

**Domestic markets and foreign investment
regulation: a functional analysis of CFIUS**

*Regulação do mercado interno e do investimento estrangeiro: análise funcional
do CFIUS*

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Abstract

This paper aims at carrying out functional analysis of the Committee on Foreign Investment in the United States – CFIUS, following Brazil's Economic Law tradition. The intention is to identify the function it performs, the legal structure designed for this purpose and the social effectiveness of its existence. Regarding the Committee's function, CFIUS was an entity conceived by U.S. Government to guarantee its economic sovereignty, enabling control over foreign investments and domestic markets' regulation. The legal structure designed to fulfill these goals involved the establishment of a premerger notification system whenever foreign buyers try to acquire a US company. The system is conducted by the Committee and is strictly linked to the Presidency. For its analyses, CFIUS makes use of broad hermeneutical criteria, such as (i) critical infrastructure, (ii) key-resources, (iii) critical sectors and (iv) controlling power. Throughout the notification procedure, CFIUS might conclude Mitigation Agreements and recommend the operation's prohibition. In terms of social effectiveness, CFIUS has experienced three different stages of evolution since its creation in 1975: (i) initially as a body for advisory purposes to the Presidency; (ii) later in 1988, it became responsible for the prohibition of threatening operations to US national security; (iii) after 2012, it increased significantly its activities, when Chinese investments toward the US largely amplified. Finally, when blocking foreign economic agents to exploit US companies against its national interests, CFIUS should be understood within a vast legal framework oriented to protect its economic sovereignty.

Keywords: economic law; economic sovereignty; foreign investment; domestic market; CFIUS.

Resumo

O presente artigo, na tradição do Direito Econômico brasileiro, visa a realizar análise funcional do Committee on Foreign Investment in the United States – CFIUS, buscando identificar a função por ele exercida, a estrutura jurídica concebida para tanto e a eficácia social de sua atuação. Funcionalmente, percebe-se que o CFIUS foi a entidade criada pelo Estado norte-americano para a garantia de sua soberania econômica, possibilitando o controle do

investimento estrangeiro e do mercado interno do país, num momento de profundas transformações na economia política mundial. A estrutura jurídica erigida para o cumprimento desta função envolveu a criação de um sistema de análise prévia de operações de aquisição de controle de empresas norte-americanas por capital estrangeiro, conduzida por Comitê vinculado à Presidência da República dos EUA, a partir de amplos critérios hermenêuticos como (i) infraestruturas críticas, (ii) recursos-chave, (iii) setores críticos e (iv) poder de controle – com competência para celebrar acordos de mitigação de riscos com as partes e recomendar a proibição do negócio. Quanto à eficácia do CFIUS na realidade norte-americana, percebe-se que o Comitê passou por três diferentes estágios desde sua constituição, em 1975: (i) inicialmente como órgão de caráter informativo à Presidência da República; (ii) posteriormente, em 1988, ganhando competência para recomendar a proibição de operações problemáticas sob a perspectiva da segurança nacional norte-americana; e (iii) após 2012, com a escalada dos investimentos chineses nos EUA, intensificando sobremaneira sua atividade. Por fim, reconhece-se que o CFIUS, impedindo que agentes econômicos estrangeiros instrumentalizem empresas norte-americanas contrariamente aos seus interesses nacionais, está inserido em verdadeira arquitetura jurídica de proteção à soberania econômica do país.

Palavras-chave: direito econômico; soberania econômica; investimento estrangeiro; mercado interno; CFIUS.

Introduction

The Committee on Foreign Investment in the United States – CFIUS is an inter-ministerial Committee which is directly subject to the US Presidency. Its main duty is to supervise the implications of foreign investments in the United States (“US”) economy, in terms of national security and economic sovereignty. The Committee was established by President Gerald Ford, in 1975, and since its formation it has functioned in considerable opacity.¹

In accordance to the Committee on Government Operations, CFIUS was firstly conceived as a direct response to investments originated from member nations of the Organization of Petroleum Exporting Countries (OPEC), which had increased after the First Oil Shock (1973).²

The Committee was initially responsible for advisory activities, especially to (i) prepare reports describing trends related to foreign investments in the US; (ii) analyze the impact of such investments; and (iii) suggest legislative, regulatory, and diplomatic policies related to this matter.

In 1988, President Reagan approved the “Exon-Florio Amendment”, when US semiconductors leading company was about to be acquired by Japanese enterprise Fujitsu. The Amendment granted powers to US President to prohibit transactions which resulted in foreign control of US companies and, as a consequence, threatened to impair its national security.

In 1990, President George Bush made use of this prerogative, in order to hinder the acquisition of MAMCO Manufacturing (associated to the aeronautics industry) by the Chinese CATIC. President Barack Obama, on the other hand, made use of the Amendment to prevent Sany Group (also Chinese) to buy wind farms belonging to Terna Energy USA.

