
THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES:
AN ANALYSIS OF THE FOREIGN INVESTMENT RISK REVIEW
MODERNIZATION ACT OF 2018

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I. Introduction

The United States is the world's largest recipient of foreign direct investment ("FDI"), with acquisition expenditures by foreign-direct investors totaling \$373.4 billion dollars in 2016.² Foreign investment into the U.S. economy offers many benefits, from providing jobs to driving innovation.³ The Committee on Foreign Investment in the United States ("CFIUS") is an interagency body that

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² See Bureau of Economic Analysis, *Expenditures by Foreign Direct Investors for New Investment in the United States*, U.S. DEPT. OF COM. (July 12, 2017), *archived at* <https://perma.cc/9RCJ-XD4A> (explaining the total expenditures by foreign investors to acquire, establish, or expand U.S. businesses).

³ See Foreign Investment Risk Review Modernization Act of 2018, H.R. 5515, § 1702(a)(1), 115th Cong. (2018) [hereinafter *FIRMA*] (finding 8.5% of the U.S. labor force have jobs resulting from foreign direct investment). "Foreign investment provides substantial economic benefits to the United States, including the promotion of economic growth, productivity, competitiveness, and job creation, thereby enhancing national security." *Id.* at § 1702(b)(1); see also Leslie Wagner, *The Importance of FDI to the U.S. Economy*, AREA DEV. (2017), *archived at* <https://perma.cc/AHB6-DQ8N> (estimating that in 2013, about 6.1 million people were employed by U.S. affiliates of foreign companies).

serves as the President's council on potential national security implications related to FDI in the U.S. economy.⁴ CFIUS has the duty to balance the United States' open and rule-based policy on international investment with national security interests in reviewing FDI.⁵ The committee reviews transactions resulting in foreign ownership or control of U.S. businesses and makes a determination on whether the transaction poses a national security threat.⁶ Recently, key United States government officials have taken note of FDI coming into private entities, such as joint ventures, which may not trigger a CFIUS review.⁷ This led to President Trump signing into law the John S. McCain National Defense Authorization Act on August 13, 2018, which expanded CFIUS' authorization to scrutinize inbound foreign

⁴ See JAMES K. JACKSON, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES 1 (Cong. Res. Serv. 2018) [hereinafter *CFIUS*] (defining CFIUS as an interagency body made up of members appointed by the President that assist in the national security aspects of foreign direct investment).

⁵ See *FIRREA* H.R. 5515, § 1702(b)(1) (codifying the current policy of the United States to encourage foreign investment while protecting the country's national security); see also Robert H. Mundheim & David W. Heleniak, *American Attitudes Toward Foreign Direct Investment In The United States*, 2 U. PA. J. OF INT'L. LAW 221, 221 (1979) (explaining that America's "open door policy" to foreign investment reflects two core principles). First, the investment process is "most efficient" in the absence of government intrusion. *Id.* Second, the United States treats all investors, domestic or foreign, equally and in a "nondiscriminatory fashion." *Id.* at 222; see also *CFIUS*, *supra* note 4, at 2 (describing the role of CFIUS to be of balancing the role of foreign investment in the domestic economy with national security concerns).

⁶ See Amy S. Josselyn, *National Security At All Costs: Why the CFIUS Review Process May Have Overreached Its Purpose*, 21 GEO. MASON L. REV. 1347, 1348 (2014) (discussing the purpose of CFIUS and two factors used to assess potential effects of transactions on national security). The factors CFIUS considers include access to sensitive technology and interference with industries that support defense requirements. *Id.*

⁷ See *Examining the Committee on Foreign Investment in the United States: U.S. Senate Committee on Bank, Housing and Urban Affairs* (2017) (statement of Sherrod Brown, Senator for Ohio), archived at <https://perma.cc/BD9Z-HGGM> (explaining that transactions, such as foreign acquisitions of U.S. companies, may pose national security and commercial implications). CFIUS reviews of Chinese acquisitions of U.S. companies have topped the list for the last three years. *Id.*; see Saleha Mohsin, *Mnuchin Seeks Lawmakers' Help to Fix Foreign Investment Panel*, BLOOMBERG POL. (June 6, 2017), archived at <https://perma.cc/4RRP-NJDY> (discussing parts of CFIUS that need to be amended to include review joint ventures in addition to mergers and acquisitions).

investment.⁸

Access to critical technology as a result of a transaction is one factor CFIUS looks at in determining whether a national security risk exists in a foreign transaction.⁹ Based out of the United Kingdom, the SoftBank Investment Adviser-led Vision Fund (“the Fund”) had its first major close in May 2017, reporting \$93 billion dollars of committed capital.¹⁰ Masayoshi Son (“Masa”), Chairman and CEO of SoftBank Group and leader of the Fund, has claimed the purpose of the Fund will be to help create a portfolio of businesses that will engage in partnerships to promote the coexistence of artificial intelligence entities and mankind in the event of “The Singularity.”¹¹

⁸ See Mario Mancuso & Lucille Hague, *CFIUS After Lattice: What Boards, Investors, and Bankers Need to Know Now*, BLOOMBERG BNA (Sept. 20, 2017), archived at <https://perma.cc/C9CS-WEWG> (presenting Senator Cornyn’s proposed bill that would expand CFIUS’ jurisdiction to include joint ventures, certain types of minority investments, and require CFIUS to devote additional scrutiny to transactions involving “countries of concern,” including China and Russia); see also Donald Trump, *Remarks by President Trump at a Signing Ceremony for H.R. 5515, “John S. McCain National Defense Authorization Act for Fiscal Year 2019”*, WHITEHOUSE.GOV (Aug. 13, 2018), archived at <https://perma.cc/4PJQ-MAW3> (claiming the defense bill to be the most significant investment in U.S. military history); *FIRRMA FAQs*, U.S. DEP’T OF TREASURY, (Aug. 13, 2018), archived at <https://perma.cc/26QV-KFPM> (stating that FIRRMA broadens the scope of the CFIUS to review more types of transactions that pose modern threats).

⁹ See *FIRRMA H.R. 5515*, § 1702(c)(1)-(2) (assessing the national security risks the Committee considers when a country of special concern acquires critical technology or infrastructure). This could involve critical infrastructure, energy assets, critical material, or critical technology by a foreign person or government. *Id.*; see also Josselyn, *supra* note 6, at 1348 (emphasizing that sensitive technology is one of the factors CFIUS considers when evaluating a foreign company).

¹⁰ See Press Release, SoftBank Group Corp, *SoftBank’s Vision Fund First Major Closing (May 22, 2017)* (on file with author) (announcing the Fund acquired \$93 billion of committed capital with a number of investors including Apple Inc., Foxconn Technology Group, Sharp Corporation, and others). “First major closing” can be defined as of May 2017, the Vision Fund had \$93 billion of committed capital to the Fund. *Id.*; see also Jon Russell, *SoftBank’s massive Vision Fund raises \$93 billion in its first close*, TECHCRUNCH (May 20, 2017), archived at <https://perma.cc/386P-JA6P> (reporting the sources of the committed capital to be from investors such as Apple, Saudi Arabia’s Public Investment sovereign wealth fund, and UAE-based Mubadala Investment Company).

¹¹ See Katie Benner, *Masayoshi Son’s Grand Plan for SoftBank’s \$100 Billion Vision Fund*, N.Y. TIMES (Oct. 10, 2017), archived at <https://perma.cc/4MZE-AR2E> (describing Mr. Son’s ambition to establish a network of businesses to collect data that could lead to the adoption of self-driving cars); see also Amie Tsang & Michael J. de la Merced, *Morning Agenda: Masayoshi Son Warns of the Singularity*, N.Y.

After a December 2016 meeting with then President-elect Trump, Masa pledged to invest \$50 billion in the United States with a focus on investing in disruptive high-technology, which would reportedly create 50,000 jobs.¹² One aspect of such high-technology is the dual-use feature that many of these technologies possess, which provides both civilian and military-type applications of the technology.¹³ As many Vision Fund transactions have involved such critical technology, due to its ability to be used in war, it is unclear how CFIUS will view these types of investments with a United States high-technology company. Furthermore, it remains uncertain whether the CFIUS reform Senator Cornyn proposed will deter potential national security threats that foreign joint ventures pose with their investments in U.S. high-technology companies.

TIMES (Sept. 20, 2017), *archived at* <https://perma.cc/DR3C-NLSG> (stating that many blue and white collar jobs will be replaced by robots once “The Singularity” is reached). “The Singularity” is described as the moment in time when artificial intelligence surpasses human intelligence capabilities. *Id.*; *see generally* RAY KURZWEIL, *THE SINGULARITY IS NEAR*, 14-21 (Penguin Group 2006) (predicting “The Singularity” as a likely outcome of artificial intelligence).

¹² *See* Michael J. de la Merced, *After Meeting Trump, Japanese Mogul Pledges \$50 Billion Investment in the U.S.*, N.Y. TIMES, (Dec. 6, 2016), *archived at* <https://perma.cc/CYH6-YTQZ> (reporting on the meeting between President-elect Trump and Mr. Son in which Mr. Son pledged to invest \$50 billion in the United States). The capital is projected to come from the Vision Fund, not the SoftBank Group Corporation. *Id.*; *see also* Disruptive Technology, *INVESTOPEDIA.COM* (Feb. 23, 2017), *archived at* <https://perma.cc/TCJ8-MUKB> (defining “Disruptive Technology” as industry or business-altering technology).

¹³ *See FIRRMA*, H.R. 5515, § 1742(2)(defining the term “dual-use” with respect to an item, as when an “item has [both] civilian applications and military, terrorism, weapons of mass destruction, or law-enforcement-related applications.”); *see also* JIM MATTIS, DEPT. OF DEF., *SUMMARY OF THE 2018 NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA* 3 (2018) (describing how innovations in commercial technology necessarily changes “the character of war.”). “New commercial technology will change society and, ultimately, the character of war.” MATTIS, *supra* note 13. “The fact that many technological developments will come from the commercial sector means that state competitors and non-state actors will also have access to them, a fact that risks eroding the conventional overmatch to which our Nation has grown accustomed.” *Id.*; *see also* GREG ALLEN & TANIEL CHAN, *ARTIFICIAL INTELLIGENCE AND NATIONAL SECURITY* 65 (Harvard Kennedy Sch. Belfer Ctr., July 2017), *archived at* <https://perma.cc/8P3V-ZC77> (describing how AI technologies can serve dual purposes, for both military and commercial sectors, because “the commercial sector also has security needs”).

Part II of this note provides an overview of the creation of CFIUS, and describes how the Committee evolved from being first established by an executive order to being codified through a statute and proceeding amendments.¹⁴ Part III of this note outlines the transactions that have been blocked by the President, as well as the creation of Masa's Vision Fund and the potential implications of the Vision Fund's investments on CFIUS.¹⁵ Lastly, Part IV provides an analysis of the most recently proposed FIRRMA amendment and ultimately concludes that it strengthens CFIUS to meet present day challenges CFIUS that confronts.¹⁶ Additionally, Part IV will predict the role that the FIRRMA Amendment would have had on investments made by the Vision Fund and analyzes how the amendment politicizes the foreign investment process.¹⁷

II. History

Through an Executive Order, President Ford established CFIUS in 1975.¹⁸ CFIUS was composed of eight United States government leaders, and was granted the primary duty of monitoring the impact of foreign investment in the United States.¹⁹ This committee

¹⁴ See *infra* Part II (providing a brief history of relevant amendments that have developed CFIUS).

¹⁵ See *infra* Part III (addressing the history of blocked transactions under the CFIUS regime).

¹⁶ See *infra* Part IV (articulating how FIRRMA is drafted accordingly to meet the challenges posed to CFIUS).

¹⁷ See *infra* Part IV (deciding FIRRMA would either block or require mitigation agreements for the Vision Fund's recent investments and exploring how the text of FIRRMA detrimentally politicizes CFIUS).

¹⁸ See Foreign Investment in the United States, Exec. Order No. 11858, (May 7, 1975) (to be codified 40 Fed. Reg. 20263) (establishing that CFIUS is responsible, in part, for the preparation of development analyses of foreign investments and the review of investments which have major implications for US national interests); see also Mundheim & Heleniak, *supra* note 5, at 224 (commenting on the United States government's creation of CFIUS as a means of "improv[ing] its information base").

¹⁹ See 40 Fed. Reg. 20263 (outlining how CFIUS is comprised of several Executive Branch officials). President Ford ordered that CFIUS be made up of the following eight members: The Secretary of State, The Secretary of the Treasury, The Secretary of Defense, The Secretary of Commerce, The United States Trade Representative, The Chairman of the Council of Economic Advisors, The Attorney General, and The Director of the Office of Management and Budget. *Id.* The Secretary of the Treasury would be the chairman of the Committee. *Id.*; see also CFIUS, *supra* note 4, at 3-4

was tasked primarily to (1) arrange for the preparation of analyses of trends and significant developments in foreign investments in the United States, (2) provide guidance or arrangements with foreign governments for advance consultations on prospective major foreign governmental interests in the United States, (3) review investments in the United States which, in the judgement of the Committee, might have major implications for United States national interests, and (4) consider proposals for new legislation or regulations relating to foreign investment as may appear necessary.²⁰

CFIUS was established in response to concerns about increased investments by the Organization of the Petroleum Exporting Countries in American portfolio assets.²¹ For example, with a surplus of money following OPEC's U.S. oil embargo, OPEC's holdings of longer-than-one-year U.S. treasury notes and bonds reached \$4 billion dollars in 1976.²² However, the executive order created confusion among CFIUS' members as to whether the objective of CFIUS was to focus

(describing the establishment of CFIUS). The Committee's authority was delegated through "Section 721(a) and (e) of the Defense Production Act." *Id.*

²⁰ See 40 Fed. Reg. 20263 (summarizing the responsibilities of the Committee as "monitoring the impact of foreign investment in the United States, both direct and portfolio, and for coordinating the implementation of United States policy on such investment.").

