_law_article.php?a=320 (last visited Oct. 27, 2008).

47. Cohen & Gourley, *supra* note 25.

48. USLaw.com, *supra* note 46.

investments.[49] One other change in FINSA involves the promotion of "mitigation agreements," which mandate that investors take certain actions to address potential security concerns in order to gain approval from the government.[50] There was precedent for these agreements, such as in 2000 when a Japanese firm's acquisition of the U.S.-based Internet service provider Verio was allowed on the condition that the Japanese government agreed not to have any involvement with the firm after the conclusion of the transaction.[51]

In promoting FINSA, the Bush administration largely touted the measure as a compromise of sorts with Congress and a means to improve and reform the CFIUS system.[52] The Treasury Department noted recent controversies over particular foreign investments as well as "troubling signs that other countries are pursuing barriers to foreign investment, and increasingly negative media coverage of the U.S. investment climate" as reasons necessitating the changes.[53] Others have said that these reforms would give Congress greater confidence in the CFIUS review process and would deter potential political conflicts over their decisions.[54] Proponents of the bill have also been quick to point out that scrutiny of such transactions has not affected U.S. openness to such deals because "CFIUS has reviewed on average only about 5 percent of such deals per year, restricting or blocking only a few" since 2000, and while foreign investment is still well below its peak in 2000 at $321 billion, there was a "sharp upsurge in 2006 that brought it to $183 billion."[55]

FINSA has not been entirely well received, however, as some have been critical of the changes required by the new Act. Critics have bristled at the extension of CFIUS review to transactions beyond those related specifically to homeland security and to those that implicate "critical infrastructure and critical technologies."[56] These critics are concerned about creating such broad standards that by "some estimates, the business sectors encompassed by these terms comprise over 65% of the domestic US economy," potentially bringing a significant part of the U.S. economy under the reach of CFIUS

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49. Zwaniecki, *supra* note 45.
50. *Id.*
51. Casselman, *supra* note 13, at 161.
52. *See infra* Part III. *See generally* Press Release, The Department of the Treasury, Testimony of Treasury Assistant Secretary Clay Lowery Before the House Financial Services Committee (Feb. 7, 2007), *available at* http://www.treas.gov/press/releases/hp250.htm [hereinafter Treasury Department Press Release] (discussing the tensions involved between CFIUS and Congress that helped lead to the Act's formation).
53. Treasury Department Press Release, *supra* note 52.
54. Zwaniecki, *supra* note 45.
55. *Id.*
56. Cohen & Gourley, *supra* note 25.

review.[57] There also appears to be a general distaste toward the prospect of a CFIUS application becoming a "required stop in the process of evaluating, negotiating and closing an investment in a US business with substantial industrial or technology activities."[58]

From its humble beginnings as Executive Order 11,858 to FINSA, CFIUS and Exon–Florio have come to define the quantity of foreign investment handled in the United States.[59] Over the years, CFIUS's power has grown to a level that has led to conflicts with other branches of the government regarding the balancing of national security concerns with the promotion of foreign investment. The pertinent quandary then becomes the maintenance of that balance, especially considering that foreign countries may be headed toward an approach less favorable to foreign investment.

III. CANADA: THE INVESTMENT CANADA ACT

A. *Canadian Investment Before the Investment Canada Act*

The strictness of Canadian governmental review of foreign investments has ebbed and flowed over the years based in part on public opinion and political control.[60] The Canadian approach has vacillated from laissez-faire to strict controls.

Prior to the 1970s, the Canadian investment climate was open to foreigners and free of significant barriers to completing foreign acquisitions transactions.[61] During the 1970s, however, concerns arose about the high level of foreign investment and its potentially negative effects on the economy.[62] The 1972 Gray Report legitimized the concerns finding that "nearly 60 percent of manufacturing activities and 76 percent of the energy sector were foreign controlled, and that, in certain industries, such foreign ownership exceeded 90 percent."[63] The Gray Report found that foreign investment was "so prevalent as to impede legitimate Canadian economic objectives" and recommended a general review policy for foreign investments.[64]

Accordingly, in 1974, the Canadian government enacted the Foreign Investment Review Act (FIRA) that established the Foreign

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57. *Id.*
58. *Id.*
59. *See* Casselman, *supra* note 13, at 159 (noting the approximately 1,500 voluntary notices that have been filed with CIFUS since the adoption of the Exon–Florio Amendments).
60. *See* Raby, *supra* note 5, at 395–97 (discussing changes in Canadian investment law as they coincided with changes in political control and public opinion).
61. *Id.* at 395.
62. *Id.*
63. *Id.*
64. *Id.*

Investment Review Agency (Review Agency) to address these concerns.[65] Under FIRA, the Review Agency reviewed all direct foreign investment in Canada and approved such transactions before they could proceed.[66] The final decision rested in the hands of the Cabinet Council, to whom the Review Agency reported.[67]

In the early 1980s, the tide of permissive foreign investment ebbed following a national recession and mounting criticism of FIRA by the international community.[68] As the country saw the effects of a downturn in foreign investment, "economic nationalism no long[er] assumed paramount importance in Ottawa."[69] The new Conservative government rose to power in September 1984 and cemented the movement away from such a policy.[70] The new government spelled the beginning of the end for FIRA and its stricter controls over foreign investments.