Nevertheless, beyond these precedents, which were publicly prohibited to be concluded by the US Presidency, numerous other private

¹ JACKSON. James. *Foreign Investment, CFIUS, and Homeland Security: An Overview*. Washington: Congressional Research Service, 2011, p. 1.

² “The Committee was established following a major review early in 1975 of overall U.S. policy with respect to foreign investment here, which was undertaken in response to Congressional and public concern about potential threats stemming from investments by the OPEC countries.” UNITED STATES. *The Operations of Federal Agencies in Monitoring, Reporting on, and Analyzing Foreign Investments in the United States: Hearings before a Subcommittee of the Committee On Government Operations House of Representatives*, vol. 3. Washington: U.S. Government Printing Office, 1979, p. 334-5.

negotiations cease to occur because of CFIUS. In spite of the lack of official information, the press has reported a series of unsuccessful deals due to the Committee's influence.³

In this regard, this essay aims at developing an institutional analysis of the Committee, with the objective of clarifying at least a part of what CFIUS represents for the US domestic markets legal-economic regulation. This institutional autopsy will apply Economic Law as its main instrument, in order to investigate how relevant CFIUS is for the defense of US economic sovereignty.

This essay's scope is significantly different from the rest of the literature regarding the Committee. Most authors usually (i) present CFIUS in broad terms⁴; (ii) investigate the limits of its activities in an allegedly liberal economy⁵; (iii) limit the Committee as a tool for the US national security⁶; (iv) addressing it circumstantially, in the middle of discussions related to other topics, such as (iv.a) sovereign funds' increasing role in the international circulation of capitals⁷; or (iv.b) general essays regarding Foreign Direct Investment in the US.⁸

³ The most concrete example is probably when the Chinese Huawei made a public statement after waiving to buy US\$ 2 million assets which belonged to the US company 3Leaf: "This was a difficult decision, however we have decided to accept the recommendation of CFIUS to withdraw our application to acquire specific assets of 3Leaf". Available at: <http://www.reuters.com/article/us-huawei-3leaf-idUSTRE71I38920110219>. Besides, one may also observe US Congress efforts to make use of CFIUS with the objective of discouraging specific transactions. In this sense: Letter dated of February 16th, 2016, signed by 46 Republican Congressmen, asking Chicago Stock Exchange's possible acquisition by the Chinese Chongqing Casin Enterprise Group (CCEG) to be submitted to a "full and rigorous investigation", since the transaction would imply "the first time a Chinese-owned, possibly state-influenced, firm maintained direct access into the \$22 trillion U.S. equity marketplace". Available at: <https://lynnjenkins.house.gov/uploads/Letter%20To%20CFIUS%20Re%20Chicago%20Stock%20Exchange%20Purchase.pdf>.

⁴ JACKSON, James. *The Committee on Foreign Investment in the United States (CFIUS)*. Washington: Congressional Research Service, 2016.

⁵ MORAN, Theodore. *International Economics and National Security*. In: *Foreign Affairs*, vol. 69, n. 5, 1990, p. 74-90.

⁶ LEWIS, James. *New Objectives for CFIUS: Foreign Ownership, Critical Infrastructure, and Communications Interception*. In: *Federal Communications Law Journal*, vol. 57, n. 3, 2005, p. 457-77.

⁷ GHARAMANI, Salar. *Sovereign Wealth Funds, Transnational Law, and the New Paradigms of International Financial Relations*. In: *Yale Journal of International Affairs*, vol. 8, n. 2, 2013, p. 52-64.

⁸ BAILEY, David. *U.S. Policy towards Inward FDI: CFIUS and Extension of the Concept of "National Security"*. In: *The Journal of World Investment: Law, Economics, Politics*, vol. 4, 2003, p. 867-891; See also, KANG, Eliot. *U.S. Politics and Greater Regulation of Inward Foreign Direct Investment*. In: *International Organization*, vol. 51, n. 2, 1997, p. 301-333.

That is truly an inversion on the typical rationality of Brazilian legal research, in which US methodologies are employed in the assessment of Brazilian institutions.

On the contrary, this essay aspires to resort to a method with deep roots in Brazilian legal studies⁹ for the comprehension of an US institution. It will be attempted the discovery of CFIUS' function, structure, and social effectiveness.¹⁰ Firstly, the essay will try to uncover why the Committee was established (Topic I). Secondly, it will seek to identify which legal structure was built in the US legal system for the performance of those duties (Topic II). Thirdly, both these elements will be combined in CFIUS practical reality, in order to ascertain its dynamical repercussions (Topic III). Finally, a brief conclusion will summarize the partial findings of other topics and suggest a few parallels between CFIUS' regulation and other dimensions of the US economic police power.