²¹ See David Zaring, *CFIUS as a Congressional Notification Service*, 83 S. CAL. L. REV. 81, 91 (2009) (quoting C.S. Eliot Kang, *U.S. Politics and Greater Regulation of Inward Foreign Direct Investment*, 51 INT'L. ORG. 301, 302-03 (1997)). "As America was coming out of the oil embargo, there was congressional concern 'regarding the 'return in the form of direct investment of a portion of [OPEC's] huge petrodollar surplus, gained just after a politically motivated oil embargo on the United States.'" *Id.* at 92; see also *About Us: Member Countries*, ORG. OF THE PETROLEUM EXPORTING COUNTRIES (Jan. 15, 2019), archived at <https://perma.cc/EN7B-YCUE> (listing the five founding member states of OPEC as Iran, Iraq, Kuwait, Saudi Arabia, and Venezuela). Established in 1960, the founding OPEC member states were later joined by Qatar in 1961, Indonesia and Libya in 1962, the United Arab Emirates in 1967, Algeria in 1969, Nigeria in 1971, Ecuador in 1973, Gabon in 1975, Angola in 2007, Equatorial Guinea in 2017, and Congo in 2018. *Id.*; see also *CFIUS*, *supra* note 4, at 1 (expressing concerns related to the Executive Order creating CFIUS). Concerns existed that OPEC countries investments were politically, not economically motivated. *Id.* Portfolio assets are described as treasury securities, and corporate stocks and bonds. *Id.*

²² See SOO ANN LEE, *ECONOMIC RELATIONS BETWEEN WEST, ASIA, AND SOUTHEAST ASIA* 81 (1977) (stating OPEC invested just under half of its investible surplus money in U.S. treasury bonds and notes).

on the political or economic aspect of FDI.²³

A. Exon-Florio Amendment

In 1988, over growing concerns of Japanese and British acquisitions of U.S. firms, Congress created a formal review system for CFIUS through the Exon-Florio Amendment to (the “Amendment”) the 1950 Defense Production Act.²⁴ The Amendment granted the President the power to suspend or prohibit foreign “mergers, acquisitions, or takeovers” that might threaten U.S. national security.²⁵ A protocol was put in place where if it was determined that

²³ See *CFIUS*, *supra* note 4, at 4 (suggesting that some Members of Congress believed CFIUS was not fulfilling its duty). CFIUS only met ten times between 1975 and 1980. *Id.*

²⁴ See George S. Georgiev, *The Reformed CFIUS Regulatory Framework: Mediating Between Continued Openness to Foreign Investment and National Security*, 25 *YALE J. ON REG.* 125, 126-27 (2007) (citing concerns of foreign investment behind the Exon-Florio amendment passing); see also Timothy Webster, *Why Does The United States Oppose Asian Investment?*, 37 *NW. J. INT’L. L. & BUS.* 213, 228, 231 (2017) (exploring the consequences of economic tensions between the United States and Japan during the 1960s and 1970s). Japan’s economic success made it the main economic rival of the United States offering lower priced products such as televisions, stereos, cars, and computers that were often superior in quality to similar U.S.-produced products. *Id.* A possible transaction involved Fairchild and Fujitsu and how Fujitsu withdrew its bid to purchase. *Id.* at 231; see also Cecelia M. Waldeck, Note, *Proposals for Limiting Foreign Investment Risk Under the Exon-Florio Amendment*, 42 *HASTINGS L.J.* 1175, 1175 (1991) (describing policymakers’ concern for security behind the adoption of the Exon-Florio amendment). The Exon-Florio amendment was adopted under section 5021 of the 1998 Omnibus Trade and Competitiveness Act. *Id.*; see also *CFIUS*, *supra* note 4, at 5 (commenting on concerns of Japanese firms acquiring U.S. firms). The Defense Department opposed the transaction, believing it would give Japan control over a major supplier of computer chips for the U.S. military and made U.S. defense industries more dependent on foreign suppliers. *Id.* CFIUS’s investigation into the transaction and the strong opposition from cabinet officials led to Fujitsu withdrawing its bid of the sale. *Id.*

²⁵ See Georgiev, *supra* note 24, at 127 (discussing Presidential powers under the Amendment now include the power to “investigate the effect of foreign acquisitions on U.S. national security and, acting based on ‘credible evidence,’ to suspend or prohibit acquisitions that might threaten national security”); see also *CFIUS*, *supra* note 4, at 5 (analyzing Presidential authority under the Exon-Florio Amendment to the Defense Production Act). Congress directed that before the President suspend or prohibit a transaction, the President must conclude: (1) other U.S. laws are inadequate or inappropriate to protect the national security, and (2) the President

an investigation should be taken, it would start no later than thirty days after the President received a report of the acquisition, merger, or takeover, and that said investigation should be completed within forty-five days.²⁶

Congress designated factors that the President may take into consideration when determining if a national security threat existed within a transaction.²⁷ Leading up to the adoption of the amendment and continuing to the present day, a hotly debated topic in Congress was how to define “national security” in the amendment.²⁸ Through

must have credible evidence that the foreign investment will impair national security. *Id.*

²⁶ See Waldeck, *supra* note 24, at 1176 (setting forth the protocol to be undertaken when a national security investigation into an acquisition, merger, or takeover was to take place).

²⁷ See Authority to review certain mergers, acquisitions, and takeovers, 50 U.S.C § 2170(f) (1988) (suggesting factors the President may take into account when investigating a foreign acquisition, merger, or takeover of a U.S. company). The bill sets forth a list of five factors: (1) domestic production needed for projected national defense requirements, (2) the capability and capacity of domestic industries to meet national defense requirements, including the availability of human resources, products, technology, materials, and other supplied services, (3) the control of domestic industries and commercial activity by foreign citizens as it affects the capability and capacity of the United States to meet the requirements of national security. (4) the potential effects of the proposed or pending transaction on sales of military goods, equipment, or technology to any country identified by the Secretary of State that (A) supports terrorism, as a country of concern regarding missile proliferation, or as a country of concern regarding the proliferation of biological or chemical weapons, (5) the potential effects of the proposed or pending transaction on United States international technological leadership in areas affecting United States national security, (6) the potential national security-related effected on United States critical infrastructure, including major energy assets, (7) the potential national security-related effects on United States critical technologies, (8) whether the covered transaction is a foreign government controlled transaction, (9)(A) a review of the current assessment of the adherence of the subject country to nonproliferation control regimes, (9)(B) the relationship of such country with the United States, specifically setting on its record on cooperating in counter-terrorism efforts, (10) the long-term project of United States requirements for sources of energy and other critical resources, and (11) such other factors as the President or the Committee may determine to be appropriate in connection with a specific review or investigation. *Id.*

²⁸ See Xingxing Li, *National Security Review in Foreign Investments: A Comparative and Critical Assessment on China and U.S Laws and Practices*, 13 BERKELEY BUS. L.J. 255, 271 (2016) (stating “CFIUS enjoys broad power because ‘national security’ is not defined”); see also Ji Li, *Investing near the National*

the Exon-Florio Amendment, the President's role in CFIUS was strengthened, while it attempted to emphasize that the decisions made by the President regarding foreign investment policy remained free of political considerations.²⁹

B. Byrd Amendment

Through the Byrd Amendment of 1992, Congress expanded the reach of the Exon-Florio Amendment.³⁰ The Byrd Amendment's two main additions to Exon-Florio were the instituted mandatory investigation of transactions involving foreign governments and increased Congressional report requirements of the President.³¹ CFIUS

Security Black Hole, 14 BERKELEY BUS. L.J. 1, 6 (2017) (describing CFIUS as a "legal black hole" due to its dearth of enforcement actions and the lack of common knowledge about it); *see also* Webster, *supra* note 24, at 232, 243 (claiming that "national security" ramifications are often exaggerated and that the domestic industry withstood the pressure of foreign investment); *see also* CFIUS, *supra* note 4, at 6 (observing that the most controversial issue debated in the proposal of the Amendment was the definition of "national security").

²⁹ *See* CFIUS, *supra* note 4, at 7 (delving into Congress's attempt "to strengthen the President's hand in conducting foreign policy" through the Exon-Florio Amendment). Congress designed the amendment to balance public concerns of the economic impact resulting in foreign investment while remaining committed to the United States' open environment to foreign investors. *Id.*

³⁰ *See* Stephen K. Pudner, *Moving Forward From Dubai Ports World—The Foreign Investment and National Security Act of 2007*, 59 ALA. L. REV. 1277, 1281 (2008) (pointing to the addition of "in any instance in which an entity controlled by or acting on behalf of a foreign government seeks to engage in any merger, acquisition, or takeover which could . . . affect the national security of the United States."); *see also* Jonathan C. Stagg, *Scrutinizing Foreign Investment: How Much Congressional Involvement Is Too Much?*, 93 IOWA L. REV. 325, 337 (2007) (contending that the standard for CFIUS review is significantly lower under the Byrd Amendment to the Exon-Florio Amendment).

³¹ *See* National Defense Authorization Act for the Fiscal Year 1993, Pub. L. No. 102-484, § 837, 106 Stat. 2315, 2463-65 (enacted Oct. 23, 1992) (codified as amended at 50 U.S.C. app. § 2170(b) (2000)) (describing the mandatory investigations of the President or the President's designee under the Defense Production Act Amendments).

The President or President's designee shall make an investigation, as described in subsection (a), in any instance in which an entity controlled by or acting on behalf of a foreign government seeks to engage in any merger, acquisition, or takeover 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.

members and Congress had different interpretations of the Byrd Amendment's meaning with regards to conducting a full forty-five day investigations into a covered transaction.³² The differences in interpretation truly came to light during Dubai Ports World attempt to acquire six commercial U.S. ports in 2006.³³ The intense public and

Id.; see also Margaret L. Merrill, Article, *Overcoming CFIUS Jitters: A Practical Guide for Understanding the Committee on Foreign Investment in the United States*, 30 QUINNIPIAC L. REV. 1, 22 (2011) (highlighting the growing concern that increasing FDI could result in increasing foreign control of "key sectors" of the U.S. economy); see also Pudner, *supra* note 30, at 1281 (summarizing Byrd Amendment as requiring investigation anytime investment could "affect national security and mandatory anytime the investment could affect national security and the entity is controlled by, or acting on behalf of, a foreign government."); see also Stagg, *supra* note 30, at 337 (explaining the institution of mandatory investigations of transactions involving foreign governments). The Byrd Amendment increased the burden on the President to report to Congress by requiring the President to send a written report of their determination of whether or not to take action against a transaction prohibited by the Exon-Florio Amendment. *Id.* The Byrd Amendment's main effect was to increase Congressional oversight by requiring presidential reporting. *Id.* at 338.

³² See *CFIUS*, *supra* note 4, at 8 (describing how CFIUS members and Congress interpreted the Byrd Amendment); see also Patrick Griffin, *CFIUS In The Age Of Chinese Investment*, 85 FORDHAM L. REV. 1757, 1766 (2017) (discussing the differences in CFIUS members and Congress' interpretations of the Byrd Amendment). CFIUS members believed that the amendment gave the committee discretion in regard to the length of the investigation, while Congress believed that the amendment required a full investigation. *Id.*

³³ See *CFIUS*, *supra* note 4, at 58-59 (articulating the Dubai Ports World ("DP World") proposed acquisition). DP World proposed to acquire six U.S. commercial ports that were operated by British-owned Peninsular and Oriental Steam Navigation Company. *Id.* The CFIUS committee concluded the transaction did not threaten to impair U.S. national security, and therefore, did not require the full forty-five-day investigation. *Id.* Congress was under the belief that CFIUS was required to conduct a full forty-five-day review. *Id.*; see also Griffin, *supra* note 32, at 1766 (describing the discrepancies, specifically CFIUS declining to conduct a full forty-five day investigation contrary to congressional interpretation of the Committee's role); see also *CFIUS*, *supra* note 4, at 59 (detailing why DP World sold off its U.S. port operations to an American owner). As a result of the negative attention from Congress and the American public, DP World decided to sell off the U.S. port operations to A.I.G. Global Investment Group, a New York-based asset management company. *Id.* Cf. Christopher M. Tipler, Comment, *Defining National Security: Resolving Ambiguity In The CFIUS Regulations*, 35 U. PA. J. INT'L L. 1223, 1258-59 (2014) (articulating the impact of increased wariness of investing in U.S. opportunities as a result of the the DP World controversy on FDI from the U.A.E.). Analysts estimated that foreign investment in the U.S. from the United Arab

congressional debate from the Dubai Ports World acquisition changed the way the Bush administration viewed CFIUS investigations into foreign acquisitions, specifically when CFIUS approved of the French-based Alcatel SA acquisition of Lucent Technologies with a Special Security Agreement (S.S.A).³⁴

C. *Foreign Investment And National Security Act of 2007*

A myriad of domestic and international factors played a role in the passage of the Foreign Investment And National Security Act of 2007 (FINSAs).³⁵ From the start, FINSAs placed a strong emphasis on national security and was designed to balance foreign investment and U.S. national security interests.³⁶ FINSAs was the first statutory codification of CFIUS, which was previously empowered by Executive Order 11858.³⁷ FINSAs formalized the process by which

Emirates fell by over \$1 billion in 2006 as a result of the DP World fallout. *Id.* at 1259.

³⁴ See Jessica Holzer, *National Security Chill on Takeovers*, FORBES (Dec. 22, 2006), archived at <https://perma.cc/L7DC-YNSE> (asserting worries that CFIUS' "evergreen provision" attached to the Alcatel SA and Lucent Technology acquisition would become commonplace). "This is out there publicly. People who go into CFIUS have to consider whether they will be asked to do that and whether they will agree." *Id.*; see also CFIUS, *supra* note 4, at 8-9 (distinguishing how this administrative decision changed CFIUS' role in foreign transactions from being deemed final to being subject to review, creating a heightened level of uncertainty to foreign investors seeking to acquire U.S. firms). The decision to give CFIUS the power to unwind a deal previously approved was strongly opposed by individuals in the international trade community. *Id.*; see also Griffin, *supra* note 32, at 1766 (detailing the S.S.A requirement with the Alcatel SA acquisition of Lucent Technologies). The S.S.A. had two requirements, which (1) restricted Alcatel SA's access to sensitive work done by Lucent pertaining to the United States' communications infrastructure, and (2) allowed CFIUS to reopen a review of the deal and overturn their approval at any point. *Id.*

³⁵ See Tipler, *supra* note 33, at 1228-29 (explaining domestic and international trends that inform CFIUS regulations). Tipler describes an increased emphasis on national security in the wake of the September 11, 2001 terrorist attacks and a movement of global economic integration through globalization. *Id.*

³⁶ See Foreign Investment and National Security Act of 2007, H.R. 556, § 2(a)(6), 110th Congress (2007) (placing an emphasis on national security). The preamble of the FINSAs act states the act's purpose is to "ensure national security while promoting foreign investment" and to "reform the process by which such investments are examined for any effect they may have on national security." *Id.*

³⁷ See Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons, 31 C.F.R. §§ 800.101- 800.802 (Nov. 21, 2008) (asserting FINSAs formally

CFIUS conducted its national security investigations into a three part process.³⁸ Through President Bush's Executive Order 13456, the

established CFIUS as a statute); *see also* Tipler, *supra* note 33, at 1228-30 (detailing two specific trends and two specific transactions that led to the passage of FINSA as the first statutory codification of CFIUS).

³⁸ *See* 31 C.F.R. §§ 800.402(c)(iv)-(v) (discussing the process of a CFIUS investigation). FINSA refers to a "covered transaction" as any transaction in which could result in foreign control of a person engaged in interstate commerce in the United States. *Id.* FINSA states a review of a covered transaction must be completed within 30 days. *Id.* A review by CFIUS can be filed voluntarily by the parties involved in the transaction or by a request from CFIUS. *Id.*

A voluntary notice must include in detail, including but not limited to: (i) A summary setting forth the essentials of the transaction, including a statement of purpose of the transaction, both within and outside the United States; (ii) The nature of the transaction; (v) The name, address, and nationality [for individuals] or place of incorporation or other legal organization [for entities] of: (A) The immediate parent, the ultimate parent, and each interim parent, if any, of the foreign person that is a party to the transaction; (B) Where the ultimate parent is a private company, the ultimate owner(s) of such parent; and (C) Where the ultimate parent is a public company, any shareholder with an interest of great than five percent in such parent; (ix) The name of any and all financial institutions involved in the transaction, including as advisors, underwriters, or a source of financing for the transaction; (3)(i) [With respect to the U.S. business that is the subject of the transaction] Their respective business activities, as, for example, set forth in annual reports, and the product or service categories of each, including an estimate of U.S. market share for such product or service categories and the method used to determine market share, list of direct competitors for those primary product or service categories.

Id. at 70724. FINSA requires an additional investigation to be completed in 45 days in the following types of transactions: "(1) where the transaction threatens to impair U.S. national security and that threat has not been mitigated prior to or during the 30-day review; (2) where the transaction is a foreign government-controlled transaction; (3) where the transaction results in foreign control over critical infrastructure that, in the determination CFIUS, could impair national security, if that impairment has not been mitigated; and (4) where the lead agency recommends, and CFIUS concurs, that an investigation be undertaken." *Id.* at 70703. At the conclusion of the 45-day investigation, CFIUS will make a recommendation to the President, and if the President decides to prohibit the transaction, they must announce their decision publicly within 15 days of the completion of the investigation. Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons, at 70703; *see also* CFIUS, *supra* note 4, at 11 (indicating why a business entity would want to

Committee's membership makeup was changed to nine members.³⁹ FINSA clarified that "national security" included issues related to homeland security as it applies to critical infrastructure.⁴⁰ Five new factors were added for the Committee to consider while undertaking an investigation into a covered transaction.⁴¹ Much like the Committee

voluntarily file a CFIUS review); *see also* Tipler, *supra* note 33, at 1233-34 (describing the initial thirty-day CFIUS review). An organization may also want to voluntarily file to avoid negative publicity by being blocked or labeled as impairing U.S. national security interests. *Id.* at 1234, 1238.