B. *The Investment Canada Act*

The Conservatives' accession to power led to the passage of the Investment Canada Act (ICA) and prompted new Prime Minister Mulroney to proclaim boldly that "Canada is open for business again."[71] According to Prime Minister Mulroney, the explicit purpose of the new act was "to encourage investment in Canada by Canadians and non-Canadians that contributes to economic growth and employment opportunities and to provide for the review of significant investments in Canada by non-Canadians in order to assure such benefits to Canada," primarily by raising the threshold for review, shortening the time for review, and streamlining the process in general.[72]

Under the ICA, parties to direct or indirect investment by a non-Canadian resulting in the creation of a new business or the takeover of a Canadian business must file a notice or application for review with the Investment Canada review board.[73] Monetary thresholds relating to the size of the transaction determine the cases eligible for

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65. *Id.*

66. *Canadian Legislation Is Designed to Attract Foreign Investment*, BUS. AM., Aug. 5, 1985, at 24, *available at* http://findarticles.com/p/articles/mi_m1052/is_v8/ai_3885605.

67. *Id.*

68. Raby, *supra* note 5, at 395.

69. *Id.* at 395.

70. *Id.*

71. *Id.* at 396–97.

72. *Id.* at 397.

73. Jason McKenzie, *Canada: Canadian Government to Reconsider Foreign Investment Review Provisions of the Investment Canada Act*, MONDAQ BUS. BRIEFING, Aug. 7, 2007, *available at* http://www.mondaq.com/article.asp?articleid=50448.

review.[74] The thresholds trigger review in three situations: (1) a direct acquisition of control in a Canadian business with more than C$5 million in assets; (2) an indirect acquisition of control of a Canadian business with over C$50 million in assets; or (3) the indirect acquisition of a Canadian business with over C$5 million in assets "where the Canadian assets acquired represent more than 50 percent of the aggregate gross asset value of all domestic and international business acquired, directly and indirectly, in connection with the transaction."[75]

Transactions may require review where the business is related to "Canada's cultural heritage or national identity," even if the transaction does not meet the monetary threshold.[76] While the ICA gives no explicit definition of what businesses will relate to "cultural heritage or national identity," businesses involved in the production, distribution, sale, or exhibition of books, magazines, periodicals, newspapers, film, or music (recordings and print) have all been found to be covered by this provision.[77] The non-Canadian acquisition of such a business, either directly or indirectly, leads to governmental review regardless of whether the acquisition meets the monetary threshold requirements.[78]

If either of the standards—the financial standard and the cultural standard—is met, the investor must apply for review of the transaction by Investment Canada.[79] The transaction must receive a certificate of approval from either the Minister of Industry when the monetary threshold is met, or the Minister of Canadian Heritage when the transaction implicates cultural heritage.[80] In rare cases involving transactions that meet both standards, both Ministers must approve.[81] The certificate of approval attests to the fact that the reviewing agency believes that the transaction would be a "net benefit to Canada."[82] If the investment would not provide a net benefit to Canada, the transaction is stopped or, if the transaction has already been completed, the investor may be required to divest control.[83]

In determining whether a transaction will be of net benefit to the country, Investment Canada weighs a number of different factors. Section 20 of the Act sets out several factors to be considered, including:

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74. Raby, *supra* note 5, at 397.
75. *Id.*
76. *Id.* at 398.
77. *Id.*
78. *Id.*
79. *Id.*
80. McKenzie, *supra* note 73.
81. *Id.*
82. *Id.*
83. *Id.*

> [T]he effect of the investment on the level and nature of economic activity in Canada; the degree and significance of participation by Canadians in the business in question; the effect of the investment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada; the effect of the investment on Competition within Canada; the compatibility of the investment with national industrial, economic and cultural policies; and the contribution of the investment to Canada's ability to compete in world markets.[84]

The ICA further provides that these factors are to be considered as a whole and that each factor be given "different weight in different circumstances" depending on the specific facts of each case.[85] Thus, the government has created even more definite guidelines for some "politically sensitive and economically important sectors of the economy," like the telecommunication and the oil and gas industries.[86] It is also of particular interest to note that none of the factors consider the transaction's effect on national security.[87] Overall, the review process is flexible in order to allow Investment Canada to consider a multitude of different factors that can be tailored in the way that the reviewer deems most appropriate for each transaction as opposed to formulaic application of the same factors to every transaction regardless of circumstance.

C. *ICA in Practice Today*

The Conservatives passed the ICA with the intent of boosting foreign investment in the country. The government wanted to simplify the system by streamlining the process and enable potential investors to complete transactions within a reasonable time.[88] To this end, the ICA appears to have largely achieved its purpose—it seldom operates as a real barrier to the foreign acquisition of Canadian companies as the vast majority of the deals reviewed under the ICA have been approved without much conflict.[89]

The one exception to this generally laissez-faire attitude toward foreign investment has been in politically sensitive industries. For example, general government policy prohibits the acquisition of healthy Canadian businesses in the oil and gas industry, which led to the demise of a proposed takeover of the Canadian Bow Valley

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84. Raby, *supra* note 5, at 398–99.
85. *Id.* at 399.
86. *Id.*
87. *See* McKenzie, *supra* note 73 ("[T]hese factors do not, however, explicitly require that the Minister consider whether a proposed transaction is injurious to national security.").
88. *See* Raby, *supra* note 5, at 396 (describing the reasons behind creating the ICA).
89. *See* McKenzie, *supra* note 73 ("The government of the day has, on several occasions, said that it will generally not meddle with market forces.").

Industries, Inc. by British Gas PLC when the government refused to make an exception.[90] Otherwise, the policy facilitates foreign investment because the government has not formally voided a proposed transaction since the law's enactment in 1985.[91] Rather than use the ICA to stop transactions, the government preferred using the review process to obtain concessions from potential foreign investors through side agreements.