1. CFIUS: functional analysis

CFIUS should be understood in the light of the capitalist system's trends and the US insertion pattern into global economy, considering the Committee as a regulatory tool applied to the entrance of foreign investments in its domestic markets. The Committee's institutional analysis must address its condition as an instrument on US Government's disposal to implement economic policies

⁹ Which might be identified in works such as, among plenty of others: COMPARATO, Fábio Konder. O indispensável direito econômico. In: Ensaios e Pareceres de Direito Empresarial. Rio de Janeiro: Forense, 1978; SOUZA, Washington Peluso Albino de. Primeiras Linhas de Direito Econômico, 4ª ed. São Paulo: LTr, 2005; VENÂNCIO FILHO, Alberto. A Intervenção do Estado no Domínio Econômico: o Direito Público Econômico no Brasil, ed. fac-similar. Rio de Janeiro: Renovar, 1998; VIDIGAL, Geraldo de Camargo. Teoria Geral do Direito Econômico. São Paulo: Revista dos Tribunais, 1977; CARVALHOSA, Modesto. A Ordem Econômica na Constituição de 1969. In: Direito Econômico: Obras Completas. São Paulo: Revista dos Tribunais, 2013; GRAU, Eros Roberto. Elementos de Direito Econômico. São Paulo: Revista dos Tribunais, 1981.

¹⁰ The importance of the function in legal interpretations might be found, among others, in: BERCOVICI, Gilberto and OCTAVIANI, Alessandro. Direito e Subdesenvolvimento. In: OCTAVIANI, Alessandro. Estudos, Pareceres e Votos de Direito Econômico. São Paulo: Singular, 2014, p. 72; See also: BOBBIO, Norberto. Da estrutura à função: novos estudos de teoria do direito, trad. Daniela Beccaccia Versiani. Barueri: Manole, 2007, p. 53ff.; and COMPARATO, Fábio Konder. Função social da propriedade dos bens de produção. In: Direito Empresarial. São Paulo: Saraiva, 1995, p. 30-2.

destined to deal with the world-economy, and the US position within “modern world-system”.¹¹

A functional analysis such as this is supported by Economic Law’s tradition, which brought the function¹² to the very core of State’s activities,¹³ as the “legal discipline of economic policy”,¹⁴ as stated by COMPARATO. Economic Law allows timely and adequate legal responses to an increasingly complex, dynamic, and hectic world, demanding considerably more comprehensive activities for the solution of modern challenges regarding the production and distribution of goods and services.¹⁵

In this respect, legal shaping of modern economy, embodied in Economic Law, has to emanate specific legal treatment to economic behaviors of market players, considering the effects they spread through entire society.¹⁶

¹¹ Well-known descriptions of the world-economy are due to Fernand Braudel’s famous trilogy “Civilisation matérielle, économie et capitalisme”, as well as both volumes of Immanuel Wallerstein’s “The Modern World-System”. In Brazil, these ideas are thought under the Economic Law paradigm in OCTAVIANI, Alessandro. Recursos genéticos e desenvolvimento: os desafios furtadiano e gramsciano. São Paulo: Saraiva, 2013, p. 149-59.

¹² As COMPARATO states: “substantivo functio, na língua matriz, é derivado do verbo fungor (functus sum, fungi), cujo significado primogênito é de cumprir algo, ou desempenhar-se de um dever ou uma tarefa. (...) usa-se do termo para designar a finalidade legal de um instituto jurídico, ou seja, o bem ou o valor em razão do qual existe” COMPARATO, Fábio Konder. Estado, Empresa e Função Social. In: Revista dos Tribunais, ano 85, vol. 732, 1996, p. 40-1.

¹³ OCTAVIANI, Alessandro. O CADE e a Hermenêutica Realista: Grupo Econômico para Fins de Direito Concorrencial, Participação Minoritária, Gestão Compartilhada e Fundos de Investimento (Homenagem a Fábio Konder Comparato). In: A Nova Lei do CADE: o 1º ano na visão das autoridades. Ribeirão Preto: Migalhas, 2013, p. 51; e BOBBIO, Norberto. Da estrutura à função: novos estudos de teoria do direito, op. cit., p. 53ff.

¹⁴ (Free translation). Economic Law is considered in Brazil as a range of legal techniques used by the contemporary State on the implementation of its economic policies. It represents State action’s legal discipline over economic system structures. See: COMPARATO, Fábio Konder. O indispensável direito econômico, op. cit., p. 465. See also: GRAU, Eros Roberto. A Ordem Econômica na Constituição de 1988, 9ª ed. São Paulo: Malheiros, 2004, p. 15ff; and FARJAT, Gerard. Droit Économique. Paris: Press Universitaire de France, 1971, p. 10.

¹⁵ OCTAVIANI, Alessandro. A bênção de Hamilton na semiperiferia: ordem econômico-social e os juro da dívida pública interna. In: SCAFF, Fernando Facury; CONTI, José Maurício. Orçamento Público e Direito Financeiro. São Paulo: Revista dos Tribunais, 2011, p. 1180. Specifically regarding the US history, it’s possible to identify in Alexander Hamilton’s Reports the transformation of its administrative machine to convert the newly-independent country into a global major player. See: UNITED STATES. Reports of the Secretary of the Treasury of the United States: The Reports of Alexander Hamilton on Public Credit, on a National Bank, on Manufactures and on the Establishment of a Mint, vol. I. Washington: Duff Green, 1828. For an overview of US interventionism since the 19th Century, see: GALBRAITH, John Kenneth. The new industrial state. New Jersey: Princeton University Press, 2007; SKLAR, Martin. The United States as a Developing Country: Studies in U.S. History in the Progressive Era and the 1920s. Pennsylvania: Bucknell University, 1992; and MAZZUCATTO, Mariana. O Estado Empreendedor: desmascarando o mito do setor público vs. setor privado, traduzido por Elvira Serapicos. São Paulo: Portfolio-Penguin, 2014.