³⁹ *See* Further Amendment of Executive Order 11858 Concerning Foreign Investment in the United States, Exec. Order No. 13456, 73 F.R. § 4677 (Jan. 23, 2008) (establishing the Committee's members); *see also* CFIUS, *supra* note 4, at 14 (noting the CFIUS members after the passage of FINSA). Five officials were designated to "observe and, as appropriate, participate in and report to the President on the Committee's activities: (i) The Director of the Office of Management and Budget; (ii) The Chairman of the Council of Economic Advisors; (iii) The Assistant to the President for National Security Affairs; (iv) The Assistant to the President for Economic Policy; and (v) The Assistant to the President for Homeland Security and Counterterrorism. *Id.* The Committee now consists of nine members: (1) Secretary of State; (2) Secretary of the Treasury; (3) Secretary of Defense; (4) Secretary of Homeland Security; (5) Secretary of Commerce; (6) Secretary of Energy; (7) The Attorney General; (8) The United States Trade Representative; and (9) the Director of the Office of Science and Technology Policy. *Id.* The Committee seeks at consensus among its members that no national security issues exist, each member must confirm they have no unresolved national security concerns with the transaction. *Id.* at 14-15; *see also* Zaring, *supra* note 21, at 96 (differentiating CFIUS' role now that the Committee had been granted statutory power). "FINSA formalized CFIUS's role statutorily, whereas it had previously been defined only by an executive order of the president." *Id.*

⁴⁰ *See* H.R. 556, § 2(a)(6) (codified as amended at 5 U.S.C. § 5315 (2012)) (defining "critical infrastructure"). "The term 'critical infrastructure' means, subject to rules issued under this section, systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems or assets would have a debilitating impact on national security." *Id.*; *see also* Josselyn, *supra* note 6, at 1355 (indicating that the definition of "national security" includes homeland security and critical infrastructure).

⁴¹ *See* H.R. 556, § 2(a)(6) (adding additional factors for the Committee to consider). Specifically, the Committee may consider:

(6) the potential national security-related effects on United States critical infrastructure, including major energy assets; (7) the potential national security-related effects on United States critical technologies; (8) whether the covered transaction is a foreign government-controlled transaction . . . (9)(C) the potential for transshipment or diversion of technologies with military applications, including an analysis of national export control laws and regulations; [and] (10) the long-term projection of United

did with Alcatel SA when it acquired Lucent Technologies,⁴² FINSA authorized the Committee to require a foreign entity to enter into a mitigation agreement to deter the potential national security threat of a transaction.⁴³ Congressional oversight of the Committee was also increased with the passage of FINSA, which included providing Congress an annual report with a list of all concluded reviews and investigations.⁴⁴

D. The Foreign Investment Risk Review Modernization Act

On November 8, 2017, Senators John Cornyn, Dianne Feinstein, and Richard Burr introduced the Foreign Investment Risk Review Modernization Act (FIRRMA).⁴⁵ The new FIRRMA bill

States requirements for sources of energy and other critical resources and material.

Id.; see also Tipler, *supra* note 33, at 1241-42 (considering the effects on the new factors the Committee looks into). “CFIUS considers the potential effects instead of the realized effects of these factors, which gives the Committee significantly broader authority.” *Id.* at 1241.

⁴² See Griffin, *supra* note 32, at 1766 (clarifying the purpose of the Special Security Arrangement (S.S.A.), which the Committee required Alcatel to adhere to).

⁴³ See 31 C.F.R. § 800.00 (detailing the statutory authority FINSA grants CFIUS to enter into mitigation agreements). “Where a covered transaction presents national security risks, FINSA provides statutory authority for CFIUS, or a lead agency acting on behalf of CFIUS, to enter into mitigation agreements with parties to the transaction or to impose conditions on the transaction to address such risks.” *Id.*; see also Zaring, *supra* note 21, at 97 (discussing the Committee’s new statutory powers). CFIUS was also granted penal authority to impose civil penalties for a violation of the mitigation agreement. *Id.*; see also CFIUS, *supra* note 4, at 20 (explaining how the CFIUS concludes a mitigation agreement is necessary). Such determinations are to be made on a “risk-based analysis” to the transaction. *Id.*

⁴⁴ See Zaring, *supra* note 21, at 97 (realizing the expanded power Congress had over CFIUS with FINSA). The Committee is to provide a classified annual report to Congress and unclassified public report. *Id.* Upon a Congressional request, CFIUS must provide a briefing on a covered transaction. *Id.*

⁴⁵ See FIRRMA, H.R. 5515 § 1701 (highlighting the short title for the bill); see also Press Release, John Cornyn, Cornyn, Feinstein, Burr Introduce Bill to Strengthen the CFIUS Review Process, Safeguard National Security (Nov. 8, 2017) (on file with author) (modernizing CFIUS to meet present day challenges of foreign investments in the United States). Along with Senators Feinstein (D-CA) and Burr (R-NC), Senators Rubio (R-FL), Klobuchar (D-MN), Barrasso (R-WY), Peters (D-MI), Lankford (R-OK), Manchin (D-WV), and Scott (R-SC) are also co-sponsors on the bi-partisan bill. *Id.* U.S. Representative Robert Pittenger introduced identical

broadens CFIUS' jurisdiction to investigate non-passive, minority-position investments in critical technology or infrastructure and associated support of a foreign arrangement such as a joint venture and real estate investments close to national security facilities.⁴⁶ Although

legislation in the House of Representatives, along with Representatives Devin Nunes, Chris Smith, Denny Heck, Dave Loebsack, Sam Johnson, and John Culberson. *Id.*; *see also* Ana Swanson, *Targeting China's Purchases, Congress Proposes Tougher Reviews of Foreign Investments*, N.Y. TIMES, Nov. 9, 2017, at B1 (introducing bi-partisan legislation to subject Chinese investments in the U.S. to stricter scrutiny).

⁴⁶ *See* H.R. 5515, § 1703(a)(4)(B) (defining a transaction involving real estate in close proximity to a United States military facility or property that is sensitive to U.S. national security as a covered transaction). “[T]he term ‘close proximity’ refers only to a distance or distances within which the purchase, lease, or concession of real estate could pose a national security risk in connection with a United States military installation or another facility or property of the United States.” § 1703(a)(4)(C)(ii). The FIRMMA bill offers clarification for investment funds, typically a non-controlling or a non-passive minority investment. However, the statute provides an exception for investment funds if the investment fund meets certain qualifications:

[A]n indirect investment by a foreign person in a United States business described in subparagraph (B)(iii) through an investment fund that affords the foreign person (or a designee of the foreign person) membership as a limited partner or equivalent on an advisory board or a committee of the fund shall not be considered an ‘other investment’ for purposes of subparagraph (B)(iii) if— (aa) the fund is managed exclusively by a general partner, a managing member, or an equivalent; (bb) the general partner, managing member, or equivalent is not a foreign person; (cc) the advisory board or committee does not have the ability to approve, disprove, or otherwise control—(AA) investment decisions of the fund; or (BB) decisions made by the general partner, managing member, or equivalent related to entities in which the fund is invested; (dd) the foreign person does not otherwise have the ability to control the fund, including the authority—(AA) to approve, disapprove, or otherwise control investment decisions of the fund; (BB) to approve, disapprove, or otherwise control decisions made by the general partner, managing member, or equivalent related to entities in which the fund is invested; or (CC) to unilaterally dismiss, prevent the dismissal of, select, or determine the compensation of the general partner, managing member, or equivalent; (ee) the foreign person does not have access to material nonpublic technical information as a result of its participation on the advisory board or committee; and (ff) the investment otherwise meets the requirements of this subparagraph.

§ 1703(a)(4)(D)(iv). Any merger, acquisition, or takeover with any foreign person that could result in foreign control of a U.S. business, carried out by a joint venture

FIRRMA does not specifically reference any specific country, the bill states that CFIUS should review covered transactions that are likely to reduce the technological leadership of the U.S. compared to a country of “special concern.”⁴⁷ Additionally, the legislation calls for a report to Congress on Chinese foreign investment in the United States.⁴⁸

FIRRMA further expands CFIUS’ jurisdiction by amending the definition of a “covered transaction” and identifying six factors the Committee would take into consideration when evaluating the national security aspects of such transaction.⁴⁹ The factors include

is under CFIUS jurisdiction. § 1703(a)(4)(B); *see also* Will Kenton, *Joint Venture - JV*, INVESTOPEDIA (Mar. 28, 2018), *archived at* <https://perma.cc/LL96-ZENT> (defining a joint venture as an arrangement where investors pool their resources together for a business activity); *see also* Robert D. Williams, *CFIUS Reform and U.S. Government Concerns Over Chinese Investment: A Primer*, LAWFARE (Nov. 13, 2017), *archived at* <https://perma.cc/UE4U-XRFR> (explaining that the FIRRMA would close the gaps currently left by the FINSA Amendment).

⁴⁷ *See* H.R. 5515 § 1702(c)(1) (considering a factor CFIUS should take into consideration when reviewing a covered transaction). “Whether a covered transaction involves a country of special concern that has a demonstrated or declared strategic goal of acquiring a type of critical technology or critical infrastructure that would affect United States leadership in areas related to national security” *Id.* The CFIUS Committee is not required to maintain a list of countries of special concern to U.S. national security. *Id.*

⁴⁸ *See* H.R. 5515 § 1719(b)(1),(2)(A) (establishing the baseline for the Chinese foreign investment report). China is the only country that FIRRMA calls for an individualized report on their FDI. *Id.* The Secretary of Commerce will submit the report to Congress every two years through 2026. *Id.*

⁴⁹ *See* H.R. 5515 § 1719(c) (considering national security risks for a ‘covered transaction’). The statute sets forth the following factors:

- (1) whether a covered transaction involves a country of special concern that has demonstrated or declared strategic goal of acquiring a type of critical technology or critical infrastructure that would affected United States leadership in areas related to national security;
- (2) the potential national security-related effects of the cumulative control of, or pattern of recent transactions involving, any one type of critical infrastructure, energy asset, critical material, or critical technology by a foreign government or foreign person;
- (3) whether any foreign person engaging in a covered transaction with a United States business has a history of complying with United States laws and regulations;
- (4) the control of United States industries and commercial activity by foreign persons as if affects the capability and capacity of the United States to meet the requirements of national security, including the

considerations if a “country of special concern” is a party to the transaction, if the transaction is likely to create cybersecurity vulnerabilities, whether the transaction will likely expose U.S. citizen personally identifiable information, and whether the foreign person

availability of human resources, products, technology, materials, and other supplies and services, and in considering ‘the availability of human resources’, should construe that term to include potential losses of such availability resulting from reductions in the employment of United States persons whose knowledge or skills are critical to national security, including the continued production in the United States of items that are likely to be acquired by the Department of Defense or other Federal departments or agencies for the advancement of the national security of the United States; (5) the extent to which a covered transaction is likely to expose, either directly or indirectly, personally identifiable information, genetic information, or other sensitive data of United States citizens to access by a foreign government or foreign person that may exploit that information in a manner that threatens national security; and (6) whether a covered transaction is likely to have the effect of exacerbating or creating new cybersecurity vulnerabilities in the United States or is likely to result in a foreign government gaining a significant new capability to engage in malicious cyber-enabled activities against the United States, including such activities designed to affect the outcome of any election for Federal office.

Id. Under FIRRMA, the definition of a “covered transaction” was broadened to include “other investment.” *Id.*; see also § 1703 (a)(4)(D) (highlighting the elements of an “other investment”). These elements include:

(1) Access to any material nonpublic technical information in the possession of the United States business; (2) membership or observer rights on the board of directors or equivalent governing body of the United States business or the right to nominate an individual to a position on the board of directors or equivalent governing body; (3) any involvement, other than through voting of shares, in substantive decision making of the United States business regarding—(aa) the use, development, acquisition, safekeeping, or release of sensitive personal data of United States citizens maintained or collected by the United States business; (bb) the use, development, acquisition, or release of critical technologies; or (cc) the management, operation, manufacture, or supply of critical infrastructure.

Id.; see also Jason M Silverman, Michael E. Zolandz, and Jasmine M. Fisher, *United States: CFIUS Gets Expanded Powers Over Foreign Inbound Investments, With Procedural Changes On The Horizon*, MONDAQ (Aug. 30, 2018), archived at <https://perma.cc/6VA4-RUWA> (broadening the definition of “control” to include businesses in industries of CFIUS’ concern).

engaged in the transaction has a history of complying with U.S. laws and regulations.⁵⁰ Additionally, FIRRMA defined “critical technologies” to include “emerging and foundational technologies” that are controlled by the Export Control Reform Act of 2018 (“ECRA”).⁵¹ Under FINSA, the initial investigation period was thirty days⁵², but with FIRRMA, the initial investigatory period would be extended forty-five days.⁵³ Senator Cornyn took the *Ralls* decision into consideration with FIRRMA, which codified the standard that unclassified administrative record must be provided to the petitioner if the administrative record is to be reviewed, i.e., if a party files an action in court.⁵⁴ Lastly, the FIRRMA bill creates an exemption to the

⁵⁰ See *FIRRMA*, H.R. 5515 § 1719(b)(1),(2)(A) (identifying the national security factors taken into consideration).

⁵¹ See *FIRRMA*, H.R. 5515 § 1703(6)(A) (defining ‘critical technologies’). This definition includes “[E]merging and foundational technologies controlled pursuant to section 1758 of the Export Control Reform Act of 2018.” *Id.* The CFIUS chairperson may recommend technologies to be identified pursuant to the ECRA:

The President shall establish and, in coordination with the Secretary, the Secretary of Defense, the Secretary of Energy, the Secretary of State, and the head of other federal agencies as appropriate, lead, a regular, ongoing interagency process to identify emerging and foundational technologies that—(A) are essential to the national security of the United States; and (B) are not critical technologies described in clauses (i) through (v) of section 721(A)(6)(A) of the Defense Production Act of 1950, as amended by section 1703.

Id.; see also § 1702 (a)(6)(A) (defining “emerging and foundational” technologies); § 1702 (b)(6) (finding in the Senses of Congress preamble to the bill that the President should make an effort with allies to protect U.S. national security). “The President should lead a collaborative effort with allies and partners of the United States to strengthen the multilateral export control regime.”; see also Michael Brown & Pavneet Singh, *China’s Technology Transfer Strategy: How Chinese Investments in Emerging Technology Enable A Strategic Competitor to access the Crown Jewel of U.S. Innovation*, DEF. INNOVATION UNIT EXPERIMENTAL (Jan. 2018), archived at <https://perma.cc/2V4T-ZJBJ> (assessing emerging and foundational technologies are likely to include: artificial intelligence, autonomous vehicles, augmented/virtual reality, robotics, and blockchain technology).

⁵² See H.R. 556(b)(1)(E) (explaining the initial investigatory period for the CFIUS Committee).

⁵³ See *FIRRMA*, H.R. 5515 § 1709(2)(C) (articulating the investigation shall be completed before the end of 45 days in which the investigation began).

⁵⁴ See *FIRRMA*, H.R. 5515 § 1715(3) (determining that protected information in the record that is necessary to resolve the legal challenge shall be submitted to the court).

covered transaction definition for indirect participation by a foreign person in an investment fund.⁵⁵

III. Facts

A. Covered Transactions Blocked by the President

In February 1990, President Bush delivered a message to Congress that was the first exercise of the executive's power under the Exon-Florio Amendment to block a transaction due to national security concerns.⁵⁶ President Bush blocked the acquisition of Mamco Manufacturing ("MAMCO") by the China National Aero-Technology Import and Export Corporation (CATIC).⁵⁷ This order came as a shock to some commentators, as MAMCO, a Seattle-based company, was simply a manufacturing company that designed metal components exclusively for commercial aircrafts in the United States.⁵⁸ On the

⁵⁵ See *FIRRMA*, H.R. 5515 § 1703(iv)(I) (exempting certain indirect foreign investments through an investment fund if it meets certain qualifications); see also William H. Aaronson, *New CFIUS Legislation*, DAVIS POLK (Aug. 13, 2018), archived at <https://perma.cc/5AQC-3VZQ> (establishing the requirements for a non-controlling investment not to be defined as a "covered transaction"); see also Scott M. Flicker, *A "Transformative" CFIUS Bill: Not So Fast*, PAUL HASTINGS (Aug. 13, 2018), archived at <https://perma.cc/YF5F-R2D3> (declaring participation by a foreign person in an investment fund does not automatically trigger CFIUS review).