Canada has also experienced a rise in concern regarding the perceived dangers of permitting large amounts of foreign investment, which mirrors the recent concerns over foreign investment in the United States. In May 2007, the opposition Liberal Party called for a moratorium on foreign takeovers until the ICA was reviewed.[92] In the twelve months prior, a number of prominent Canadian corporations had been acquired by foreign investors, including Hudson's Bay Co., Four Seasons Hotels, Inc., and La Senza, leading to fears that the country had become "the boy scouts of the world in this area."[93] In July 2007, the government established a review panel, the Competition Policy Review Panel, charged with reviewing the ICA to determine its current efficacy and suggest possible reforms.[94] The panel returned its final report in June 2008 with recommendations on future implementation of the Act and utilizing foreign investment to strengthen Canadian business.[95]

While the Review Panel investigates the current state of the ICA, there have also been a number of proposals from other sources in Ottawa that suggest additional changes to the Act. Among the proposed changes would be considering the state-owned status of a foreign investor and whether an investment by a state-owned enterprise may be used to serve the interests of the foreign government rather than Canada's interests.[96] Further, there is a push to include a provision that would allow Investment Canada to screen and possibly prevent acquisitions that raise concerns about "national security," in an effort to target potential acquisitions by investors with ties to organized crime or terrorism.[97]

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90. Raby, *supra* note 5, at 399.

91. McKenzie, *supra* note 73.

92. Stephen Chase, *Liberals Aim to Reduce Foreign Takeovers*, THE GLOBE AND MAIL (Canada), May 28, 2007, at A7.

93. *Id.*

94. Anthony F. Baldanza & Douglas C. New, *Canada: Whither Foreign Investment in Canada?*, Oct. 26, 2007, http://www.mondaq.com/article.asp?articleid=53660; Cliff Sosnow et al., *Canada: Foreign State-Owned Investors Spark "National Security" Concerns*, BLAKES BULL. ON INT'L TRADE, Oct. 23, 2007, *available at* http://www.mondaq.com/article.asp?articleid=53328.

95. COMPETITION POLICY REVIEW PANEL, COMPETE TO WIN—FINAL REPORT (2008), *available at* http://www.ic.gc.ca/epic/site/cprp-gepmc.nsf/vwapj/Compete_to_Win.pdf/$FILE/Compete_to_Win.pdf; Sosnow et al., *supra* note 94.

96. McKenzie, *supra* note 73.

97. *Id.*

In 2005, Bill C-59 originally targeted potential acquisitions by investors with nefarious connections by advocating the consideration of national security concerns under the ICA.[98] With a change in government and opposition by some officials, however, the Bill floundered and was never passed.[99] The implementation of a number of the suggestions risks creating a climate antagonistic to promoting foreign acquisition, which runs counter to the original intentions of the Canadian government in passing the ICA.

IV. RECENT AND CURRENT CONFLICTS OVER THE LAWS

A. *The United States*

For many years, the U.S. held a positive view on foreign investment and attempted to implement policies promoting this general belief. The post-9/11 period, however, ushered in a new era of concerns and brought to the forefront a number of issues related to national security. In recent years, the U.S. began to see a number of cases raising national security concerns, and the current regime under CFIUS and Exon–Florio may prove insufficient to address such concerns. The first major case raising such issues involved a potential acquisition by the China National Offshore Oil Corporation (CNOOC) of the U.S. corporation Unocal, which triggered "one of the most politically charged merger battles in U.S. history."[100]

i. CNOOC

By 2005, China sought to increase extensively its assets in the energy market to meet an ever-increasing demand, and, as part of its policy, China made an unsolicited $18.5 billion offer for the U.S. energy company Unocal.[101] CNOOC is one of China's largest oil producers but, more importantly, seventy percent of the firm is owned by a state-controlled company.[102] CNOOC's bid topped that of the nearest competitor, the U.S.-owned Chevron Corporation, by $2 billion.[103] Despite assurances from the Chinese foreign minister that the proposed acquisition represented merely "normal commercial activity between enterprises" and was being done because it "makes

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98. Baldanza & New, *supra* note 94.
99. *Id.*
100. Casselman, *supra* note 13, at 161 (quoting Christopher Palmeri, *Unocal Goes out with a Bang*, BUS. WK. ONLINE, Aug. 11, 2005, http://www.businessweek.com/bwdaily/dnflash/aug2005/nf20050811_8247_db017.htm).
101. *Id.* at 161–62.
102. *Id.* at 162.
103. Sud, *supra* note 5, at 1304.

sound business sense for our company," the proposal set off a number of alarms in the U.S.[104]

Shortly after the bid was announced, the matter became a hot topic of concern in Congress. CNOOC attempted to assuage those concerns by making a number of concessions.[105] CNOOC agreed to continue selling most of the U.S.-produced oil and gas to U.S. customers, to retain almost all of Unocal's employees, and to attempt to retain as much of the current management as possible following the acquisition.[106] Further, CNOOC also agreed to make a voluntary filing with CFIUS for review and approval of the transaction.[107]

Congress quickly responded to the conciliation attempts by CNOOC but remained largely undeterred from its previous stance of skepticism toward the transaction.[108] During the summer of 2005, Congress passed several measures expressing opposition to the deal and requested that the President conduct a thorough investigation of the proposition. House Resolution 344, one of the most prominent of these bills—passed by a wide margin of 398 to 15—expressed the concern that the transaction potentially impaired the national security of the United States and called for the President to review the deal immediately upon its execution.[109] In addition, the passage of House Amendment 431 on the same day cut off funding to CFIUS by prohibiting the Treasury Department from making any expenditures involved in approving the deal.[110] The Senate also made attempts to have its voice heard on the transaction by including a proposed joint resolution that would prohibit the transaction from proceeding outright.[111]

The congressional response to the proposed acquisition had its own effect on the decision making of the CNOOC board.[112] The board soon elected to withdraw its bid for Unocal before even having a chance to be investigated by CFIUS or the President, citing "unprecedented political oppression" and the creation of "a level of uncertainty that presents an unacceptable risk" to securing the completion of the deal.[113] The CNOOC board also noted its willingness to "further improv[e] the terms of its offer, and [that it] would have done so but for the . . . political environment in the

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104. *FM: CNOOC's Unocal Bid Is Pure Business*, CHINADAILY, June 29, 2005, http://www.chinadaily.com.cn/english/doc/2005-06/29/content_455555.htm.