¹⁶ In this respect, see how GRAU defines State’s intervention techniques toward the economy, which brings private actors to the centre of its intervention disciplines over and in the economy:

Under the “markets legal organization” perspective, it is worth noticing that the classic distinction between Private Law and Public Law fades¹⁷, and the enterprise becomes the locus of Economic Law rules,¹⁸ especially legal transactions they conclude¹⁹ as leading actors of economic processes.²⁰

This topic will thus try to understand the imperatives of international political economy which justified the creation of CFIUS, (i) initially by briefly analyzing the mode of regulation that preceded it, commonly called “Fordism”; (ii) after this, describing the deterioration of the previous mode of regulation and consolidation of a new one, which is currently prevailing (called “financialization”), to which (iii) CFIUS seems to be one the US institutional answers, caused by the unprecedented international opening to the movement of capital.

1.1. Background: “fordist” mode of regulation

CFIUS’ establishment, in 1975, is related to a broader context of deep institutional transformations in the international economic order. They affected “capitalism’s organic core”²¹ and led to the need of adjustment to an economy with hegemonic pretensions, in order to maintain and reproduce its position. It is therefore paramount to investigate the background of this

GRAU, Eros Roberto. *A Ordem Econômica na Constituição de 1988*, op. cit., p. 84ff. It’s actually so mandatory to regulate private behaviors adopted within the markets that authors such as VIDIGAL characterize Economic Law as the “Market’s Organization Law”: VIDIGAL, Geraldo de Camargo. *Teoria Geral do Direito Econômico*, op. cit., p. 44.

¹⁷ VIDIGAL, Geraldo de Camargo. *Objeto do Direito Econômico*. São Paulo, 1976, p. 50.

¹⁸ “Se nos voltarmos para os sujeitos do Direito Econômico, seremos tentados a descrevê-lo como a disciplina jurídico-econômica que, sob inspiração dominante do interesse coletivo, regula a atividade do empresário e condiciona a dinâmica da empresa, dado que, por situar-se no centro dos mercados, recebe o empresário todo o impacto das normas voltadas à organização desses.” VIDIGAL, Geraldo de Camargo. *Teoria Geral do Direito Econômico*, op. cit., p. 50. See also: SALOMÃO FILHO, Calixto. *Regulamentação da Atividade Empresarial*. In: *Regulação e Desenvolvimento: Novos Temas*. São Paulo: Malheiros, 2012, p. 65.

¹⁹ As stated by SOUZA, Washington Peluso Albino de. *As Teorias do Contrato e o Direito Econômico*. In: FACHIN, Luis Edson; e TEPEDINO, Gustavo (org.). *Doutrinas Essenciais*, vol. II. São Paulo: Revista dos Tribunais, 2011, p. 1361. “Por mais individual que seja o interesse, a sua satisfação, em termos econômicos, apresenta projeção fora do indivíduo, e portanto, social. A troca, fato econômico plural, erigida a elemento de interesse dos dois contratantes não os subtrai das relações sociais, mesmo em relação a esse ‘negócio’.”

²⁰ VIDIGAL, Geraldo de Camargo. *Objeto do Direito Econômico*. São Paulo, 1976, p. 154.

²¹ OCTAVIANI, Alessandro. *A bênção de Hamilton na semiperiferia: ordem econômico-social e os juros da dívida pública interna*. In: SCAFF, Fernando Facury; CONTI, José Maurício. *Orçamento Público e Direito Financeiro*, op. cit., p. 1180ff.

international political economy movement for its complete comprehension: the reasons why a controlling and monitoring body concerned to the entrance of foreign investments in the US domestic markets became unavoidable.

For this task it is pivotal to define the main features of the “Fordist mode of regulation” (also known as “Fordism”). Initially, it is worth mentioning that “Fordism” is the mode of regulation that prevailed in the post-war period. It rendered what as probably capitalism’s most prosperous era and preceded a “financialized mode of regulation”, during which CFIUS was conceived.