⁵⁶ See Jim Mendenhall, *United States: Executive Authority To Divest Acquisitions Under The Exon-Florio Amendment—The MAMCO Divestiture*, 32 HARV. INT'L L. J. 286, 293 (1991) (discussing President Bush's divestiture order to CATIC); see also Kristy E. Young, *The Committee on Foreign Investment in The United States and the Foreign Investment and National Securities Act of 2007: A Delicate Balancing Act That Needs Revision*, 15 U.C. DAVIS J. INT'L L. & POL'Y 43, 46 (2008) (looking at post-Cold War transactions covered by CFIUS). Between 1988 and 1994, CFIUS conducted full investigations of fifteen transactions, this was the only transaction the President blocked. *Id.*; see also George Bush, *Message to Congress on the China National Aero-Technology Import and Export Corporation Divestiture of MAMCO Manufacturing, Incorporated*, FED. AM. SCI. (Feb. 1, 1990), archived at <https://perma.cc/XRK2-XGY4> (delivering the order to CATIC to divest from MAMCO under section 721 of the Defense Production Act of 1950).

⁵⁷ See Bush, *supra* note 56 (describing the parties involved in the transaction which are China National Aero-Technology Import, Export Corporation and MAMCO Manufacturing, Inc.). President Bush ordered China National Aero-Technology Import and Export Corporation to divest from MAMCO Manufacturing, Inc. using his vested presidential authority. *Id.*

⁵⁸ See W. Robert Shearer, *The Exon-Florio Amendment: Protectionist Legislation Susceptible To Abuse*, 30 HOUS. L. REV. 1729, 1756 (1993) (describing MAMCO's

other hand, CATIC was a company owned by China's Ministry of Aerospace, which purchased, manufactured, and developed civilian and military aircrafts for the Chinese government.⁵⁹ Further, CATIC had a reputation for disregarding foreign-export-control laws to gain access to critical U.S. technology.⁶⁰ MAMCO voluntarily notified CFIUS of the proposed transaction, but the deal was finalized during CFIUS's initial 30-day review.⁶¹ CFIUS then undertook the forty-five-day national security investigation of the covered transaction to assess MAMCO's present and potential production and technological capabilities that went along with the national security implications of

business); *see also* Andrew Rosenthal, *Bush Urged to Void Sale of Airplane-Parts Maker to Chinese*, N.Y. TIMES, Feb. 2, 1990, at A00009 *archived at* <https://perma.cc/E44V-FJCJ> (affirming MAMCO's president's belief that his company was an innocent party to the transaction, posing no national security threat to the U.S.). "I would be amazed if there were a recommendation against allowing the transaction to stand" he said. "I was not aware of anything that we do here that would have any possible impact on national security," said MAMCO president Kenneth A. Keller." *Id.*; *see also* Tom Brown, *Mamco: Victim of China Anger?—Firm May Have Been Target of Opportunity*, SEATTLE TIMES, Feb. 6, 1990, *archived at* <https://perma.cc/SN7E-GJAM> (explaining the non-national security threat MAMCO Manufacturing poses to the deal). The president of MAMCO described the company as "a machine shop with no national security implications." *Id.* MAMCO manufactured parts for Boeing commercial airlines and held no government contracts. *Id.*; Mendenhall *supra* note 56, at 291 (characterizing MAMCO as a corporation which did not possess and was unlikely to obtain confidential information).

⁵⁹ *See* Mendenhall, *supra* note 56, at 290 (commenting on how CATIC was a purchasing agent for the Chinese government); *see also* Deborah M. Mostaghel, Article, *Dubai Ports World Under Exon-Florio: A Threat to National Security or a Tempest in a Seaport?*, 70 ALB. L. REV. 583, 598 (2007) (comparing the innocuous nature of both MAMCO and CATIC).

⁶⁰ *See* Mendenhall *supra* note 56, at 291 (highlighting CATIC's potential national security concerns). The United States had imposed controls on its aerospace exports to China prior to this transaction. *Id.* at 290; *see also* Brown, *supra* note 58 (commenting on the past rocky relationship between CATIC and the U.S. government). However, CATIC proceeded to purchase two General Electric airplane engines and disassembled them in order to access information on the technology. *Id.*

⁶¹ *See* Bush, *supra* note 56 (announcing MAMCO's voluntary notice to CFIUS); Bush, *supra* note 56 (listing the timeline of events of the transaction in accordance with the CFIUS review); Shearer, *supra* note 58, at 1756-57 (citing the voluntary notice MAMCO provided CFIUS of the proposed transaction). On November 30, 1989, CATIC purchased all of the voting shares of MAMCO. *Id.*

the CATIC's acquisition.⁶² CFIUS then recommended to President Bush that he prohibit the transaction, which he did on February 1, 1990.⁶³

President Bush maintained throughout his message to Congress the reasoning behind the prohibition of the transaction was due to national security concerns of CATIC's future actions.⁶⁴ National security implications could have existed due to the fact that MAMCO's manufactured parts could have been used in a Chinese military aircraft or China using their control of MAMCO to access other U.S. aircraft manufacturer's technology.⁶⁵ However, the national security threat imposed by the transaction was ambiguous, and the prohibition occurred during a time of heightened political tension between Beijing and Washington, leading to a theory that the blockage was politically motivated.⁶⁶ Ultimately, CATIC resolved the issue by

⁶² See Bush, *supra* note 56 (claiming that on December 4, 1989 CFIUS undertook the 45-day national security investigation into the transaction); see also Shearer, *supra* note 42, at 1757 (following CFIUS' finding that products of MAMCO required validated licenses if exported, CFIUS undertook the 45-day investigation).

⁶³ See Young, *supra* note 56, at 47 (addressing President Bush's order that CATIC fully divest itself from MAMCO within three months); see also Shearer, *supra* note 42, at 1757 (determining President Bush's divestiture came after following the recommendation of CFIUS).

⁶⁴ See Bush, *supra* note 56 (declaring that confidential information available to the President raised appropriate national security concerns of CATIC's future actions).

⁶⁵ See Matthew R. Byren, *Protecting National Security and Promoting Foreign Investment: Maintaining The Exon-Florio Balance*, 67 OHIO ST. L. J. 849, 872 (considering national security reasons such as CATIC's "unique access" to U.S. aerospace companies as a national security concern); see also Mendenhall, *supra* note 56, at 290 (theorizing that the components MAMCO manufactured could be converted for use in a military aircraft); see also Robert N. Cappucci, Note, *Amending the Treatment of Defense Production Enterprises Under the U.S Exon-Florio Provision: A Move Toward Protectionism or Globalism?*, 16 FORDHAM INT'L L.J. 652, 659-60 (1993) (defending President Bush's use of executive power to block the covered transaction granted under the Exon-Florio Amendment); see also John R. Coogan, *U.S. Takes New Approach to Regulation of Foreign Investment*, ABA SEC. ON BUS. L., 10 Business Lawyer Update 3, 3 (1990) (describing the potential national security implications of CATIC gaining access to other company's technology).

⁶⁶ See Christina E. Holzer, Note, *Committee on Foreign Investment in the United States and Judicial Review*, 13 INT'L BUS. & L. 169, 171 (2014) (addressing concerns of the Chinese government and CATIC that the prohibition of the transaction was due to the events at Tiananmen Square). "The president of MAMCO explained to numerous news sources that MAMCO was simply a machine shop with no classified contracts and no national security implications, which only added to the speculation

announcing that it would sell MAMCO to a United States company, DeCrane Aircraft Holdings, Inc.⁶⁷

Twenty-two years later, in 2012, President Obama prohibited the Ralls Corporation (“Ralls”) from acquiring a group of windfarms in Oregon on the recommendation of CFIUS.⁶⁸ Ralls was an American company incorporated in Delaware with its principal place of business in Georgia but was owned by two Chinese nationals, Dawei Duan and Jialiang Wu.⁶⁹ These two men were in the business of identifying U.S. opportunities to construct windfarms of which Sany wind turbines would be used and the turbines’ quality and reliability could be showcased in the United States.⁷⁰ The four windfarms Ralls acquired were located around the Eastern region of restricted airspace and a

that the rescission may have been more about retribution, than national security.” *Id.*; see also Mendenhall *supra* note 56, at 293 (arguing the President may have viewed the transaction as not between two companies, but between a domestic manufacturer and the Chinese government). “The MAMCO case could simply be a part of the ongoing love-hate relationship between Washington and Beijing.” *Id.* at 294. Looking at this blockage through a foreign-policy lens, this transaction could be viewed as a compromise with Congress as an attempt to compensate for the President’s disagreement with the violent crackdown on student dissent in China. *Id.*; see also Mostaghel, *supra* note 43, at 599 (addressing that the national security threat remained unclear during the three months granted for the divestiture due to uncertainty to the nature of the threat); see also Shearer, *supra* note 58, at 1757 (pointing to President Bush’s disdain for the Tiananmen Square incident for a reason to prohibit the transaction).

⁶⁷ See Mendenhall *supra* note 56, at 292 (discussing that the sale of MAMCO to DeCrane fulfilled CFIUS’ divestiture order).

⁶⁸ See *Ralls Corp. v. Comm. on Foreign Inv.*, 758 F.3d 296, 304 (D.C. Cir. 2012) (describing the defendants, an American company with its principal place of business in Georgia and their executive officers in a civil action by the Commission on Foreign Investments). The acquired LLCs were: Pine City Windfarm, LLC; Mule Hollow Windfarm; High Plateau Windfarm; and Lower Ridge Windfarm. *Id.* at 304; see also Yang Wang, Article, *Incorporating the Third Branch of Government into U.S. National Security Review of Foreign Investment*, 38 HOUS. J. INT’L L. 323, 324 (2016) (characterizing the parties to the transaction to include an American company owned by two Chinese nationals and a group of four windfarms).

⁶⁹ See *Ralls*, 758 F.3d at 304 (identifying the owners of the Ralls Corp. as businessmen of Chinese origin). Both men held executive positions at Sany Group, a Chinese manufacturing company that produced wind turbines. *Id.*

⁷⁰ See *id.* (indicating that Duan and Wu believed in their ability to bring wind turbines to the United States’ wind energy industry and create jobs for American workers); see also Wang, *supra* note 68, at 324 (recognizing the businessmen’s motivation for pursuing the acquisition of four wind farms).

bombing zone held by the U.S. Navy.⁷¹

Ralls did not file a voluntary notice to CFIUS, but after the transaction closed, CFIUS requested that Ralls file a notice regarding the acquisition.⁷² During CFIUS' initial thirty-day review, Ralls answered many questions posed by CFIUS and even gave a presentation to CFIUS officials regarding the transaction but to no avail as CFIUS issued an Order Establishing Interim Mitigation Measures to mitigate the national security threat.⁷³ Throughout the investigative process, CFIUS did not disclose to Ralls of the national security concerns they were reviewing, essentially leaving Ralls in the dark as a sitting duck.⁷⁴ On September 28, 2012, with the recommendation of CFIUS, President Obama issued an order

⁷¹ See *Ralls*, 758 F.3d at 304 (maintaining the location of the four wind farms were proximately close to military training facilities). “Three of the windfarm sites are located within seven miles of the restricted airspace while the fourth—Lower Ridge—is located within the restricted airspace.” *Id.* See also Li *supra* note 28, at 275 (noting the windfarms' location near a military training facility).

⁷² See *Ralls*, 758 F.3d at 305 (describing the CFIUS review process in the Ralls' case). “CFIUS accepted Ralls' written notification on June 28, 2012 and issued the July Order on July 25, 2012, indicating the latest start date of a forty-five-day investigation with two days left on the Committee's thirty-day limit of a review.” *Id.* In late June 2012, Ralls submitted a twenty-five-page notice to CFIUS informing them of the acquisition and why Ralls believed there to be no national security threat in its acquisition of the windfarms. *Id.*; see also Holzer, *supra* note 34 (hinting at rarity of the CFIUS investigation into the transaction); see also Li, *supra* note 28, at 7 (discussing that Ralls did not make a voluntary notice to CFIUS).

⁷³ See *Ralls*, 758 F.3d at 305 (indicating CFIUS never disclosed to Ralls the information it reviewed). “The July Order required Ralls to (1) cease all construction and operations at the project sites, (2) “remove all stockpiled or stored items from the project sites and Ralls shall not deposit or store any new items at the [project sites]”, and (3) cease all access to the project sites.” *Id.* CFIUS later amended this order in August to include prohibiting Ralls from completing any sale of the windfarms or their assets without first removing all items, including concrete foundations, and notifying CFIUS of the sale and giving them at least ten days to object it. *Id.*; see also Christian E. Holzer, *Notes and Student Work: Committee on Foreign Investment In The United States and Judicial*, 13 J. INTL'L BUS. & L. 169, 184 (2014) (finding the CFIUS August order forbid sales of any items made by Ralls' Chinese parent company to any third party with CFIUS' consent). “The August Order may have stepped beyond the boundaries of power granted to CFIUS by Section 721 by asserting power over *any* interested third party because the August Order language is inclusive of American parties looking to purchase assets.” *Id.* at 187; see also Griffin, *supra* note 32, at 1780-1781 (determining Ralls was compliant with CFIUS officials during their review).

⁷⁴ See *Ralls*, 758 F.3d at 305 (expressing Ralls to be unaware of the nature of the national security threat the transaction posed).

prohibiting the acquisition.⁷⁵

President Obama ordered Ralls to divest itself of all interests in the companies, their assets, intellectual property, technology, personnel, customer contracts, operations, and access to the property, within ninety days.⁷⁶ CFIUS' annual unclassified report to Congress attributed the prohibition to the windfarms' proximate location to a U.S. military base, but experts have considered the perceived threat from the rising economic power of China and the U.S. government's willingness to protect U.S. energy from foreign control as national security concerns.⁷⁷ Interestingly, in the same restricted military area, there had already been windfarms installed and some were owned by foreign entities.⁷⁸ In September 2012, President Obama was involved

⁷⁵ See Press Release, Order Signed by the President regarding the Acquisition of Four U.S. Wind Farm Project Companies by Ralls Corporation, The White House Office of the Press Secretary (Sept. 28, 2012) [hereinafter *Wind Farm*] (on file with author) (clarifying the transaction between Rall Company, Sany Group, Mr. Duan or Wu is a national security threat). "The transaction resulting in the acquisition of the Project Companies (four wind farms) and their assets by the Companies or Mr. Wu or Mr. Duan is hereby prohibited, and ownership by the Companies or Mr. Wu or Mr. Duan of any interest in the Project Companies and their assets, whether directly or indirectly through owners, subsidiaries, or affiliates, is prohibited." *Id.*; see also Li *supra* note 28, at 276 (affirming CFIUS' recommendation, President Obama unwound the transaction).

⁷⁶ See *Wind Farm*, *supra* note 75 (declaring Ralls shall certify their compliance with this order upon divestment); see also Holzer *supra* note 73, at 189 (examining how the President's order went further than the previous July and August Orders from CFIUS).

⁷⁷ See THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES, ANNUAL REPORT TO CONGRESS 2 (Dec. 2013) (detailing that the windfarms' vicinity to the restricted airspace at Naval Weapons Systems Training Facility Boardman in Oregon); see also Wang *supra* note 68, at 327 (attributing the consensus of expert opinion on the perceived national security threat because the Section 721 statute does not require the President to provide an explanation).

