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Exon-Florio, CFIUS & foreigners

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From the earliest days of our independence, the United States has both welcomed and been leery of foreign investment in the US economy. In the immortal words of Yogi Berra, the last several months have been a case of *déjà vu* all over again.

On February 13, 2006, talk radio's Michael Savage, in his program "The Savage Nation," and Lou Dobbs, in his television show "Lou Dobbs Tonight," complained about the pending acquisition of the Peninsular & Oriental Steam Navigation Company (P&O) by Dubai Ports World (DPW). The concern was that P&O, a British corporation, among its many worldwide holdings, operated six port facilities in the United States and that, with the planned acquisition, those US assets would be operated by an Arab corporation, in which the Government of the United Arab Emirates is a major shareholder.

On February 16, Senator Charles Schumer (D-NY) called a press conference to denounce the pending acquisition. Depending on your favorite metaphor, the issue quickly turned into a feeding frenzy, a snowball rolling downhill, or the perfect storm. Congressional Representatives and Senators, who only weeks before had expressed no interest in maritime security, were drafting legislation, holding press conferences, and appearing on news programs all for the purpose of saving America from the imminent arrival of weapons of mass destruction through foreign-controlled US ports.

The ports of the United States are largely owned by state and local government agencies. The thousands of individual port facilities are leased to thousands of maritime companies. Some of these companies specialize in operating port facilities. Some ship-owning companies operate their own facilities in order to ensure convenient access for their ships. Shipping is an international business and the vast majority of ship-owning companies are domiciled outside the United States. Not surprisingly, the majority of port facilities in the United States are now operated by companies domiciled outside the United States. How did a large, but otherwise routine, commercial transaction that included as a minor aspect the transfer of operation of six US port facilities from one foreign company to another foreign company end up in a political firestorm?

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With the onset of the Cold War in 1945, it became apparent to persons in the federal government that efforts must be made to keep national defense assets out of the hands of America's enemies (i.e., the Communist countries, such as the USSR and Red China). Initially, this was done on an *ad hoc* basis. In 1950, Congress enacted the Defense Production Act to provide some guidelines and standards, as well as specific legal authority. In 1975, following the OPEC oil embargo, President Ford issued an Executive Order establishing the Committee on Foreign Investment in the United States (CFIUS) to administer the process of monitoring foreign investment in US industry and assets. Initially, the focus was on companies that manufactured weapons and defense systems.

After an attempt in 1987 by Japan-based Fujitsu Ltd. to acquire majority ownership of Fairchild Semiconductor Corporation, Congress adopted a significant amendment to the Defense Production Act. Known informally as the Exon-Florio bill (after its principal proponents – Senator Exon from Nebraska and Representative Florio from New Jersey), the 1988 legislation formalized the role and authority of CFIUS in the review process. The Defense Production Act of 1950, as amended by the Exon-Florio bill, grants the President authority to block proposed foreign acquisitions of companies engaged in interstate commerce in the US where that acquisition threatens to impair the national security. Review of a proposed acquisition, merger, or takeover is particularly intense where the proposed activity is by an entity controlled by or acting on behalf of a foreign government. The President can suspend or prohibit the proposed activity, but only if there is “credible evidence” that the foreign investment will impair national security. The statute does not define “national security,” but the term is to be interpreted broadly without limitation to a particular industry.

US Department of Commerce records indicate that, as of 2004, foreign direct investment in the United States amounted to more than \$1.5 trillion. The United Kingdom is the largest foreign direct investor (\$252 billion), followed by Japan (\$177 billion), the Netherlands (\$167 billion), Germany (\$163 billion), and France (\$148 billion). In 2004, the direct investment in the United States by companies from the United Arab Emirates was shown to be approximately \$24 million, but this data only counts ownership or control, by one foreign resident, of 10% or more of the voting securities of an incorporated US business enterprise or the equivalent interest in an unincorporated US business enterprise. It is estimated that UAE companies have invested approximately \$1 billion in US assets, but, because the ownership percentage is generally low, most of these investments do not show up in government statistics.

US port facilities are currently operated by companies domiciled in the United Kingdom, Denmark, Japan, South Korea, Taiwan, Singapore, and China, and this listing is far from complete. Ships from virtually every nation enter and depart US ports daily, carrying cargoes from everywhere. The majority of the crewmembers on these ships are from third world nations. All the ships adhere to internationally-agreed security standards and are subject to examination by the US Coast Guard. The cargoes are subject to examination by the US Customs and Border Protection. The crews are subject to examination by the US Immigration and Customs Enforcement. The US port facilities themselves (regardless of the nationality of the operating company) must comply with USCG security regulations, must prepare a facility security plan,

must have the plan reviewed and approved by the Coast Guard, and are subject to both regular and random USCG inspections. The proposed acquisition of the six US port facilities by DPW was examined by CFIUS, which found no “credible evidence” that the transfer would impair national security.

While there is certainly room for improvement in maritime security, US ports and US port facilities are significantly more secure today than they were in 2001. That we don't feel more secure is more a matter of perception than reality. That we are comfortable with a British company operating various US port facilities (remembering that a significant percentage of Britons are of Arab descent), but uncomfortable with an Arab company operating those same US port facilities (even though much of the senior management of the Arab company are US citizens), is a reflection of both long-term history and recent experience. We live in an international community. We are engaged in a global war against terrorism (sometimes called “the Long War”). We need to and have enlisted the cooperation and assistance of many international partners, including Middle Eastern nations. The United States owes it to our international partners (and to the citizens of the United States) to act in a thoughtful, deliberate manner with regard to homeland and international security. Knee-jerk responses are the opposite of leadership.