Wage relationship was perhaps the most “structuring” axis in “Fordism”. Before its advent, wages were facing deep stagnation (considering the late 19th and early 20th centuries). This plight created a huge vacuum between workers remuneration and the growing productivity gains allowed by the Second Industrial Revolution. Consequently, there was no compatibility between effective demand and the set of available goods.²²

This phenomenon described contributed decisively to the Crash of Wall Street. In view of the resulting economic collapse, capitalist system’s institutional response was to integrate to the average wages the variations of inflation, scale gains and the technical progress which permitted this period’s high productivity. Such measures shared productive activities’ gains with the working class and created thus a favorable environment for the advent of mass consumption, the only component which would guarantee necessary demand for such high production.²³

The capitalist reorganization that occurred in this period was also encouraged by the rise of a new international monetary regime. It was based on an US dollar gold standard and on coordinating multilateral institutions, such as the IMF and the World Bank, both created by the famous Bretton Woods Agreements.²⁴

²² CHANCELLOR, Edward. *Salve-se quem puder: uma história da especulação financeira*, traduzido por Laura Motta. São Paulo: Companhia das Letras, 2001, p. 235.

²³ BOYER, Robert. *Teoria da regulação: os fundamentos*, translated by P. Cohen. São Paulo: Estação Liberdade, 2009, p. 87.

²⁴ Bretton Woods’ monetary system, in accordance to BALANCO and PINTO, “configurou-se a partir de três elementos fundamentais: 1) taxas fixas de câmbio, mas ajustáveis, em virtude de “desequilíbrios fundamentais” associados aos balanços de pagamentos; 2) a aceitação do controle dos fluxos de capitais internacionais; e 3) a criação do FMI para monitorar as políticas nacionais e oferecer financiamento para equilibrar os balanços de pagamentos desequilibrados”.

These elements allowed the emergence of “Fordism”, which is synthesized by BOYER²⁵ as an articulated cycle of three cornerstones: (i) weak international openness; (ii) a stable commitment between capital and labor, and (iii) potential increases in productivity.

Notwithstanding, there are no stable equilibriums when it comes to the capitalist organization. From the institutional arrangements conceived in a given historical moment “disparities and conflicts arise, which cannot be solved within the present configuration”.²⁶ Eventually, “Fordist” structures came to exhaustion, giving cause to the “redefinition of the grounding rules that encode institutional forms”.²⁷

The crisis faced by this “mode of regulation” refers basically to three phenomena: (i) Bretton Woods international monetary system’s crisis; (ii) exhaustion of productivity gains occurred during Keynesian commitment; (iii) breakdown of full employment model; and (iv) weakening of union entities, which intermediated labor relations throughout this period.²⁸ The combination of such events resulted in low economic growth, unemployment and wage compression, and a monetary and financially unstable condition.²⁹

From this turmoil emerged a new “mode of regulation”, assembled from the broken pieces of “Fordism”. CFIUS was designed as a reaction apparatus, as it will be possible to conclude subsequently: initially collecting data to aid the US in the comprehension of this transition, and later to effectively intervene in the economy, after the exacerbation of this new regime.

BALANCO, Paulo; PINTO, Eduardo. Os Anos Dourados do Capitalismo: Uma Tentativa de Harmonização entre as Classes. In: Pesquisa & Debate, vol. 18, 2007, p. 29.

²⁵ BOYER, Robert. Teoria da regulação: os fundamentos, op. cit., p. 87. See also AGLIETTA, Michel. A Theory of Capitalist Regulation: The US Experience. Londres: New Left Books, 1980, p. 57.

²⁶ (Free translation). BOYER, Robert. Teoria da regulação: os fundamentos, op. cit., p. 47.

²⁷ (Free translation). Idem, ibidem.

²⁸ CHESNAIS, François. Mundialização do Capital, translated by Silvana Finzi Foá. São Paulo: Xamã, 1996, p. 297; CHESNAIS, François. O Capital Portador de Juros: Acumulação, Internacionalização, Efeitos Econômicos e Políticos. In: CHESNAIS, François (org.). A Finança Mundializada: raízes sociais e políticas, configuração, consequências. São Paulo: Boitempo, 2005, p. 44. Regarding Bretton Woods collapse, its immediate consequence was the end of the fixed exchange rates system. That enabled international capital flows restrictions and subsequent regulations to slowly fade away. DOLPHIN, Tony. Don’t Bank on It: The Financialisation of the UK Economy. Londres: IPPR, 2012.

²⁹ PAULANI, Leda Maria. A crise do regime de acumulação com dominância da valorização financeira e a situação do Brasil. In: Revista de Estudos Avançados, vol. 23, n. 66, 2009, p. 26.