⁷⁸ See Griffin, *supra* note 32 (alleging that another windfarm, Oregon Windfarms, LLC, had developed nine other windfarm projects in the general vicinity of Ralls' acquired windfarms). Seven turbines used by Oregon Windfarms are located within the restricted airspace and one of the projects is owned by a foreign investor. *Id.*; see also *Ralls*, 758 F.3d at 325 (arguing that the presidential order deprived of constitutional property interest without due process of law). "We can thus infer therefrom that mere proximity of the Project Companies (four windfarms) to the restricted air space is not the only factor that precipitated the CFIUS order." *Id.*; see also Xingxing Li, *supra* note 28, at 276 (cautioning not to overlook the fact that multiple windfarms already existed in the same military restricted area that CFIUS

in an election where he was criticized for not being “tough enough” on China, sending some observers to question whether this order was used as campaign propaganda.⁷⁹

In December of 2016, President Obama for the third time in CFIUS’ history and second time in his administration, with a recommendation of CFIUS, blocked an acquisition of the U.S. subsidiary of German semiconductor company Aixtron SE by Chinese investor Fujian Grand Chip Investment Fund.⁸⁰ Aixtron SE is a limited liability company organized under the laws of the Federal Republic of Germany, which owns a subsidiary Aixtron, Inc., a California corporation.⁸¹ Fujian Grand Chip Investment Fund is a special investment vehicle that is owned by investors in China, in which some investors had ties to the Chinese government.⁸² Obama administration officials, specifically, The President’s Council of Advisors on Science

declared a national security concern in their annual report); *see also* Wang, *supra* note 68, at 336 (citing Ralls’ approval from the Federal Aviation Administration, which found no hazard for “military operations, readiness, and testing.”).

⁷⁹ *See* Julie Pace, *Obama blocks Chinese purchase of U.S. wind farms*, THE WASH. POST (Sept. 28, 2012), *archived at* <https://perma.cc/JVR8-KTPR> (explaining that Republican candidate, Mitt Romney, had been harsh on President Obama during the 2012 election, claiming the President had been too soft on China through his first term in office).

⁸⁰ *See* Press Release, Barack Obama, Presidential Order—Regarding the Proposed Acquisition of a Controlling Interest in Aixtron SE by Grand Chip Investment GMBH, The White House Office Of the Press Sec’y (Dec. 2, 2016), *archived at* <https://perma.cc/3QSN-24C7> (granting Grand Chip Investment and Aixtron 30 days to abandon the transaction). The proposed acquisition was blocked by President Obama because he perceived Grand Chip Investment to be a potential threat in their control over AIXTRON SE that could “impair the national security of the United States.” *Id.*

⁸¹ *See* Michael T. Gershberg & Justin A. Schenck, *CFIUS Takeaways From Blocked Aixtron Deal*, LAW360 (Dec. 16, 2016), *archived at* <https://perma.cc/B8KL-A87Z> (claiming both German and U.S. national security authorities reviewed the transaction); *see also* David McLaughlin, *Obama Blocks Chinese Takeover of Aixtron as U.S. Security Risk*, BLOOMBERG MARKETS (Dec. 3, 2016), *archived at* <https://perma.cc/4SP3-3EXL> (describing the nexus between CFIUS and the foreign transaction). Aixtron, Inc. employs about 100 people and generated about 20% of its parent company’s sales. *Id.*

⁸² *See* U.S. Dept. of the Treasury, *Statement on the President’s Decision Regarding U.S. Business of Aixtron SE*, PRESS CTR. (Dec. 2, 2016), *archived at* <https://perma.cc/RD93-P9WT> (proposing the purpose of Sino IC Leasing Co. Ltd. is to promote the growth of the China’s integrated circuit industry); *see also* McLaughlin, *supra* note 81 (stating that part of the investment was to be funded by Sino IC Leasing Co. Ltd., which is owned by the Chinese government).

and Technology (PCAST), wrote a report to President Obama highlighting the importance of the semiconductor industry to U.S. interests and the challenges due to the shift in China's active industrial policies to aiming to achieve a global leadership position in semiconductor design and manufacturing.⁸³

In a rare occurrence, the Treasury Department released a statement commenting on the prohibited transaction, commenting on the military applications of semiconductor technology and the overall knowledge and experience Aixtron possess as a company in the semiconductor realm as national security concerns both CFIUS and President Obama took into consideration.⁸⁴ The Treasury Department's statement, but not President Obama's Order, continued to emphasize the U.S.'s commitment to open investment and stress that CFIUS' process focuses solely on national security concerns.⁸⁵

Early into his administration, President Trump blocked the takeover of Lattice Semiconductor Corporation by Canyon Bridge Capital Partners Inc.⁸⁶ Lattice is a publicly traded semiconductor company based in Portland, Oregon, that manufactures semiconductor

⁸³ See PRESIDENT'S COUNCIL OF ADVISORS ON SCI. AND TECH., ENSURING LONG-TERM U.S. LEADERSHIP IN SEMICONDUCTORS, 4 (Jan. 2017) [hereinafter *President's Council*] (stating that semiconductor technology is critical to U.S. defense systems and military, and the vast amount of semiconductors makes their safety critical to cybersecurity). Semiconductors are essential to many industries and products, such as computers, cell phones, and medical devices. *Id.*

⁸⁴ See U.S. Dept. of the Treasury, *supra* note 82 (assessing the contribution of Aixtron Inc. to the overall body of knowledge and experience with semiconductors). Aixtron Inc. provides resources that greatly contribute to technology advancements, specifically with semiconductors and are known for being a "producer and innovator of semiconductor manufacturing equipment and technology." *Id.*

⁸⁵ Compare U.S. Dept. of the Treasury, *supra* note 82 (proclaiming the longstanding, bi-partisan U.S. commitment to open trade); with Obama, *supra* note 75 (summarizing the prohibited transaction without commenting on the U.S.'s commitment to open trade).

⁸⁶ See Press Release, Donald J. Trump, Order Regarding the Proposed Acquisition of Lattice Semiconductor Corporation by China Venture Capital Fund Corporation Limited, The White House Office of The Press Sec'y (Sept. 13, 2017) (on file with author) (giving Canyon Bridge and Lattice no later than 30 days to abandon the transaction); see also The Editorial Board, *The Lattice Warning to China*, WALL ST. JNL. (Sept. 15, 2017), archived at <https://perma.cc/D4ED-4DP5> (stating the national security concern that Canyon Bridge's acquisition of Lattice could give China access to critical military technology).

chips that can be used in vehicles, computers, mobile phones and has sold semiconductor chips to the U.S. military.⁸⁷ Canyon Bridge Capital Partners is a global private equity firm, backed by the Chinese government, which invests in high technology companies to help bridge the gap between the U.S., Europe, and China.⁸⁸ A letter to then Secretary of the Treasury and Chairman of CFIUS, Jack Lew, 22 members of Congress urged Secretary Lew to block the acquisitions and highlighted the national security concern of protecting the U.S. military semiconductor supply chain and lessening the Department of Defense's reliance on foreign-sourced technologies for their programs.⁸⁹ In a White House press release following President Trump's order, the statement indicated the potential transfer of intellectual property to the foreign acquirer and the Chinese government's role in supporting the transaction as national security concerns.⁹⁰

⁸⁷ See Brendan Hanifin et. al., *CFIUS Continues To Present Obstacles To Chinese Acquisitions*, LAW360 (Sept. 19, 2017), archived at <https://perma.cc/37MU-DCMB> (summarizing Lattice's capabilities); see also The Editorial Board, *supra* note 86 (noting the military implications of the technology transfer).

⁸⁸ See Letter from Robert Pittenger, Member of Congress et. al., to The Honorable Jack Lew, Secretary of the Dep't of the Treasury and Chairman, Comm. on Foreign Inv., (Dec. 6, 2016) (on file with Free Beacon), archived at <https://perma.cc/FH7R-2CX2> (indicating Canyon Bridge Capital Partners' financial arrangements are tied to the Chinese government); see also Canyon Bridge Capital Partners, *Investment Strategy and Philosophy*, CANYON BRIDGE (Feb. 7, 2019), archived at <https://perma.cc/GDS6-9B82> (providing a strong management team, Canyon Bridge is able to accelerate a company's growth strategy into new markets, particularly China); see also David McLaughlin et. al., *Trump Blocks China-Backed Lattice Bid*, BLOOMBERG POLITICS (Sept. 13, 2017), archived at <https://perma.cc/LDY9-F3AK> (describing Canyon Bridge Capital Partners as a private equity firm backed by Chinese state-owned asset managers). “[Canyon Bridge Capital Partners] primary financial backer is the China Reform Fund Management Company...The China Reform Fund is nearly exclusively-owned and operated by the Chinese State Council. Further, several [People's Republic of China] government investors with the China Reform Fund also appear to finance numerous Chinese military industrial firms.” *Id.*

⁸⁹ See Letter from Robert Pittenger, *supra* note 88 (reaffirming CFIUS' role to ensure protecting U.S. national security).

⁹⁰ See Press Release, Office of the Press Secretary, Statement from the Press Secretary on President Donald J. Trump's Decision Regarding Lattice Semiconductor Corporation (Sept. 13, 2017) [hereinafter *Semiconductor*](on file with author) (stating the risks involved if the transaction were to take place). “The national-security risk posed by the transaction relates to, among other things, the potential transfer of intellectual property to the foreign acquirer, the Chinese

Most recently, in March 2018, President Trump blocked Broadcom's hostile takeover of Qualcomm.⁹¹ Qualcomm is a global leader in telecommunication products and technologies used in mobile devices and is at the forefront of developing the standards for a 5G network.⁹² Further, Qualcomm's success can be attributed to their unrivaled investment into their research and development (R&D), which in turn drives U.S. leadership in setting global standards for such communication networks.⁹³ A Chinese competitor of Qualcomm is Huawei Technologies, the world's largest maker of cellular tower-equipment and is in direct competition with Qualcomm in developing the 5G network.⁹⁴ A main concern of the CFIUS Committee was Broadcom's supposedly private equity-styled approach to acquisitions, which the Committee believed would lead to a reduction

government's role in supporting this transaction, the importance of semiconductor supply chain integrity to the United States Government, and the use of Lattice products by the United States Government." *Id.*

⁹¹ See Kate O'Keefe, *Trump Orders Broadcom to Cease Attempt to Buy Qualcomm*, WALL ST. JNL. (Mar. 13, 2018), archived at <https://perma.cc/3ZFZ-GQ86> (citing implications of Broadcom's relationship with third-party foreign entities and Broadcom's private equity-style approach to management). A hostile takeover is when one company, the acquirer, goes directly to another company's shareholders (the target), and proposes board members for the target company's shareholders to vote in during the annual shareholder meeting; see also James Chen, *Hostile Takeover*, INVESTOPEDIA (Feb. 11, 2019), archived at <https://perma.cc/6EV2-NJ4P> (defining hostile takeover).

⁹² See Letter from Aimen N. Mir, Deputy Assistant Secretary for Investment Security, U.S. Dep't of Treasury, to Mark Plotkin & Theodore Kassinger (Mar. 5, 2018) (on file with the Securities Exchange Comm'n) (describing Qualcomm as leading the global revolution through 2G, 3G, and 4G networks). The 5G communication network will be faster and more efficient than the current 3G and 4G/LTE networks in use. *Id.*; see also Amanda Campanaro, *What is 5G? The next wireless revolution explained*, NBC NEWS (Mar. 12, 2018), archived at <https://perma.cc/XER7-GH4Z> (projecting data transfer speeds to be ten times faster under the 5G regime with greater connectivity capabilities). The 5G network will also likely allow the bandwidth needed for the Internet of Things technology to become feasible. *Id.*

⁹³ See Letter from Aimen N. Mir, *supra* note 92 (stating that Qualcomm ranks second among semiconductor companies in R&D expenditure, only behind Intel).

⁹⁴ See Newley Purnell & Stu Woo, *China's Huawei Is Determined to Lead the Way on 5G Despite U.S. Concerns*, WALL ST. JNL. (Mar. 30, 2018), archived at <https://perma.cc/A2PJ-KGUR> (claiming Huawei representatives are attending global conferences with design recommendations for how the 5G network should work).

in their willingness to continue investing in R&D as Qualcomm once had.⁹⁵ Despite however, Broadcom released a statement pledging a continued investment in Qualcomm's core franchise, the 5G cellular network and making the U.S. the global leader in 5G.⁹⁶ The CFIUS Committee was concerned with the potential of a Chinese company, specifically Huawei, controlling the global telecommunications industry and the 5G network because of reports of the Chinese government directing Huawei for espionage or direct cyberattacks.⁹⁷

B. Masayoshi Son and The Softbank Vision Fund

Masayoshi Son ("Masa"), CEO of SoftBank Group Corp., has been described by individuals familiar with him as "an American with a samurai mind."⁹⁸ Masa was born to Korean parents in 1957 and grew up in Saga Prefecture, Japan.⁹⁹ Fascinated by America, Masa moved

⁹⁵ See Letter from Aimen N. Mir, *supra* note 92 (pointing to concerns that a reduction in Qualcomm's position in the global communications industry would leave a vacuum for Huawei to fill). Qualcomm's business model revolves around licensing their patented technology and using the profits received from licensing to fund their R&D. *Id.* Changes to Qualcomm's business model would negatively impact their R&D model to a level of national security concerns. *Id.*; see also Michael J. de la Merced, *Broadcom Pledges 5G Investment to Win Approval of Qualcomm Deal*, N.Y. TIMES (Mar. 7, 2018), archived at <https://perma.cc/4C8H-GU4H> (describing Broadcom's approach to acquisitions as cost-cutting ventures to provide short-term profits).

⁹⁶ See *Broadcom Pledges to Make the U.S. the Global Leader in 5G*, PR NEWswire (Mar. 7, 2018), archived at <https://perma.cc/4S7P-SEBZ> (claiming Broadcom will maintain Qualcomm's R&D resources related to 5G and to critical technologies that are essential to the U.S.).

⁹⁷ See MIKE ROGERS, INVESTIGATIVE REPORT ON THE U.S. NATIONAL SECURITY ISSUES POSED BY CHINESE TELECOMMUNICATIONS COMPANIES HUAWEI AND ZTE 2 (U.S. House of Representatives Permanent Select Comm. on Intelligence 2012) (asserting Huawei wants to control the telecommunications market and use their equipment and infrastructure for espionage, and this creates a U.S. national security concern); see also Purnell & Woo, *supra* note 94 (stating U.S. reluctance to Huawei controlling the telecommunications market due to fear of Chinese spying and potential cyberattacks being carried out by the Chinese government). "A Huawei spokesman says the company is employee-owned and that no government has ever asked it to spy on or sabotage another country." Purnell & Woo, *supra* note 94.

⁹⁸ See *Masayoshi Son's \$100 Billion Bet to Conquer the Future*, DECRYPTED (May 29, 2017) (describing Masa's willingness to take risks and ambition) (downloaded using iTunes).

⁹⁹ See Jeff Blagdon & Sam Byford, *Meet Masayoshi Son, the fascinating Japanese CEO who just bet \$20 billion on Sprint*, THE VERGE (Oct. 22, 2012), archived at

to the U.S. at age sixteen and efficiently graduated from high school within two weeks, passing the college preparatory exam, and enrolled at UC Berkley.¹⁰⁰ At the age of 19, Masa sold an early electronic translation dictionary to Sharp for \$1.7 million.¹⁰¹ Masa eventually returned to Japan and started a software distribution company, Nihon SoftBank, in 1981.¹⁰² Through the 1990s, Masa led SoftBank into the dot-com era, backing more than 800 companies, along with investing in magazine publishing and broadband internet service, among other things.¹⁰³ Two years before Apple officially announced the existence of the iPhone, Masa met with Steve Jobs to become the exclusive carrier of the iPhone in Japan when Masa purchased Vodafone Japan in 2006, making SoftBank a household name.¹⁰⁴ SoftBank also made early investments in Yahoo and Alibaba, yielding favorable returns for Masa and SoftBank.¹⁰⁵ Masa has always been playing the long game

<https://perma.cc/2CKW-FRFQ> (introducing Masa as an individual born to a second-generation Zainichi Korean family).

¹⁰⁰ See Blagdon, *supra* note 99 (indicating that Masa's pushiness and intelligence would become common features in his career as a business man).

¹⁰¹ See *Masayoshi Son's \$100 Billion Bet to Conquer the Future*, *supra* note 98 (describing this first million dollars as the necessary capital to fund various other early business ventures).