105. Casselman, *supra* note 13, at 162–63.

106. *Id.*

107. Sud, *supra* note 5, at 1305.

108. *Id.*

109. Casselman, *supra* note 13, at 163.

110. *Id.*

111. *Id.*

112. Sud, *supra* note 5, at 1305.

113. *Id.* at 1306 (quoting Press Release, CNOOC, Ltd., CNOOC Limited to Withdraw Unocal Bid (Aug. 2, 2005) [hereinafter CNOOC, Ltd. Press Release]).

U.S."[114] Soon thereafter, Unocal accepted the Chevron bid—by then raised to $17 billion—and gained shareholder approval of the transaction.[115] Approximately six months later, CNOOC announced that it had entered into a $2.27 billion acquisition of a forty-five percent share of a Nigerian oil and gas field, demonstrating continued efforts to expand its energy holdings.

ii. Dubai Ports World

In 2006, news came that Dubai Ports World (DPW), owned by the Emir of Dubai (part of the United Arab Emirates), was seeking to acquire the British Peninsular and Oriental Steam Navigation Company (P&O) for $6.8 billion.[116] The transaction raised eyebrows in the U.S. because P&O operates a number of port terminals across the world, including six ports in the U.S., and the transaction would give operational control over these American sites to DPW.[117] Unlike CNOOC, the Dubai Ports deal reached CFIUS, which approved the deal because the panel found no concern large enough that merited blocking the transaction or necessitating an extra forty-five day investigation.[118] CFIUS's approval caused a political storm to erupt in Washington.

Much as it had with the CNOOC deal, Congress stepped in, voiced its disapproval with the potential deal, and passed legislation asking the President to examine the deal.[119] The largest concern raised by most members of Congress involved questions of national security because a U.S. transportation hub would be managed and controlled by an Arab country.[120] As Representative Peter King of New York stated, it was "only 4½, 5 years ago that they were very close to bin Laden, they were supporting Taliban . . . and unless there's been a complete transformation, I have real concerns."[121] Other critics attempted to reinforce the significant risks associated with providing an Arab country with wider access to the U.S. economy by pointing out that the United Arab Emirates housed some of the 9/11 hijackers and functioned as a source of terrorist funding.[122]

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114. *Id.* (quoting CNOOC, Ltd. Press Release, *supra* note 113).
115. *Id.*
116. Byrne, *supra* note 5, at 876–77.
117. *Id.* at 877.
118. Sud, *supra* note 5, at 1308.
119, Jonathan Weisman, *Port Deal to Have Broader Review; Dubai Firm Sought U.S. Security Probe*, WASH. POST, Feb. 27, 2006, at A1; *see also* Sud, *supra* note 5, at 1308–09 (describing the congressional role in the CNOOC deal).
120. Sud, *supra* note 5, at 1308–09; Weisman, *supra* note 119.
121. Weisman, *supra* note 119.
122. Byrne, *supra* note 5, at 879.

Congress introduced legislation that would require the Administration to proceed with the forty-five-day review despite CFIUS's decision that it was unnecessary.[123] Before the legislation passed, DPW agreed with CFIUS to move forward with the extended forty-five day investigation despite CFIUS's decision.[124] The Administration and the small band of the deal's supporters in Congress attempted to use the concessions to signal that the company was willing to cooperate with an extended investigation.[125] Senator John Warner pointed to the "willingness of this company to give every means of support to help work this thing out," while White House spokesman Scott McClellan assured that "the additional time and investigation at the request of the company will provide Congress with a better understanding of the facts, and that Congress will be comfortable with the transaction moving forward once it does."[126]

Despite reassurances by the Administration and defenders of the deal, Congress remained skeptical; the House Appropriations Committee voted 62–2 to essentially block the deal from proceeding and continued to apply pressure on the Administration to step in and take action.[127] Citing "extreme public and political pressure," DPW agreed to relinquish potential control over the American seaports.[128] The interest in the U.S. seaports was transferred to an American buyer, instead.[129] Congress achieved its short-term goal of stopping the DPW acquisition of the U.S. seaports.[130] The controversy over the deal, however, also caused members of Congress to questions whether the Exon–Florio system as a whole needed reform because it originally approved the transaction without recommending further investigation.[131]

iii. NASDAQ

In the closing months of 2007, an opportunity arose for another large controversy regarding the potential acquisition of a U.S. company by a foreign buyer; however, the transaction failed to generate the firestorm found in the CNOOC and DPW deals. In September 2007, the government-owned stock exchange in Dubai announced that it had plans to acquire a large part of both the

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123. *Id.* at 878.
124. *Id.*
125. *See* Weisman, *supra* note 119.
126. *Id.*
127. Byrne, *supra* note 5, at 852.
128. Sud, *supra* note 13, at 1309 (quoting Gwyneth K. Shaw & Julie Herschfed Davis, *Dubai Firm to Shed Stake in U.S. Ports*, BALTIMORE SUN, Mar. 10, 2006, at 1A).
129. Byrne, *supra* note 5, at 852–53.
130. *See id.* (discussing congressional outcry against possible DPW control of U.S. ports).
131. *Id.* at 853.