1.2. Globalization of capital: The emergence of a “financialized” mode of regulation

The succession of “Fordism” encompasses a set of transformations that has been gradually systematized by literature. Meanwhile some authors are used to call it “globalization”, others prefer to treat it as a “capital globalization” or “financialization”.³⁰ Either way, since the 1970s, a “shift in the hierarchy of institutional forms on the benefit of a financial regime”³¹ has played a central role.³²

Its distinctive mark lies on three fundamental axes (which may be detected as opposed to a typically “Fordist” regulation): (i) “deregulation, or monetary and financial liberalization”, (ii) “national financial markets’ decompartmentalization”, and (iii) “disintermediation, i.e., the opening of credit transactions to every sort of institutional investors, which were formerly exclusively reserved for banks”.³³

Such a process managed to produce a worldwide financial space. It guaranteed both external and inner openness to national systems which were previously closed and compartmentalized.³⁴

This movement enabled a process of capital globalization. The newly globalized capital was not exclusively financial, but also productive,³⁵ both

³⁰ According to CHESNAIS: “A expressão ‘mundialização do capital’ é a que corresponde mais precisamente à substância do termo inglês globalisation. Tratando-se da produção e da comercialização, o termo globalisation traduz a capacidade estratégica do grande grupo de adotar uma abordagem e uma conduta ‘global’, atuando simultaneamente nos mercados com demanda solvável, nas fontes de aprovisionamento e na localização da produção industrial.” CHESNAIS, François. *O Capital Portador de Juros: Acumulação, Internacionalização, Efeitos Econômicos e Políticos*, op. cit., p. 45.

³¹ (Free translation). BOYER, Robert. *Teoria da regulação: os fundamentos*, op. cit., p. 124.

³² MASSONETTO, Luís Fernando. *O direito financeiro no capitalismo contemporâneo: a emergência de um novo padrão normativo*. São Paulo: Tese de Doutorado em Direito (USP), 2006, p. 112.

³³ (Free translation). CHESNAIS, François. *O Capital Portador de Juros: Acumulação, Internacionalização, Efeitos Econômicos e Políticos*, op. cit., p. 46.

³⁴ Idem, p. 44. Financial capital prevalence over productive activities had already aroused concerns in the US since, at least, the beginning of the 20th century: VEBLEN, Thorstein. *The Theory of Business Enterprise*. New York: Charles Scribner’s, 1915, p. 166. By that century’s dawn, however, financial sphere had obtained unprecedented proportion: EPSTEIN, Gerald. *Financialization, Rentier Interests, and Central Bank Policy*. In: *Financialization of the World Economy*. Amherst: Political Economy Research Institute, 2001, p. 2. See also BELLUZZO, Luiz Gonzaga; TAVARES, Maria da Conceição. *A Mundialização do Capital e a Expansão do Poder Americano*. In: FIORI, José Luis. *O Poder Americano*. Petrópolis: Vozes, 2005, p. 127.

³⁵ Even in a context marked by finance-oriented globalized markets, it is worth mentioning that the financial sphere’s autonomy will always be relative. As stated by CHESNAIS: “[o]s capitais

reflections of the same social phenomenon. They were part of the same trend towards greater liberalization of international capital flows from the constraints imposed by the institutions which regulated the Economy at an earlier point.

Market opening movement to global capitals' traffic and the myriad of financial innovations led to fiercer international competition.

CFIUS may then be analyzed as a shield to protect US domestic markets from global forces which threatened to invade strategic sectors for the maintenance of the US hegemonic position. This position was achieved throughout "Fordism", but it was once again in dispute under the "financialized" mode of regulation.

1.3. US institutional response: CFIUS as a functionalized instrument to ensure economic sovereignty

The deregulation cycle which occurred after the 1970s led to the prevalence of a financial-oriented regime. This new accumulation paradigm was centered on stock markets and on securities trading within secondary markets. Nevertheless, other consequences arising from "capital globalization" justified the introduction of an organ like CFIUS to the range of tools at the US Economic Law disposal.

As described by CHESNAIS, this new era was marked by an intense movement of Mergers & Acquisitions, which was strengthened by financial globalization. This regulatory transition's byproduct was an inversion on "Fordist" traditional productive investments. During "Fordism", industrial companies' international expansion was based on the construction of new industrial plants in other countries, creating new production capacity. After the "financialization", those investments were destined to great international corporate control transactions over incorporated companies on the recipient

que se valorizam na esfera financeira nasceram – e continuam nascendo – no setor produtivo." CHESNAIS, François. *Mundialização do Capital*, op. cit., p. 241.

country. That was when Foreign Direct Investments (FDI) became a central issue on economic debates.³⁶

FDI's nature is fundamentally distinct from the traditional foreign trade. It generates specific concerns in terms of economic policy. Primarily, FDI lacks typical liquidity of conventional commercial transactions. In contrast, FDI has a keen "time dimension" that is absent in conventional transactions, even when celebrated through commercial credit provisions. It enables continuous and long-lasting international monetary flows, and cross-border economic power transfers, which were not observable in previous export transactions.³⁷

This final aspect is particularly relevant for the comprehension of the function of CFIUS in the regulation of US economy. The mere possibility of international economic power allocation through FDI should be analyzed with great caution by a country that is not willing to get rid of its own economic power.³⁸ FDI transactions allow its "strategic use" by several global agents. It carries, for instance, "the idea of penetration, either to erode local competitors, or to 'drain' local technologies".³⁹

According to CHESNAIS,

By the end of the 1970s, all those elements have converged to start a huge movement of cross-international investments, dominated by Mergers & Acquisitions. Once this movement was initiated, alongside a concentration/centralization process, its growth and acceleration became unavoidable. Currently, this 'reciprocal invasion' (...) represents a core aspect of the competition of worldwide oligopolies members.⁴⁰