¹⁰² See Blagdon, *supra* note 99 (stating that Masa was able to obtain exclusive contracts with Osaka electronics retailer Joshin and Japanese software developer Hudson). "[Masa] grabbing 50 percent of Japan's retail market for computer software by 1984." *Id.*

¹⁰³ See Blagdon, *supra* note 99 (recognizing Masa's interest in diversifying SoftBank's portfolio); see also *Masayoshi Son's \$100 Billion Bet to Conquer the Future*, *supra* note 98 (summarizing Masa's gains during the dot-com bubble). Masa eventually lost \$60 billion dollars on paper when the dot-com bubble burst in 2000. *Id.*

¹⁰⁴ See Mark Millian, *How Steve Jobs Got the iPhone Into Japan*, Bloomberg (Mar. 2014), *archived at* <https://perma.cc/4JBX-VRQ5> (discussing the risk Jobs took with granting Masa the iPhone deal). Masa reportedly showed up to the meeting with a rough sketch of an iPod with mobile phone capabilities in order to show Jobs his seriousness. *Id.*; see also Blagdon, *supra* note 99 (acknowledging Masa and Jobs agreed to collaborate once Masa purchased Vodafone Japan); *Masayoshi Son's \$100 Billion Bet to Conquer the Future*, *supra* note 98 (explaining that Masa had this meeting and drawing before he even owned Vodafone Japan). Masa explained to Jobs that he needed a "weapon" to help break into the mobile industry and Masa believed that Jobs was the person to create a revolutionary phone. *Id.*

¹⁰⁵ See Saheli Roy Choudhury, *SoftBank's Masayoshi Son breaks the mold of conservative Japanese investors*, CNBC (Aug. 21, 2017), *archived at*

with his vision for SoftBank and the philosophy behind the company's investments, he firmly believes in the Singularity and has proposed a 300-year-plan to keep SoftBank sustainable.¹⁰⁶

The SoftBank Group Corp. announced the formation of the SoftBank Vision Fund in October of 2016.¹⁰⁷ Masa's plan for the Fund is built around the idea of the *Singularity* and building a network of companies to create the "brains" for the artificial intelligence machines that will coexist with mankind.¹⁰⁸ Currently, SoftBank is the largest

<https://perma.cc/35PV-KUV5> (noting that Masa invested in Yahoo! and Alibaba when the latter's valuation was lower than \$100 million); *see also* *Why Masayoshi Son Invested \$20 Million in a Young Jack Ma* (2017) (considering why Masa invested \$20 million in Jack Ma, when Ma had no revenue, few employees, and no business plan). The interview explains how the enormous return on Masa's initial investment in Alibaba was worthwhile through determining that SoftBank had a profitable return with Yahoo's initial public offer ("IPO"). *Id.*; *see also* Una Galani, *Valuing SoftBank in Alibaba's Aftermath*, N.Y. TIMES (Sept. 22, 2014), *archived at* <https://perma.cc/NU97-LEAU> (ranking SoftBank's investment in Alibaba as one of the greatest ever). Masa invested \$20 million dollars in Alibaba in 2000, at Alibaba's IPO in 2014, Masa's stake could be valued at \$90 billion dollars, a 4,500% return. *Id.*; Benner, *supra* note 11 (commenting on SoftBank's cutting edge mergers and acquisitions, becoming the *largest* shareholder in Yahoo).

¹⁰⁶ *See* Amie Tsang & Michael J. de la Merced, *supra* note 11 (constituting the Singularity as the point when artificial intelligence will surpass mankind's intelligence); *see also* *Masayoshi Son's \$100 Billion Bet to Conquer the Future*, *supra* note 98 (discussing Masa's long term approach to business and how SoftBank's 300-year plan will keep the company sustainable even after the Singularity event occurs).

¹⁰⁷ *See* Press Release, SoftBank Group, *Establishment of SoftBank Vision Fund* (Oct. 14, 2016) (on file with author) (announcing the formation of the SoftBank Vision Fund for making investments in the technology sector globally); *see also* *Management Policy*, SOFTBANK GROUP (Jan. 5, 2019), *archived at* <https://perma.cc/RYJ8-9EJZ> (stating the Vision Fund is managed by SoftBank Investment Advisers). SoftBank Investment Advisers is based in London. *Id.*

¹⁰⁸ *See* Benner, *supra* note 11 (determining that the Vision Fund's investments may seem random and diverse, but they all have one thing in common, the collection of data). "Yet the companies [the Fund's portfolio companies] all have something in common: They are involved in collecting enormous amounts of data, which are crucial to creating the brains for the machines that, in the future, will do more of our jobs and creating tools that allow people to better coexist." *Id.* The Singularity has been described as an event or a moment when technological entities possess superior intelligence to mankind. *Id.*; *see also* Tim Urban, *The AI Revolution: The Road to Superintelligence*, WAIT BUT WHY (Jan. 22, 2015), *archived at* <https://perma.cc/4J3L-RW5D> (clarifying Vinge's singularity moment as a time when the normal rules of life will no longer apply); *see also* Vernor Vinge, *The Coming Technological Singularity: How to Survive in the Post-Human Era*, VISION-21 SYMPOSIUM (1993), *archived at* <https://perma.cc/VNX5-B74Y> (comparing the

shareholder of Uber and already has investments in Didi Chuxing in China, Ola in India, and Southeast Asia's Grab.¹⁰⁹ These transactions will give the Fund access to a massive amount of logistic and location data that operate a large fleet of self-driving car technology.¹¹⁰

As of October 2017, the Fund had invested capital into many high technology companies such as WeWork, Brain Corp, and Nvidia, while also holding options to buy into investments made by SoftBank Group Corp., such as their investment in ARM Holdings.¹¹¹ Brain

change of artificial intelligence to the rise of human life on Earth and the cause for this change is artificial intelligence becoming greater than human intelligence).

¹⁰⁹ See Heather Somerville, *SoftBank is now Uber's largest shareholder as deal closes*, REUTERS (Jan. 18, 2018), archived at <https://perma.cc/HWY4-S6TT> (holding a 15% stake in Uber, SoftBank is the company's largest shareholder). SoftBank added Rajeev Misra, the CEO of the Vision Fund, to Uber's board of directors. *Id.* Further, Marcelo Claure, a member of SoftBank's board of directors, was added to Uber's board of directors. *Id.*; see also Arjun Kharpal, *Uber's biggest rival in India just got \$1.1 billion from Tencent, SoftBank, valuing company around \$7 billion*, CNBC (Oct. 11, 2017), archived at <https://perma.cc/SRD9-9EWF> (observing SoftBank's other investments in Didi Chuxing and Grab).

¹¹⁰ See Benner, *supra* note 11 (describing the vast network of ride-hailing company investments SoftBank will own and how SoftBank will be able to use the data from these companies with artificial intelligence); see also Greg Bensinger, *Uber Board Settles Feud, Clearing Way for SoftBank Deal*, WALL ST. JNL. (Nov. 13, 2017), archived at <https://perma.cc/3FYL-JFXY> (using the proposed investment by SoftBank to focus on the future of the company).

¹¹¹ See Press Release, Brain Corp, Brain Corp and its Partner SoftBank Robotics Corp. Enter Japan's Commercial Cleaning Market (Sept. 25, 2018) (on file with author) (creating a partnership with Brain Corp to share AI technology); see also Zahraa Alkhalisi, *Where the huge SoftBank-Saudi tech fund is investing*, CNN TECH (Oct. 6, 2017), archived at <https://perma.cc/XZ9G-6JJJ> (describing the investments made by the Vision Fund); *Brain Corp Announces \$114 Million in Series C Funding Round Led by the SoftBank Vision Fund*, BUS. WIRE (July 19, 2017), archived at <https://perma.cc/6B5P-BGG6> (specializing in partnering with manufacturers to convert manual machines into autonomous robots). SoftBank Vision Fund led the Series C funding round. *Id.* Brain Corp CEO now feels pressure to live up to Masa's expectations of his vision for Brain Corp.; see also Peter Elstrom, Pavel Alpeyev, & Lulu Yilun Chen, *Inside the Eccentric, Relentless Deal-Making of Masayoshi Son*, BLOOMBERG BUSINESSWEEK (Jan. 2, 2018), archived at <https://perma.cc/78T7-CNWE> (accepting that by taking Masa's money, Izhikevich would need to work to Masa's standards); see also Pavel Alpeyev & Dinesh Nair, *SoftBank Sells 25 Percent Stake in ARM to Vision Fund*, BLOOMBERG TECH. (Mar. 8, 2017), archived at <https://perma.cc/75Q5-56Q5> (expressing desire to add ARM to the Vision Fund portfolio, SoftBank Group Corp sold a 25% stake in ARM to the Fund); see also Alex Konrad, *WeWork Confirms Massive \$4.4 Billion Investment From SoftBank*

Corp is a small, start-up company based in San Diego, California that has worked with the Defense Advanced Research Projects Agency (DARPA) to build high-tech, machine learning, and advanced artificial intelligent systems.¹¹² For example, DARPA and Brain Corp worked on a Predictive Vision Model (PVM) for advanced artificial intelligent systems, which essentially worked towards having artificial intelligence self-learn common sense through visual prediction.¹¹³

And Its Vision Fund, FORBES (Aug. 24, 2017), archived at <https://perma.cc/C3GU-E8HC> (pointing to WeWork's use of technology and proprietary data systems and WeWork's international reach that could "unleash a new wave of productivity"); see also Jon Russell, *SoftBank transfers its \$5B stake in Nvidia to the Vision Fund*, TECH CRUNCH (Aug. 7, 2017), archived at <https://perma.cc/3SDH-LS3D> (transferring the investment made the Fund Nvidia's fourth largest investor); but see Antony Leather, *SoftBank \$3.6 Billion Nvidia Share Dump: Chip Maker's Woes Continue But 2019 Offers Hope*, FORBES (Feb. 8, 2019), archived at <https://perma.cc/F26P-JD6F> (citing Nvidia's depreciating share price as a main reason for the sale). "SoftBank CEO Masayoshi Son explained that Nvidia's involvement in the Vision Fund makes particular sense because of the relationship it has with ARM, which licenses its chip design to Nvidia among others." *Id.*; see also Brain Corp, *supra* note 111 (discussing the partnership between SoftBank Robotics and Brain Corp, which powers SoftBank Robotics' floor scrubber with their AI system, BrainOS).

¹¹² See *Brain Tech*, BRAIN CORP. (Jan. 20, 2018), archived at <https://perma.cc/V7MD-47M3> (developing novel machine learning algorithms in partnership with DARPA with a focus on visual perception and motor control); see also *About DARPA*, DEF. ADV. RES. PROJECTS AGENCY (Jan. 20, 2018f), archived at <https://perma.cc/RTF6-NX7G> (explaining that DARPA includes approximately 220 government employees who oversee nearly 250 research and development projects). Created after the launch of Sputnik in 1957, DARPA was created to enhance our nation's technological capabilities with a focus on our nation's military services. *Id.* For example, DARPA invested in the creation of the internet. *Id.*; see also *ARPANET and The Origins of The Internet*, DEF. ADV. RES. PROJECTS AGENCY (Jan. 20, 2018), archived at <https://perma.cc/GAC3-2ZE5> (describing the role of ARPA—the predecessor to DARPA—in the creation of the modern day information revolution when DARPA contracted BBN Technologies to build the first internet routers); see also April Dembosky, *Silicon Valley rooted in backing from US military*, FIN. TIMES (June 9, 2013), archived at <https://perma.cc/L34H-MNVD> (referencing the technology that stems from the DARPA project, which includes Siri interface).

¹¹³ See *Common-Sense Machine Vision*, BRAIN CORP (Jan. 20, 2018), archived at <https://perma.cc/U4WK-42W9> (analyzing how the artificial intelligence machines can understand repeated spatio-temporal dynamics and regularities through a PVM). Enhancing the PVM in artificial intelligence systems will enable the systems to be able to contextual features in the real world to overcome challenges such as illumination, shadows, reflections, and momentary obstructions. *Id.*; see also Filip Piekiewicz ET AL., *Unsupervised Learning from Continuous Video in a Scalable Predictive Recurrent Network*, CORNELL U. LIBR. 1, 31 (2016) (arguing that an

Through this research, Brain Corp is developing artificial intelligence that has a real-world perception and mobility skills to that allow the machine to function in a human-centered world.¹¹⁴ Brain Corp and DARPA are also working on a Biological Predictive Model, a system that will allow artificial intelligence systems to deal with the high variability of real-life environments and sensory inputs that allow humans to predict the sound of a bird by first visually seeing the bird in real-life.¹¹⁵ Another company the Vision Fund had invested in, Nvidia, is a leading company in the industry of semi-conductor chips and GPU computing.¹¹⁶ Between Brain Corp and Nvidia, these high-tech companies invest research and development into technologies that

advancement in PVM research will allow for artificial intelligent systems to increase their real-world perception and mobility).

¹¹⁴ See Piekiewicz, *supra* note 113 (developing such technology would allow for the scientists to build truly intelligent robots); see also China's Technology Transfer, *supra* note 51 (stating artificial intelligence technology can be used to build U.S. military superiority in the future).

¹¹⁵ See *Biological Predictive Model Summary*, BRAIN CORP (Jan. 20, 2018), archived at <https://perma.cc/AC5L-P82T> (attempting to mimic biological functions of the human brain that allows human brains to process visual representations while at the same time producing useful behavior). Citing three observations of how the human brain perceives the real-world: first, the brain learns from continuity by receiving images in the natural order of time and combing sequential views, second the brain predicts, which allows humans to compensate for the time it takes the signal from our eyes to reach our brain, and third, the brain uses context to create a stronger prediction of how objects function in the real-world. *Id.*; see also Elsa Kania, *Artificial Intelligence And Chinese Power*, FOREIGN AFFAIRS (Dec. 5, 2017), archived at <https://perma.cc/MA3C-AP2V> (explaining how militaries are already implementing autonomous systems in their tactics). The U.S. missile defense system, the Patriot System, can automatically track and select a target. *Id.*

¹¹⁶ See *Leader in GPU Computing*, Nvidia (Jan. 20, 2018), archived at <https://perma.cc/J2ES-KQK7> (developing GPU computing to implement the technology in virtual reality and artificial intelligence systems). Nvidia technology has allowed the semi-conductor industry to grow at an exponential rate. *Id.*; see also Jon Russel, *supra* note 111 (investing to become Nvidia's fourth largest shareholder). "Mashayoshi Son explained that neither SoftBank nor the fund will look to take majority ownership in companies or invest strictly for profit, rather the goal is to develop a portfolio of top tech firms that can explore partnerships and synergies to grow together." *Id.*; see also China's Technology Transfer Strategy, *supra* note 51 (claiming artificial intelligence and virtual reality to be key components to U.S. military superiority).

could be considered dual-use technologies.¹¹⁷

Masa has amassed the largest tech fund ever to include investments from sovereign wealth funds (“SWF”) and technology giants such as Apple and Qualcomm, and he plans to continue creating subsequent Vision Funds moving forward.¹¹⁸ One particular investor