London Stock Exchange and the NASDAQ exchange in New York.[132] The deal would give Dubai a 19.9% share of NASDAQ and 28% of the London Exchange, becoming the largest single investor in the NASDAQ market.[133] In exchange, Dubai agreed to take over OMX, a Swedish equity market based in Stockholm that operated in several Scandinavian and Baltic States, and transfer the shares to NASDAQ, ending a recent bidding war between the exchanges.[134]

The deal drew some initial criticism.[135] Most prominently, Senator Charles Schumer noted that the "deal gives me pause," and that "we must still be careful of the kinds of investments made in our critical infrastructure, financial exchanges, utilities and other areas that are vital to the operation and security of our country."[136] Interestingly though, Senator Schumer was largely in the minority, as most of Congress spoke out in favor of the deal. Representative Spencer Bachus called the deal "a win-win for both exchanges . . . [and] exactly the kind of foreign investment in U.S. companies we should foster and encourage."[137] Representatives Nancy Pelosi and Barney Frank, strong critics of the Dubai Ports deal, noted that they were not alarmed by the proposed deal and tried to differentiate the transaction from the DPW deal by noting that there "the concern was smuggling something or someone dangerous into ports . . . . What are we talking about here—smuggling someone onto a stock exchange?"[138] In all, there appeared to be very few in Congress who raised the national security issues in this deal that had been brought up during the debate over the Dubai Ports acquisition.[139]

The clearest example of the differences between the Dubai Ports deal and the NASDAQ deal came recently with the final clearance of the attempted purchase.[140] On December 31, 2007, NASDAQ obtained clearance from CFIUS to proceed with the transaction that would result in the exchange's acquisition of a controlling share in

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132. Joseph B. Treaster, *Dubai to Buy Large Stake in Nasdaq*, N.Y. TIMES, Sept. 20, 2007, at C1, *available at* http://www.nytimes.com/2007/09/20/business/worldbusiness/20exchange.html?_r=1&n=Top%2FNews%2FWorld%2FCountries%20and%20Territories%2FDenmark&oref=slogin.

133. *Id.*; Stephen Labaton & Julia Werdigier, *Mild Reaction in Capitol to a Dubai Nasdaq Stake*, N.Y. TIMES, Sept. 21, 2007, at C7, *available at* http://www.nytimes.com/2007/09/21/business/worldbusiness/21exchange.html?scp=1&sq=%22Mild%20Reaction%20in%20Capitol%20to%20a%20Dubai%20Nasdaq%20Stake%22&st=cse.

134. Labaton & Werdigier, *supra* note 133; Treaster, *supra* note 132.

135. *See* Labaton & Werdigier, *supra* note 133 (discussing governmental responses to Dubai-NASDAQ deal).

136. *Id.*

137. *Id.*

138. *Id.*

139. *See generally id.* (reporting congressional responses to the deal).

140. *U.S. Clears Sale of a Stake in Nasdaq*, N.Y. TIMES, Jan. 1, 2008, *available at* http://www.nytimes.com/2008/01/01/business/worldbusiness/01nasdaq.html?scp=1&sq=%22U.S.%20Clears%20Sale%20of%20a%20Stake%20in%20Nasdaq%22&st=cse.

OMX and Borse Dubai obtaining a significant share in NASDAQ.[141] Subsequently, the OMX board unanimously recommended approving the transaction at a U.S. equivalent of $41.41 per share, and the transaction went forward.[142]

B. *Canada*

Similar to the controversy experienced in the U.S. regarding its investment laws, Canada also encountered controversy with proposed transactions that have tested the commitment of the current government to the traditional system under the Investment Canada Act. Like the U.S., Canada must ultimately consider the potential impact of proposed transactions and decide the manner in which it wants to proceed into the future with its policy toward foreign investment.

As previously noted in Part III.C., *supra*, Canada had seen a number of its larger businesses—for example, Hudson's Bay and Four Seasons—acquired by foreign interests.[143] Helping to push the issue of foreign investment into the forefront of national debate in Canada was the C$5 billion bid to acquire the Canadian based PrimeWest Energy Trust by TAQA, Abu Dhabi's National Energy Company—a case closely analogous to that of the proposed Dubai Ports acquisition.[144]

Abu Dhabi, part of the United Arab Emirates, created TAQA in 2005 to function as a holding company for the country's power and water utilities and to act as an investor in acquiring oil and gas interests in overseas markets.[145] The Abu Dhabi government officially owns fifty-one percent of TAQA but holds another twenty-four percent by means of a state-run farmers' support fund, while the remaining twenty-five percent is traded on a local stock market, where it can only be legally purchased by Abu Dhabi citizens.[146] PrimeWest, meanwhile, is a gas and oil trust company "with focus on development drilling, waterflood optimization, workovers and facilities optimization" and over $375 million in gross income for the first half of 2007.[147] The size of the transaction made it clear that

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141. *Id.*

142. *OMX Says Board Recommends Borse Dubai Offer*, REUTERS, Jan. 2, 2008, http://www.reuters.com/article/ousiv/idUSSAT00482520080102?rpc=81.