Given this situation, it is possible to realize how a financial sphere-led internationalization movement imposes nation-states a delicate problem,

³⁶ CHESNAIS, François. *Mundialização do Capital*, op. cit., p. 64. On the author's words: "Em muitos setores, especialmente os de alta intensidade de P&D ou de produção de massa, a evolução tecnológica reforçou o peso dos custos fixos (especialmente sob a forma de despesas elevadas de P&D), que essas empresas precisavam recuperar, produzindo para mercados mundiais; bem como as vantagens de poderem aprovisionar, à escala mundial, certos insumos essenciais especialmente os de ordem científica e tecnológica. (...). Em outros ramos industriais, um dos principais objetivos industriais de uma aquisição/fusão consiste em pegar uma parcela do mercado, especialmente quando for acompanhada pela aquisição de marcas comerciais, de redes de distribuição e de clientes cativos."

³⁷ Idem, p. 54.

³⁸ US current imperialist vocation might be identified, among others, in HARVEY, David. *O Novo Imperialismo*, 2ª ed. São Paulo: Loyola, 2005.

³⁹ (Free translation). CHESNAIS, François. *Mundialização do Capital*, op. cit., p. 55.

⁴⁰ (Free translation). Idem, p. 64.

regarding the maintenance of their production capacities. To what extent a national insertion on global markets must be stimulated without excessively eroding local industries? Any misconception in shaping this insertion would corrode local innovation capacities and consequently the very possibility to compete in those markets, hindering national competitiveness.

This is the context in which CFIUS should be observed. With the “financialization”, not only company stocks (fractions of their property) had become financial assets (transferable securities with increasing liquidity within the stock markets). Corporate control (property rights over the company itself,⁴¹ even over entire business groups) has also been converted into financial assets. This is especially significant when it comes to strategic sectors for US national interests over its economy.⁴²

On the one hand, the 1970s “capital globalization” movement answered to the imperatives of capitalist accumulation, which was compressed by the stiffness of “Fordist” institutions. Conversely, this process ended up exposing a wide range of previously foreign-control shielded sectors to international competition, such as public transport, telecommunications, diversified public utilities, energy distribution, or financial services.⁴³

Established in 1975, CFIUS emerged as an institutional response to this new scenario, which was beginning to generate discomforts inside US society.⁴⁴ It was created as an additional actor for the range of tools for the

⁴¹ It's known (since BERLE, Adolf; and MEANS, Gardiner. *The Modern Corporation and Private Property*. New York: The Macmillan Company, 1932) that in the corporate life, ownership and control must be treated differently. Although the ownership of company stocks represents property rights over ideal fractions of its wealth, they alone can't entitle the exercise of property rights over the company itself. In accordance to the classical work of COMPARATO and SALOMÃO FILHO, “controle é, pois, o direito de dispor dos bens alheios como um proprietário. Controlar uma empresa significa poder dispor dos bens que lhe são destinados, de tal arte que o controlador se torna senhor de sua atividade econômica.” COMPARATO, Fábio Konder; SALOMÃO FILHO, Calixto. *O poder de controle na sociedade anônima*, 5ª ed. Rio de Janeiro: Forense, 2008, p. 124.

⁴² CHESNAIS, François. *O Capital Portador de Juros: Acumulação, Internacionalização, Efeitos Econômicos e Políticos*, op. cit., p. 37.

⁴³ AGLIETTA, Michel. *A Theory of Capitalist Regulation: The US Experience*, op. cit., p. 65.

⁴⁴ “Americans have long been ambivalent toward foreign direct investment (FDI) in the United States. Foreign multinational corporations may be a source of capital, technology, and jobs. But what are the implications for US workers as the United States remains the most popular destination for foreign multinational investment, usually through acquisition of existing US firms? Does it matter when a Russian oligarch acquires American steel plants, or when an Indian billionaire becomes the largest single supplier of flat-rolled carbon steel in the United States – a product widely used in defense industries? Are Chinese electronic firms threatening to penetrate US telecommunications networks, conducting surveillance and espionage? Should

execution of US economic policies. When abdicating national sovereignty seemed like one of the global markets' side effects, CFIUS allowed US simultaneously to fully integrate into the new regime and to maintain its economic sovereignty; at first monitoring the transformations in the world economy, and later with enough powers to block potentially threatening transactions.

This is the function of CFIUS. From its function it was built an entire legal structure compatible with such an enormous task, which will now be further examined.