¹¹⁷ See *Common Dual-Use and Military Control Lists of the EU*, U.S. STATE DEPT. (Jan. 20, 2018), archived at <https://perma.cc/P3LT-NHQE> (defining dual-use technology as technology that can be used for both military and civilian purposes); see also Press Release, BRAIN CORP., Brain Corp Using NVIDIA Jetson for Latest Robotics Product Powered by BrainOS (Dec. 12, 2018) (on file with author) (announcing the partnership between NVIDIA and Brain Corp for BrainOS to be used for the commercial use of an autonomous vacuum). “The rapidity at which dual-use technologies are developed in the commercial sector has significant impact on the nature of warfare: mastering them ahead of competitors will ‘ensure that we (U.S. military) will be able to win wars of the future.’” *Id.*; see also Bureau of Investigative Journalism, *Afghanistan: Reported Covert Actions 2017*, THE BUREAU OF INVESTIGATIVE JOURNALISM (Jan. 20, 2018), archived at <https://perma.cc/KNR2-Y8S2> (claiming the three targeting authorities that grant the U.S. power to conduct such strikes in Afghanistan are: force protection of U.S. and allied forces and strategic effect strikes against enemy combatants). Future military superpowers will have superior autonomous capabilities, and if not, they will cease to be superpowers. *Id.*; see also Cara LaPointe & Peter L. Levin, *Automated War*, FOREIGN AFFAIRS (Sept. 5, 2016), archived at <https://perma.cc/3MTM-TV86> (pointing to heavy investment in autonomous weapons by United States’ adversaries). Brain Corp is using an NVIDIA semiconductor chip to help process Brain Corp’s BrainOS, in partnership with SoftBank Robotics to build an autonomous commercial vacuum cleaner. *Id.*; see also Denise Garcia, *The Case Against Killer Robots*, FOREIGN AFFAIRS (May 10, 2014), archived at <https://perma.cc/EP6G-8QYM> (alleging UAVs will eventually be able to choose human targets to kill without further human intervention). In 2017, the Bureau of Investigative Journalism recorded 2,607 to 2,609 UAV strikes by the U.S. military in Afghanistan. *Id.*; see also China’s Technology Transfer Strategy, *supra* note 51 (describing the importance of having a strategic advantage over U.S. competitors with advancing technology); see also President’s Council of Advisors on Science and Technology, *supra* note 83 (considering the importance of keeping the U.S.’s competitive advantage in the semiconductor industry). The U.S. Pentagon is planning on the gradual reduction of human control of unmanned aerial vehicles (UAV) by 2036. *Id.*

¹¹⁸ See Rani Molla, *SoftBank’s \$93 billion Vision Fund is the biggest of all time—and it’s not even close*, RECODE (Sept. 21, 2017), archived at <https://perma.cc/TDB9-QZGZ> (according to FactSet, the Vision Fund is larger than the next five largest tech funds combined); see also Zahraa Alkhalisi, *Where the huge SoftBank-Saudi tech fund is investing*, CNN TECH (Oct. 6, 2017), archived at <https://perma.cc/KH4M-DM4G> (receiving backing from Saudi Arabia’s Public Investment Fund and the United Arab Emirates’ sovereign wealth fund, Mubadala); see also Mayumi Negishi, *Japan’s SoftBank Plans a Second Giant Technology Fund*, WALL ST. JNL.

in Masa's Vision Fund is Saudi Arabia's SWF, the Public Vision Fund (PIF), which has the goal of modernizing the Saudi society and diversifying the economy, thus reducing their dependence on oil.¹¹⁹ The PIF is the Vision Fund's largest investor, committing \$45 billion dollars over 5 years.¹²⁰ As part of the PIF's goals to diversify the Saudi economy, the PIF created the Saudi Arabian Military Industries ("SAMI"), with a goal of 50% of Saudi Arabia's military procurement spending will be localized to the Saudi economy.¹²¹

Further, China and Saudi Arabia have displayed that their alliance could continue to expand, especially with many similar interests between the Saudi Vision 2030 and China's "Belt Road

(Oct. 20, 2017), *archived at* <https://perma.cc/XU26-EUEU> (discussing Masa's plan to create a second Vision Fund that could be about \$200 billion in size).

¹¹⁹ See Public Investment Fund, PUBLIC INVESTMENT FUND (Feb. 22, 2017), *archived at* <https://perma.cc/8XKD-8HYC> (driving strategic and sustainable investments in line with the Saudi Vision 2030). The Saudi Vision 2030 is a domestic initiative engineered by Mohammad bin Salman bin Abdulaziz Al-Saud (MbS), Crown Prince Deputy Prime Minister, that looks to build Saudi Arabia as the leader of the Arab world, create a more diverse and sustainable domestic economy, and connect Asia, Europe, and Africa to drive international trade. *Id.*; see also Vision 2030, *Introduction*, KINGDOM OF SAUDI ARABIA (Feb. 22, 2017), *archived at* <https://perma.cc/3U8V-F8M4> (defining the goals of the Saudi Vision 2030 initiative as creating a more diverse and sustainable economy).

¹²⁰ See Andrew Torchia, *Softbank-Saudi tech fund becomes world's biggest with \$93 billion of capital*, REUTERS (May 20, 2017), *archived at* <https://perma.cc/ZW7R-XLKZ> (comparing the PIF's investment to Softbank's \$28 billion investment to Masa's Vision Fund).

¹²¹ See Fatimah Alyas, *U.S.-Saudi Arabia Relations*, COUNCIL ON FOREIGN RELATIONS (Dec. 7, 2018), *archived at* <https://perma.cc/9UY6-6KKM> (stating Saudi Arabia is the top destination for U.S. arms sales). U.S. defense sales to Saudi Arabia have totaled close to \$90 billion since 1950. *Id.*; see also Irina Ivanova, *Saudi Arabia is America's No. 1 weapons customer*, CBS NEWS (Oct. 13, 2018), *archived at* <https://perma.cc/9KA9-V54R> (accounting for approximately 32% of total U.S. weapons sales); *Key element of Vision 2030 realized with launch of new Saudi Arabian national defense company*, (May 18, 2017), *archived at* <https://perma.cc/5TGU-399H> (asserting SAMI is aiming to become one of the world's top 25 defense companies). In 2016, approved military spending in Saudi Arabia accounted for 21% of Saudi Arabia's total expenditures. *Id.*; see also The Public Investment Fund Program, *supra* note 116 (claiming Saudi Arabia is one of the world's largest spenders on defense products). In 2017, the U.S. exported military weapons to Saudi Arabia for approximately \$18 billion dollars. *Id.*

Initiative” (BRI), which was started in 2013.¹²² In 2017, the China State Council released the “New Generation Artificial Intelligence Development Plan”, which greatly emphasized the importance of

¹²² See HENRY KISSINGER, *WORLD ORDER* 225 (Penguin Press eds., 2014) (claiming China seeks to enhance their role in the international order as potentially the world’s largest economy). “But they [China] expect—and sooner or later will act on this expectation—the international order to evolve in a way that enables China to become centrally involved in further international rule making, even to the point of revising some of the rules that prevail.” *Id.*; see also An Baijie, *China, Saudi Arabia deepen ties*, *CHINA DAILY* (Mar. 17, 2017), archived at <https://perma.cc/985T-PXSR> (expressing interest that Saudi Arabia would like to increase cooperation between China and Saudi Arabia in areas including investment, economy and trade, and finance). “China would like to work with all countries along the routes of the Belt and Road Initiative, including Middle Eastern nations, to jointly implement the initiative.” *Id.*; see also *China, Saudi Arabia sign agreements worth about \$91 billion*, *THE STRAITS TIMES* (Mar. 16, 2017), archived at <https://perma.cc/F6GD-5X9M> (emphasizing Saudi Arabia’s role in the BRI). “In terms of strategic location, Saudi Arabia serves as the central hub connecting three continents—Asia, Africa, and Europe—and has been an important part of the [BRI] initiative.” *Id.*; see also Dexter Filkins, *A Saudi Prince’s Quest to Remake The Middle East*, *THE NEW YORKER* (Apr. 9, 2018), archived at <https://perma.cc/N2MN-MC4P> (claiming the political system that best conforms with MbS’ Vision 2030 is China); see also Charlotte Gao, *Closer Ties: China and Saudi Arabia Sign \$70 Billion in New Deals*, *THE DIPLOMAT* (Aug. 27, 2017), archived at <https://perma.cc/3FPA-YQ59> (advocating that both the Chinese “One Belt, One Road” initiative and the Saudi Vision 2030 program have similar goals of advancing economic and trade relations among the countries). “His [MbS] vision [Vision 2030] seems to match well with China’s Belt and Road initiative, which was put forward by Chinese President XI Jinping in 2013.” *Id.*; see also Robbie Gramer, *Saudi Arabia, China Sign Deals Worth Up to \$65 Billion*, *FOREIGN POLICY* (Mar. 16, 2017), archived at <https://perma.cc/97NR-M56Q> (agreeing to economic and trade deals worth up to \$65 billion dollars). The foundation for the relationship between China and Saudi Arabia is based on oil, Saudi Arabia is the world’s largest exporter and China is their largest consumer of oil. *Id.*; see also Frank Holmes, *China’s Belt and Road Initiative Opens Up Unprecedented Opportunities*, *FORBES* (Sept. 4, 2018), archived at <https://perma.cc/F9H8-ZTWF> (stating the BRI can be compared to a 21st century Silk Road); see also Wang Jin, *China and Saudi Arabia: A New Alliance?*, *THE DIPLOMAT* (Sept. 2, 2016), archived at <https://perma.cc/HF2P-N5U4> (insisting the countries are interested in deepening their ties under the “One Belt, One Road” and the Vision 2030 programs put forward). Saudi Arabia meets about 20% of China’s demand for oil, acting as China’s largest oil importer. *Id.*; see also Joshua P. Meltzer, *A View from the United States*, *THE ASAN FORUM* (June 19, 2017), archived at <https://perma.cc/SJ5K-23MC> (investing in roads, railroads, airports, ports, pipelines, and communications, the BRI’s goal to spread Chinese influence among the regions). China’s BRI plans to invest \$1.4 trillion in the construction of road and maritime connections between China and countries in Southeast Asia, Central Asia, and to Europe. *Id.*

developing artificial intelligence theory and technology for the sake of economic and social development and national security.¹²³ The Chinese State Council also announced the “Made in China 2025” (“MIC 2025”) industrial policy plan in 2015, which provided preferential state capital to Chinese companies to acquire technology from abroad.¹²⁴ Currently, all of the Vision Fund’s backers are allies or friendly to the United States and none of the Fund’s investments have come under scrutiny of CFIUS. However, Masa’s goal of matching sovereign wealth funds and private companies to create joint venture investment funds should raise issues for CFIUS.¹²⁵

¹²³ See *China’s New Generation of Artificial Intelligence Development Plan*, FOUND. FOR L. AND INT’L. AFF. (July 30, 2017), archived at <https://perma.cc/Y9EZ-L3M7> (characterizing developed countries’ advanced artificial intelligence systems and China’s need to further improve their national competitiveness and safeguard their national security with artificial intelligence); see also Christina Larson, *China’s massive investment in artificial intelligence has an insidious downside*, SCIENCE (Feb. 8, 2017), archived at <https://perma.cc/4VCD-ZJU4> (identifying China’s global rise in the artificial intelligence industry such as submitting increasingly influential AI-academic papers).

¹²⁴ See Williams, *supra* note 46 (examining how Chinese industrial policy distorts the global markets); see also WAYNE M. MORRISON, *THE MADE IN CHINA 2025 INITIATIVE: ECONOMIC IMPLICATIONS FOR THE UNITED STATES 1* (2018) (signaling the creation of the Made in China 2025 plan). The Chinese State Council holds the highest power in the Chinese government. *Id.* The purpose of the MIC 2025 is to modernize the Chinese economy, by creating new sources of economic growth. *Id.* China’s goal is to become a global manufacturing power by 2049, the 100th anniversary of the founding of the People’s Republic of China. *Id.* Currently, foreign multinational companies use China to assemble their various products, but China’s goal is to assemble products that were also invented in China. *Id.*; see also U.S. Chamber of Commerce, *MADE IN CHINA 2025: GLOBAL AMBITIONS BUILT ON LOCAL PROTECTIONS* (2017) (aiming to transform China’s manufacturing platform).

¹²⁵ See Treaty of Mutual Cooperation And Security Between the United States and Japan, U.S. – Japan, Jan. 19, 1960 (signing the treaty on the same day as the San Francisco Peace Treaty, but revised in 1960, where approximately 50, 000 U.S. troops are currently stationed); see also Chao Deng et. al., *Goldman, China’s Sovereign-Wealth Fund Plan Up to \$5 Billion in U.S. Investments*, WALL ST. JNL. (Nov. 6, 2017), archived at <https://perma.cc/N9QG-MJUQ> (assisting the Chinese sovereign wealth fund to invest in U.S. manufacturing, among other sectors); Trade Investment Framework, *supra* note 48 (recognizing the importance of creating an open and predictable environment for foreign investment). Further, Saudi Arabia and the UAE are both countries that have a Trade Investment Framework Agreement with the U.S. *Id.*; see also *U.S. Relations With United Kingdom*, U.S. DEP’T OF STATE (Feb. 26, 2018), archived at <https://perma.cc/AP5S-SMB3> (stating “[t]he

IV. Analysis

A. *The CFIUS Process Is Politically Motivated*

Throughout the history of CFIUS, every transaction that has been recommended by the Committee to the President to be blocked has involved China.¹²⁶ Three out of the five prohibited transactions have been blocked due to the Chinese government's involvement in the operation and the potential military applications of the technology.¹²⁷ As indicated in the Lattice and Aixtron deals, semiconductors have a plethora of military applications and the U.S. government was opposed to letting this technology be readily available to the Chinese government.¹²⁸ The same conclusion was reached by the Committee in prohibiting the MAMCO acquisition, citing the potential use of MAMCO's technology in Chinese military aircrafts.¹²⁹ Lastly, the most recent blocked acquisition of Qualcomm by

United States has no closer ally than the United Kingdom, and British foreign policy emphasizes close coordination with the United States.”); *see also* SoftBank Group Management, *supra* note 107 (establishing SoftBank Investment Advisers are located in London and follow their securities regulations). The United Kingdom is where SoftBank Investment Advisers, the owner of the SoftBank Vision Fund, is organized. *Id.*

¹²⁶ *See* Byren, *supra* note 65, at 872 (suggesting that the potential intellectual property transfer to the Chinese government-backed CATIC would be a national security risk); *see also* McLaughlin, *supra* note 81 (noting how Obama upheld the Committee on Foreign Invest in the U.S.'s recommendation that the “sale of the semiconductor-equipment supplier to grand Chip Investment GmbH should be stopped”); *see also* *Semiconductor*, *supra* note 90 (considering the Chinese governments' financial support of the transaction created a national security risk); Swanson, *supra* note 45 (describing the blocked transaction as protectionism in disguise).

¹²⁷ *See* Mendenhall, *supra* note 56, at 290 (citing that CATIC acted as a purchasing agent of the Chinese government); *see also* McLaughlin, *supra* note 81 (stating Sino IC Leasing Co. is owned by the Chinese government and Canyon Bridge Capital Partners is a private equity firm supported by the Chinese government).

¹²⁸ *See* ROGERS, *supra* note 97, at 2 (concluding the Chinese government financier of the Canyon Bridge Capital Fund also finances numerous Chinese military firms); *see also* Editorial Board, *supra* note 86 (characterizing Lattice's semiconductors as having military capabilities in missile guidance and radar systems); *see also* U.S. Dept. of the Treasury, U.S. Dept. of the Treasury, *supra* note 82 (explaining a reason for the blockage of the Aixtron acquisition was due to the military applications of the overall body of knowledge of the technology).

¹²⁹ *See* Bush, *supra* note 56 (commenting on confidential information that related to CATIC's future military use of MAMCO technology).

Broadcom was further evidence of CFIUS politicization, bringing the power struggle between U.S. and China to the forefront of national headlines.¹³⁰

It is a clear national security concern for the U.S. to have a military advantage over a potential adversary.¹³¹ However, there have been investments with similar military-capable technologies at stake, but with different foreign parties, that the Committee has not taken action.¹³² Instead of having a protectionist outlook in the name of national security against Chinese foreign investment, the United States is in a position to change the course with our Chinese partners and should consider leading the direction of high-technology weapons through a rapprochement with China.¹³³ The overall approach to China as a potential military adversary by contributors to the CFIUS regime is political in of itself.¹³⁴ It is inherent that the CFIUS regime would

¹³⁰ See Purnell & Woo, *supra* note 94 (discussing U.S. leaders' unwillingness to allow China to control the 5G network communications industry).

¹³¹ See MATTIS, *supra* note 13, at 3 (supporting the notion that the U.S. intends to remain the preeminent military power in the world). The former Secretary of Defense also outlined the objectives of U.S. military strategy, such as "changes to industry culture, investment sources, and protection across the National Security Innovation Base." *Id.*

¹³² See Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, 121 Stat. 246 (2007) (contesting that the United States puts a major focus on maintaining a superior technological military advantage); see also *Brain Corp Announces \$114 Million in Series C Funding Round Led by the SoftBank Vision Fund*, *supra* note 111 (highlighting Brain Corp's co-development of autonomous weapons systems which was funded by the Vision Fund without CFIUS intervention); see also Williams, *supra* note 46 (discussing how China's "strategic objective" of their investment involves impeding the American military's technological advantage over China).