143. Chase, *supra* note 92.

144. Shawn McCarthy, *Taqa Deal Faces Strict Review; Ottawa Will Weigh State Control When Assessing Abu Dhabi's Purchase of PrimeWest*, THE GLOBE AND MAIL, Sept. 26, 2007, at B3.

145. *Id.*

146. *Id.*

147. PrimeWest Energy Inc., Profile Canada Business Directory of Companies, http://www.profilecanada.com/companydetail.cfm?company=135080_Primewest_Energy_Inc_Calgary_AB (last visited Oct. 27, 2008); *see also* PrimeWest Energy Trust 2007

investigation under the ICA was necessary for the transaction to proceed.[148]

The potential acquisition of an energy company by the United Arab Emirates-owned TAQA touched off a debate in Canada.[149] The deal ignited concerns that the current system operated too leniently and curbed consideration of national security concerns under the ICA review process.[150] One government official expressed the anxieties of many over the recent run on Canadian businesses in a comment that "free markets do not mean a free pass. Canada is open for business, but it's not for sale."[151] Liberal critics of the current system also expressed concerns that "the Investment Canada Act does not provide a mandate to consider the ownership of a foreign acquirer, but only looks at whether the investment represents a net benefit to the country."[152]

The Conservative government, led by Stephen Harper, attempted to allay many of the concerns that have arisen over the transaction by pledging to strictly review the transaction under the current ICA regime.[153] According to Conservative officials, the ICA net-benefit test "is a broadly stated test and it allows ultimately the minister to make decisions based on a full range of issues," including whether the acquirer is state-owned and whether it is primarily a tool of foreign governments to achieve policy objectives.[154] Further, the government also responded in defense of the regime that "[w]e are not—and we will not become—protectionist. The Investment Canada Act should not—and will not—become a shield to protect Canadian industry from the full rigours of global competition."[155] Industry Minister Jim Prentice also noted that while it would be studying the proposed transaction, the government "is not trying to intervene" in the deal.[156]

In the end, like most of the other deals that go before the ICA Review Board, the TAQA-PrimeWest deal received the Board's seal of approval.[157] On November 19, 2007, TAQA obtained clearance from

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Quarterly Report, Aug. 1, 2007, *available at* http://www.primewestenergy.com/PrimeWest/Investors/filings/2007/Q2_2007_Results.pdf.

148. *See* Raby, *supra* note 5, at 397 (outlining conditions under which the acquisition of control of a Canadian business is reviewable).

149. Baldanza & New, *supra* note 94.

150. Sosnow et al., *supra* note 9.

151. *Id.*

152. McCarthy, *supra* note 144.

153. *Id.*

154. *Id.*

155. Les Whittington, *Prentice Cautious on Foreign Buyout Security Test*, TORONTO STAR, Oct. 10, 2007, at B1.

156. *Id.*

157. *PrimeWest: Canada Government OKs Acquisition by TAQA*, DOW JONES NEWSWIRES, Nov. 20, 2007, *available at* http://www.zawya.com/story.cfm/sidDN20071120011791.

the Canadian government to proceed with its intended takeover of PrimeWest at a price of C$26.76 per share, along with an assumption of the company's debt.[158] By January 17, 2008, the C$4.6 billion transaction had been completed and PrimeWest's former CEO took control of TAQA North, part of the company's growing collection of businesses in Canada.[159] Shortly thereafter, the executives of the former PrimeWest delisted their company from the Toronto Stock Exchange, and, in a comment on the addition, the TAQA CEO noted that the new acquisition would be a "great addition to TAQA North's existing operations in Canada, providing further scale to help us capitalize on new and diverse development opportunities."[160] With that statement, the deal that had caused the minor uproar was completed.

V. RECOMMENDATIONS

In most respects, the U.S. system under CFIUS and Exon–Florio and the Canadian system under the ICA are similar. Both governments designed the system to provide an opportunity to examine potential acquisitions by a foreign buyer and determine whether the transaction should proceed.[161] Both systems allow the government to intervene in the event that a transaction is deemed potentially harmful to the country, and either create conditions upon which it can proceed or put a stop to it altogether.[162] Additionally, both systems strive to maintain a balance between interfering with transactions that appear to be harmful and trying not to appear hostile to foreign investment.[163] As the recent debates in both countries suggest, a thin line exists between the two objectives. Since both countries are positioned to consider new approaches to their current systems, now is a prudent time to consider the benefits and drawbacks of the changes and the best course of action.

A. *Pros and Cons of New Approaches*

The changes implemented under FINSA made positive additions to the current system. Requiring that a specific set of criteria be used

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158. *Id.*

159. *Abu Dhabi Deal for PrimeWest Is in the Books*, TORONTO STAR, Jan. 17, 2008, at B5, *available at* http://www.thestar.com/article/294816.

160. *Id.*

161. Byrne, *supra* note 5, at 856–57; *see also* Raby, *supra* note 5, at 397 (outlining conditions under which the acquisition of control of a Canadian business is reviewable).

162. McKenzie, *supra* note 73; Sud, *supra* note 5, at 1316–17.

163. *See* Sosnow et al., *supra* note 94 ("Canada is open for business, but it's not for sale.").

when evaluating transactions simplifies the review process for evaluators and allows more predictability for businesses who submit their proposed transactions to CFIUS.[164] Further review by the Director of National Intelligence and the Secretary of the Treasury adds another layer of protection to the review process and can, to a greater degree, assure Congress and the President that the report from CFIUS is dependable.[165] Similarly, requiring more extensive disclosure to Congress about the specific details of a proposed transaction reinforces the notion that the transaction is in good faith, which decreases the possibility of another potential public relations fiasco, similar to that which occurred during the Dubai Ports deal.[166] Further, dealing more carefully with potential security concerns is positive, especially considering the concerns that consistently remain at the forefront of many different policy issues. Including a review process that emphasizes the particular concerns surrounding national security reinforces the country's ability to discover any real threats and increase confidence that the government is taking all precautions to deal with such issues.