¹³³ See KISSINGER, *supra* note 122, at 330-60 (claiming that with new advanced technology, there needs to be an attempt to chart the challenge high technology presents). "To undertake a journey on a road never before traveled requires character and courage: character because the choice is not obvious, courage because the road will be lonely at first." *Id.* at 349. "The most far-reaching objective of this defense strategy is to set the military relationship between [the U.S. and China] on a path of transparency and non-aggression."; see also MATTIS, *supra* note 13, at 2 (delving into China's "leveraging military modernization," which includes "seek[ing] Indo-Pacific regional hegemony in the near-term and displacement of the United States to achieve global preeminence in the future").

¹³⁴ See H.R. 556 (2007) (implying that China and other adversaries are aware of the U.S. military's vulnerability in its supply chain to the private sector); see also U.S.

be vulnerable to political influence because it is governed by political administrators, but the manner in which the CFIUS committee has portrayed China as using foreign investment as the means only to secure military supremacy against the U.S. creates a strong case to view CFIUS as a political machine of the U.S. government.¹³⁵

B. The FIRRMA Bill Further Politicizes CFIUS

The FIRRMA Amendment further creates a perception of politicization by having the Committee determine if the transaction involves a “country of special concern.”¹³⁶ Because of the manner in which the FIRRMA Amendment defines a “country of special concern”, it is likely to be reoccurring debate on whether CFIUS is a “legal black hole.”¹³⁷ Further, Senator Cornyn is on the record indicating the FIRRMA Amendment was drafted to counter the perceived threat China poses to U.S. national security with their foreign investment.¹³⁸

At the start of the 21st century, China and the United States have found themselves in unfamiliar territory regarding their roles in the international order and the countries’ relationships with one another.¹³⁹ While understanding the expansive need to maintain and protect U.S. national security, the extremely vague definition of a “country of special concern”, and the ultimate power that rests with the Committee in making such determination acknowledges the United States’ observance of China’s increasing influence in global affairs but

Dept. of the Treasury, *supra* note 82 (describing that by taking control of Aixtron, the Chinese government would be taking action that threatens U.S. national security).

¹³⁵ See *FIRRMA*, H.R. 5515, § 1719(b) (requiring a report to Congress every two years on Chinese foreign investment in the U.S.). This put Washington D.C. on notice that China has been “weaponizing” their investments in U.S high technology to diminish America’s military advantage. *Id.*

¹³⁶ See *FIRRMA*, H.R. 5515, § 1702 (c) (1)-(2) (stating that the CFIUS Committee may take into consideration whether a covered transaction involves a “country of special concern”).

¹³⁷ See *id.* (describing what constitutes a “country of special concern” in the context of covered transactions); see also Ji Li, *supra* note 28, at 6 (describing CFIUS as a “legal black hole” due to its broad power to define national security).

¹³⁸ See Press Release, John Cornyn, *supra* note 45 (characterizing China as one of the most aggressive countries that attempts to avoid the CFIUS process).

¹³⁹ See KISSINGER, *supra* note 122, at 226 (arguing that the United States lacks experience of building a sustaining relationship with a global superpower of comparable size, influence, and economic size).

promotes an agenda of confrontation instead of partnership with China.¹⁴⁰ The addition of a “country of special concern” will certainly disrupt the relationship between the world’s two largest economies, as the U.S. and China are in line to directly compete for a global leadership position in the artificial intelligence industry.¹⁴¹

The FIRRMA amendment will further politicize CFIUS by how the Committee ultimately defines a “foreign person” and how the President will work with U.S. allies to strengthen the U.S. export control regime.¹⁴² Although a liberal world order has been maintained since the end of WWII, with artificial intelligence potentially having such an impact on a country’s society, culture, and military, the world order is bound to shift.¹⁴³ There will be countries who have developed artificial intelligence-based military and social systems, and there will

¹⁴⁰ See *FIRRMA*, H.R. 5515, § 1702 (c) (1) (defining a “country of special concern” to be one which has a demonstrated or declared a goal of acquiring technology that would impact U.S. national security). Congress and CFIUS require a specialized report solely on Chinese foreign investment in the U.S.; see also KISSINGER, *supra* note 122, at 232 (warning that if the U.S. comes to be perceived as a declining power, China will likely attempt to succeed the U.S. in a global leadership role); see also Meltzer, *supra* note 122 (describing China’s BRI as a tool to project regional influence for the purpose of promoting a more internationally engaged China).

¹⁴¹ See *FIRRMA*, H.R. 5515, § 1702 (alleging China’s investment in foreign technologies can significantly impact U.S. national security); see also Larson, *supra* note 113 (claiming China wants to establish itself as a global leader in artificial intelligence). “China has lagged behind the U.S. in cutting-edge hardware design... [b]ut it wants to win the AI chip race.” *Id.*

¹⁴² See *FIRRMA*, H.R. 5515, § 1703 (specifying criteria to limit FIRRMA clauses on certain categories of foreign persons). The Committee shall take such criteria in defining a “foreign person,” such as: (i) how a foreign person is connected to a foreign country or foreign government; and (ii) whether the connection may affect the national security of the United States. *Id.* The U.S. President is encouraged to work with U.S. allies to strengthen the U.S. export regime which controls investments in dual-use, emerging and foundational technologies. *Id.* at 541 (leading an effort with allies of the U.S. to reinforce the export control regime); see also Aaronson, *supra* note 55 (depending on the country where the foreign person is from, CFIUS will likely scrutinize their investment differently). All “foreign persons” will likely not be treated equally in the eyes of the CFIUS Committee. *Id.*

¹⁴³ See KISSINGER *supra* note 122, at 278 (observing after in the post-WWII era, America was essentially undamaged and was able to define global leadership that modeled domestic principles). “On the way to the first truly global world order, the great human achievements of technology must be fused with enhanced powers of humane, transcendent, and moral judgment.” See *id.* at 360.

be countries who are eager to catch up to the status quo.¹⁴⁴ This will create a geopolitical landscape where alliances may shift considerably.¹⁴⁵ The growing alliance between Saudi Arabia, a traditional U.S. ally, and China is a prime example of potential alliance rearrangements.¹⁴⁶ Although potentially exempting a country like Saudi Arabia from the traditional CFIUS review because of a current diplomatic understanding, the FIRRMA Amendment seems to take the proper steps to mitigate potential long-term national security concerns.¹⁴⁷

C. The FIRRMA Bill and Masa's Vision Fund

The FIRRMA Amendment could have blocked or mitigated national security issues related to transactions as the Vision Fund is a foreign-based investment fund.¹⁴⁸ The Vision Fund is made up of foreign sovereign wealth funds, private companies, and private individuals, which would not satisfy the “investment fund” exemption under FIRRMA and an investment in a U.S. business would fall under

¹⁴⁴ See KISSINGER *supra* note 122, at 346 (questioning whether technologically less advanced societies will need to defer to high-tech societies).

¹⁴⁵ See Jin, *supra* note 122 (predicting Saudi Arabia may attempt to hedge its bets on the U.S. for providing technological advantages). “There is a growing sense among Saudis that it has been overly dependent on Washington.” *Id.*

¹⁴⁶ See Jin, *supra* note 122 (quoting the Chinese President Xi Jing ping as predicting growing cooperation between China and Saudi Arabia in many sectors including, telecommunications, education, aerospace, and security). The Chinese President maintains that China will continue to support Saudi Arabia's efforts to safeguard national sovereignty, security, and developmental issues. *Id.*

¹⁴⁷ See FIRRMA, H.R. 5515 § 1708 (describing a “covered transaction”). “Any change in the rights that a foreign person has with respect to a United States business in which the foreign person has an investment, if that change could result in—(I) foreign control of the United States business; or (II) an investment described in clause (iii).” Saudi Arabia is the U.S.' biggest customer for arms deals. *Id.* The Act further articulates that such an example would not fall under the investment fund exemption to CFIUS review. *Id.*; see also Ivanova, *supra* note 121 (explaining how Saudi Arabia is responsible for 20% of U.S. weapons deals); see also Alyas, *supra* note 121 (claiming U.S. weapons sales to Saudi Arabia have totaled close to \$90 billion since 1950). The FIRRMA amendment would protect U.S. national security interests in the case of an investment fund established overseas that were to transfer such rights to a U.S. technology company to another foreign person. *Id.*

¹⁴⁸ See FIRRMA, H.R. 5515 § 1701 (defining the investment fund exemption); see also SoftBank Group Management, *supra* note 105 (claiming SoftBank Investment Advisers is registered with the Financial Conduct Authority, based in the United Kingdom).

the jurisdiction of the CFIUS Committee.¹⁴⁹ On the other hand, under the FIRRMA Amendment, the Vision Fund's transactions would have been defined as a "covered transaction" by the Committee because the Fund's investments in high-tech companies such as Brain Corp, Nvidia, and Uber involve dual-use technologies and big data.¹⁵⁰ For

¹⁴⁹ See *FIRRMA*, H.R. 5515, § 1703(a)(4)(D) (defining an "other investment" as one which affords the foreign person decision making powers regarding the development of critical technologies); Elstrom, *supra* note 111 (stating how Brain Corp's CEO felt "pressure" from Masayoshi to accelerate his company's work). Such a relationship between an investment fund and portfolio company could qualify the Vision Fund's investment as a covered transaction under FIRRMA's "other investment" definition. *Id.*; Russell, *supra* note 10 (acknowledging that the Saudi Arabian Public Investment Fund, the UAE's Mubadala Investment Company, SoftBank, Apple, and Larry Ellison's family company as investors of the Vision Fund); see also *FIRRMA*, H.R. 5515, § 1703(a)(4)(D)(iv)(I) (stating an investment fund would fall under the exemption only if the general partner, or managing member is not a foreign person). Masayoshi holds founders he invests in to his standard and vision for the company. *Id.*; see also Joint Venture, *supra* note 46 (defining a joint venture as a business arrangement of pooled resources for a common goal).

¹⁵⁰ See Foreign Investment Risk Review Modernization Act of 2018 § 1702 (defining a "covered transaction"). An investment subject to regulations under Section (D) of FIRRMA that involves a U.S. business that products or develops critical technology is considered a covered transaction. *Id.* The term "critical technologies" includes technologies that are considered "emerging and foundational" by the ECRA. *Id.* at 547. Such "emerging and foundational" technologies most likely mean technologies related to artificial intelligence, autonomy, robotics, and big data analytics. *Id.*; see also Mattis, *supra* note 13 at 3 (highlighting areas of technology that will ensure U.S. military superiority); see also Brown, *supra* note 51 (describing technology that the Defense Department will use to build technological supremacy compared to U.S. adversaries); see also Nvidia, *supra* note 116 (claiming Nvidia's systems are crucial to the growth of artificial intelligence); see also Trade Investment Framework, *supra* note 48 (recognizing the importance of creating an open and predictable environment for foreign investment); see also Treaty of Mutual Cooperation And Security Between the United States and Japan, U.S. – Japan, January 19, 1960, *supra* note 125 (signing the treaty on the same day as the San Francisco Peace Treaty, but revised in 1960, where approximately 50,000 U.S. troops are currently stationed). Further, Saudi Arabia and the UAE would potentially fall under this exemption because both countries have a Trade Investment Framework Agreement with the U.S.; see also Benner *supra* note 11 (detailing how Masa's Vision Fund portfolio is comprised of companies that collect data). "They (portfolio companies in the Vision Fund) are all involved in collecting enormous amounts of data, which are crucial to creating the brains for the machines that, in the future, will do more of our jobs and creating tools that allow people to better coexist." *Id.* The Committee would have to consider the national security threat relating to logistics and location data of U.S.

the ECRA “emerging and foundational technologies”, the President is encouraged by FIRRMA to work with U.S. allies on the export control regime, but would the current President have allowed the Vision Fund transactions involving such technologies that would otherwise fall under CFIUS scrutiny?¹⁵¹ This could lead to problems for the U.S., because in the ever-changing geopolitical world, an increased alliance between Saudi Arabia and China is a real possibility.¹⁵² As Saudi Arabia has stated that they do not want to be classified as “dumb money” with the Vision Fund, their plan to use the Vision Fund’s investments for their Vision 2030 domestic initiative, and the increased cooperation between Saudi Arabia and China partly due to the Vision 2030 and One Belt, One Road programs, it begs the question of whether a politicized FIRRMA safeguards long-term U.S. national security.¹⁵³

citizens; *see also* Brain Corp., *supra* note 113 (using Brain Corp’s PVM in artificial intelligence systems *See* Foreign Investment Risk Review Modernization Act of 2018 § 1708 (determining whether location and logistics data would be considered “sensitive data” of U.S. citizens). Nvidia’s GPU computing chips are implemented in artificial intelligence systems. *Id.*; *see also* President’s Council of Advisers on Sci. and Tech., *supra* note 83 (claiming how semi-conductors are crucial to U.S. defense systems). SoftBank would fall under this exemption because the company is based in Japan, and Japan and U.S. signed a mutual defense treaty following World War II and later revised the treaty in 1960. *Id.*

¹⁵¹ *See* Alyas, *supra* note 121 (dating the U.S. – Saudi Arabia alliance back to 1933). The U.S. and Saudi Arabia have an alliance that goes back 70 years. *Id.*; *see also* FIRRMA, H.R. 5515, § 1708 (positing that the President should lead a collaborative effort with allies to strengthen the U.S. export control regime); *see also id.* at 545-46 (defining the investment fund exception to CFIUS scrutiny); *see also* Treaty of Mutual Cooperation And Security, *supra* note 125 (describing the security alliance between the U.S. and Japan).

¹⁵² *See* Filkins, *supra* note 122 (contending that Mbs’ Vision 2030 is not to liberalize Saudi Arabia’s political order; but, rather seeks to adopt the Chinese model as China has a diversified economy, literate population, and an authoritarian leader); *see also* Baijie, *supra* note 122 (describing that the Saudi Arabian-Chinese relationship is increasing in relation to investment, trade, economy, and finance); *see also* Gao, *supra* note 122 (asserting that China’s ‘One Belt, One Road’ initiative and Saudi Arabia’s Vision 2030 share common goals to increase trade and economic relations between the two countries); *see also* KISSINGER, *supra* note 122, at 225 (examining how China intends to expand their role in the international order, taking into consideration their potential to be the world’s largest economy).

¹⁵³ *See* FIRRMA, H.R. 5515, § 1702 (granting CFIUS jurisdiction over a transaction it once deemed was appropriate under U.S. national security concerns). It is important to note, however, that FIRRMA grants CFIUS the power to review change in the rights at foreign person has in a U.S. business if the change results in the (i)

IV. Conclusion

The purpose of this note was to analyze the FIRRMA amendment to CFIUS and analyze how the amendment would affect the CFIUS review process, as well as determine how FIRRMA would have impacted the recent investments made by Masayoshi Son's Vision Fund. CFIUS is a powerful gatekeeping measure to protect U.S. national security in relation to foreign investments. The FIRRMA Amendment to CFIUS strengthens the Committee's power to face challenges that have transpired since CFIUS was last amended in 2007. At the same time, the Amendment fails to promote the United States' open investment policy by creating a de facto politicization to foreign investment, specifically towards China. Currently, the FIRRMA Amendment openly scrutinizes Chinese foreign investment and the United States is creating an air of hostility between the world's two largest economies. Foreign investment is an important dimension to the U.S.-China relationship and a decline in investment due to policy and politics hinders this vital economic relationship that has seen hundreds of billions of dollars exchange hands since 1979.

foreign control of the U.S. company and (ii) an investment as described in the "investment fund" exemption. *Id.*; *Masayoshi Son's \$100 Billion Dollar Bet*, *supra* note 98 (proclaiming that Saudi Arabia wants to learn how the technology they're investing in functions); *see also* Public Investment Fund, *supra* note 119 (being the largest investor of the Vision Fund, the Public Investment Fund is driving the strategy behind Vision 2030).