While similar changes in the ICA have not yet been passed in Ottawa, there would be benefits to adjusting certain functions of the current system. With foreign buyers taking over a growing number of Canadian businesses, many of those proposing changes to the ICA system fear that the country is "becoming the boy scouts of the world in this area."[167] Tightening review standards, even actually turning down a potential transaction (something yet to be done under the ICA), would place buyers on notice that the government review system will not be pushed aside easily and reinforce the idea that "Canada is open for business, but it's not for sale."[168] Further, specific provisions requiring consideration of national security concerns in a proposed transaction and further scrutiny for deals involving state-owned enterprises allow for a more in-depth study of such issues, while simultaneously inspiring more confidence overall that the deals provide a net benefit to Canada.[169]

Along with the potential positive changes in the U.S. system, there are also negatives that may result. The U.S. faces a dangerous problem if it appears hostile to foreign investment.[170] Even if the

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164. *See* USLaw.com, *supra* note 46 (setting out the new requirements under FINSA).

165. *Id.*

166. Zwaniecki, *supra* note 45 (setting out new requirements under FINSA).

167. Chase, *supra* note 92.

168. Sosnow et al., *supra* note 94; *see also* McKenzie, *supra* note 73 (noting that the Canadian government has not formally voided a proposed transaction since the implementation of the ICA in 1985).

169. *See* McKenzie, *supra* note 73 (discussing the proposed changes to ICA).

170. *See* Nina Easton, *After Dubai Ports, U.S. Courts Foreign Investment*, FORTUNE, Mar. 5, 2007, http://money.cnn.com/2007/03/05/magazines/fortune/

changes in the system still allow the vast majority of transactions to proceed, perception in this area may be very meaningful. In a time when the trade deficit is rising, appearing hostile to further investment in the U.S. economy engenders further harm.[171] Similarly, requiring expanded review of areas qualifying as "critical infrastructure and critical technologies," including power plants, toll roads, and ports, may discourage investment in these areas. Additionally, fears surrounding the media scrutiny experienced during the Dubai Ports World transaction may also discourage investment.[172] Such fears may also cause hesitation among businesses and countries that are likely to raise national security concerns in the U.S.[173]

Similar concerns may be raised about many of the proposed changes to the ICA. Under FIRA, Canada has already seen the effects of appearing hostile to foreign investment.[174] The recession and mounting international scrutiny facilitated the Conservative takeover of the government and the passage of the ICA in the first place.[175] Inserting a specific provision into ICA consideration may also add confusion to the review system. Under the current review process, the government is allowed to consider a number of factors and give more weight to specific factors depending on the circumstances.[176] Placing primacy on national security review removes some of the flexibility of the Canadian net benefit review system and diminishes the likelihood of certain continued investment in the Canadian economy, particularly investment originating in countries more likely to raise national security issues.

B. *Option: The Creation of the "Conciliation Committee"*

After weighing the benefits and drawbacks of the potential and actual changes that have occurred to the Exon–Florio and CFIUS system and the ICA system, as well as the effects of the recent events that have prompted these debates, both the U.S. and Canada must

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pluggedin_easton_commerce.fortune/index.htm (discussing President Bush's plan to actively court foreign investment following the Dubai Ports aftermath).

171. *See US Trade Deficit Widens Sharply*, BBC NEWS, Jan. 11, 2008, http://news.bbc.co.uk/1/hi/business/7183403.stm (noting that the American trade deficit in November 2007 was at highest level in fourteen months).

172. Cohen & Gourley, *supra* note 25; Zwaniecki, *supra* note 45.

173. *See* Ian Swanson, *Bush Invites Foreign Investment, Vows Balance with National Security*, THE HILL, May 11, 2007, at 14, *available at* http://thehill.com/the-executive/bush-invites-foreign-investment-vows-balance-with-national-security-2007-05-10.html (noting that some investors "have been worried that CFIUS reviews have intensified in the wake of the Dubai Ports controversy").

174. *See* Raby, *supra* note 5, at 396–97 (discussing the change from FIRA to the ICA).

175. *Id.*

176. *Id.* at 399.

decide the optimal direction for their respective foreign investment policies. It appears that the best solution lies in maintaining their current standards to allow for a rigorous review system and creating a "Conciliation Committee" to handle deals with sensitive political overtones. Creating such a committee allows an independent agency to broken agreements between countries.

In the U.S., the current system has most often let deals proceed under a fair investigation that examines the merits and potential complications of each deal. As the NASDAQ deal demonstrates, the current systems may strictly review transactions that raise concerns, but ultimately permit the consummation of the transaction once the concerns have been addressed.[177] It is in the more politically sensitive cases, however, that the need for the Conciliation Committee becomes apparent. Approaching transactions with an eye toward compromise could help the United States toe the line between policies that are too exclusionary and too inclusive.

The U.S. would like to avoid another case like the Dubai Ports deal. Dubai Ports was not only disastrous domestically for the Bush Administration, but it also likely discouraged other potential foreign investors.[178] This rings especially true for Arab investors, as many were in an uproar over the U.S. response to the deal, noting that the whole outrage over the transaction "smacked of racism."[179] If a situation like the Dubai Ports arose again, the Conciliation Committee could step in to broker a deal that would be satisfactory to both sides, both economically and politically.

One way to create the Conciliation Committee in the U.S. is creating a bipartisan governmental committee composed of both representatives and senators to work as a mediator. Members of the Committee would be appointed by the President, with equal representation given to each party. Deals would be referred to the Committee by a simple majority vote in either the House or Senate. Because the new regulations require expanded disclosure, both houses should have ample access in order to determine the status of the transaction.

The committee would act as a mediator between the parties to the deal and a government appointee to represent those expressing concerns with the deal. The committee would prepare a report based on its hearings, the findings of which would be adopted as a precondition to the deal's proceeding. Allowing politicians, who tended to raise the initial alarm over problematic deals, to have a

177. *See U.S. Clears Sale of a Stake in Nasdaq*, *supra* note 140 (noting the clearance of the transaction by the U.S. government).

178. *See* Swanson, *supra* note 173 and accompanying text.

179. *AIG Unit to Buy Dubai Company's U.S. Ports*, USA TODAY, Dec. 12, 2006, http://www.usatoday.com/money/industries/2006-12-11-dubai-ports_x.htm.

voice in the process could help to quell political pressures and further legitimize the Committee's report.[180]

Canada could create a similar committee that could function in the same procedural fashion. The committee would have to incorporate the major parties in power, and the members could be appointed by the Prime Minister to preserve the notion of bipartisanship. If the legislature found a deal questionable, it could submit the deal to the Canadian Conciliation Committee, which would have a say in the matter before any final approval was given by the Ministers. The committee would also address the concerns of Canadian politicians who have pushed for the inclusion of a specific provision for consideration of national security issues, because provisions addressing such concerns could be included in the committee's recommendations.[181]

Overall, the Conciliation Committee would be useful as an outlet for the political system in cases that raise issues in need of further exploration. By giving the legislative branches a greater voice in the resolution of these potentially hot-button political issues, concerns may be defused before a media circus develops, and the ultimate decision-makers—the President or the Canadian Ministers—could be more confident that their decisions are made in the best interests of their country.

Both countries realize the importance of continued foreign investment and appearing to be a favorable locale to invest money. The assurance that the governments are willing to come to the bargaining table to reach an agreement may settle other countries' concerns about investment in the U.S. or Canada. Thus, the Conciliation Committee could preserve strict review of transactions while maintaining a positive image abroad and not inciting the fears of a number of investors that they will come under attack if they attempt to bring their investments into the U.S. or Canada.

VI. CONCLUSION

Both the United States and Canada have long realized the importance of allowing foreign investment and acquisitions and have typically maintained a climate friendly to such business ventures.[182] The purpose of each of the respective committees in the first place

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180. *See* Weisman, *supra* note 119 (discussing the many concerns of members of Congress).

181. *See* Chase, *supra* note 92 (noting politicians' concerns over the lack of a national security provision).

182. *See generally* Raby, *supra* note 5 (discussing approaches to foreign direct investment in the Canadian context); Sud, *supra* note 5 (discussing approaches to foreign direct investment in the American context).

was to regulate investment while still remaining open to the always important influxes of capital. Changes to the CFIUS system in the U.S. after the Dubai Ports fallout and the proposed changes to the ICA, however, may cause some investors—particularly those with Middle Eastern ties—to think twice before entering what could become an awkward political battle.[183] As concerns over national security continue to take precedence in the minds of many, both countries must find a way to maintain a strict review system that allows them to investigate such concerns while still promoting foreign investment and projecting an image that encourages foreign participation in the economy.

While this may be a fine line to walk, one way to satisfy all sides is through the creation of a Conciliation Committee that would handle cases found by the legislature to need more independent consideration. The committee would function as a neutral arbiter for cases where there are concerns raised by politicians that could not be otherwise resolved. The committee would have to be bipartisan and would attempt to allow for a fair hearing of both sides of the issue, both from those involved in the deal and from those whose concerns would be raised. The committee would be able to examine closely the specifics of the deal and make reasonable proposals that would be required to be adopted for the deal to be allowed to move forward.

Such a committee could easily fit into both the U.S. and Canadian systems. In this way, the politicians could be satisfied that they have had their say without feeling the need to raise a media firestorm over the issue. Further, the parties to the deal could be confident that they can reach a reasonable compromise and proceed with less scrutiny and backlash. Neither party wants to be involved with front-page debates regarding the dangers their transaction poses to a country's national security. Given the importance of continued flows of foreign investment to both countries, keeping all parties happy in these cases is the key to achieving outcomes beneficial to both the companies and the countries involved.

Part of the system that has allowed both Wal-Mart and Royal Bank to grow to the largest business in their respective countries has been the ability to expand not only domestically but internationally as well. If the U.S. and Canada want their domestic businesses to have the continued ability to grow in such ways, they will likely expect that foreign countries will be welcoming to such expansion. Likewise, growing businesses from other countries would have the right to expect laws that reciprocate this understanding, and allow their businesses access into the U.S. and Canadian markets. In this way, the Wal-Marts and Royal Banks of other countries can continue

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183. *See* Swanson, *supra* note 173 and accompanying text.

to grow without the fear of inciting a furious storm of opposition when they look to continue to expand both domestically and internationally.

*Chris Lalonde**

* J.D. Candidate, May 2009, Vanderbilt University Law School; B.A., University of Notre Dame, 2006. I wish to thank my fiancée Molly and my loving parents for their unconditional support. I would also like to express gratitude to Professor Randall Thomas for the inspiration for this topic and to the editorial staff of the VANDERBILT JOURNAL OF TRANSNATIONAL LAW for their excellent work. All errors, of course, remain my own.