2. CFIUS: structural analysis

Under a structural perspective, an administrative body such as CFIUS should be able to deal with some of FDI's specificities. It is worth noticing that, as experience evidences, FDI is especially skilful in overcoming the commercial barriers imposed by national-states.⁴⁵

That is why CFIUS' composition strives for shielding it from multinational companies' subterfuges, assembling all the strategic interests involved in a given transaction. The Committee is composed by nine members: (i) Secretary of State; (ii) Secretary of Treasury; (iii) Secretary of Defense; (iv) Secretary of Homeland Security; (v) Secretary of Commerce; (vi) Secretary of Energy; (vii) Attorney General; (viii) United States Trade Representative; and (ix) Director of the Office of Science and Technology Policy. The Secretary of Labor and the Director of National Intelligence are also part of the Committee, without voting rights.⁴⁶ It is also important to highlight that the Secretary of

certain sectors, such as energy or infrastructure, be exempted from foreign ownership or control? What about American industries considered vital to the functioning of the US economy?" MORAN, Theodore; OLDENSKI, Lindsay. *Foreign Direct Investment in the United States: Benefits, Suspicions, and Risks with Special Attention to FDI from China*. Washington: Peterson Institute for International Economics, 2013. p. 1:

⁴⁵ YELPAALA, Kojo. In Search of Effective Policies for Foreign Direct Investment: Alternatives to Tax Incentive Policies. In: *Northwestern Journal of International Law & Business*, vol. 7, n. 2, 1985, p. 244.

⁴⁶ Section 721, (k), 1950 Defense Production Act.

Treasury (which is the Committee's chair) might add to CFIUS' composition any Federal organ or agency considered relevant.⁴⁷

As further developed below, with the objective of providing CFIUS with a functionally adequate structural design (i) several legal landmarks were necessary, which adapted the Committee's legal structure to perform its responsibilities over time. These responsibilities were organized through (ii) a sequential procedure for this economic police subsystem, in which (iii) it is possible to identify the actual exercise of corporate control in a malleable way, avoiding indirect takeovers which a quantitative and static corporate control definition would possibly allow. At last, CFIUS procedure also counts with (iv) broad economic sovereignty-related concepts (such as critical infrastructures, key-resources, and critical sectors) which define an economic core to be legally prioritized in the Committee's activities.

2.1. CFIUS legal landmarks

CFIUS structural design has been influenced by several different legal provisions. The Committee's history can however be divided into two moments. When it was firstly constituted, CFIUS belonged to an under construction world-system. It assisted the US state to understand those transformations' effects. Afterwards, the implications of a consolidated "capital globalization" were already clear and other candidates to the top of the global hierarchy started to acquire important US companies. That was when CFIUS had a major structural readjustment, gaining the necessary weapons to face foreign pressures.

⁴⁷ Executive Order No. 13456. This Executive Order has also added five representatives responsible for observe, intervene (if necessary), and keep the President informed regarding the Committee's activities: (i) Director of the Office of Management and Budget; (ii) Chairman of the Council of Economic Advisors; (iii) Assistant to the President for National Security Affairs; (iv) Assistant to the President for Economic Policy; and (v) Assistant to the President for Homeland Security and Counterterrorism. Considering CFIUS composition, it's possible to notice that only a few of its members are actually related to the defense of US military sovereignty and national security, mainly the Secretary of Defense and the Secretary of Homeland Security. Other CFIUS members come from economic related sectors, like Treasury, Commerce, Energy or the Office of Science and Technology Policy. Such a team is capable of orienting CFIUS analysis towards the defense of America's economic sovereignty.

2.1.1.CFIUS' establishment in 1975

CFIUS and its basic structure were established in 1975 by the Executive Order No. 11858, edited by President Gerald Ford. In essence, it enabled the Committee to: (i) analyze the development of foreign investment in the US; (ii) facilitate the dialogue with other countries regarding such investments; (iii) examine specific investments which, on its own criteria, could result in severe consequences for US national interests; and (iv) elaborate legislative and regulatory improvement propositions related to foreign investments in the US.⁴⁸

Pursuant to the Executive Order, the Committee was composed by six members, with the “continuing responsibility within the Executive Branch for 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.”⁴⁹

It is important to note that there were serious doubts related to the legality of a measure like the above-mentioned. During that period, it was wondered whether the Executive Branch had powers to collect and systematize that kind of information, regardless of the relevant national interests that justified the establishment of an administrative body like CFIUS. In order to answer those inquiries, President Gerald Ford approved, in 1976, the Public Law No. 94-472, known as International Investment and Trade in Services Survey Act. The Public Law granted incontestable powers to the US Presidency to oversee and investigate foreign investments and agglutinate the related data.⁵⁰

Although formally constituted, CFIUS activities were considerably discrete during its initial 5 years. As pointed by JACKSON, the Committee had effectively met only 10 times during this period. It was thus incapable of

⁴⁸ Executive Order No. 11858, Section 1, (b), (1)-(4).

⁴⁹ Executive Order No. 11858, Section 1, (b).

⁵⁰ Public Law No. 94-472, § 3101(a).

answering to the pressing question that legitimated its formation: “Is it [foreign investments] good for the economy?”⁵¹

2.1.2.CFIUS’ reorganisation in 1988

Committee’s performance remained relatively subtle until 1987. In the following year, however, the US economy began to suffer concrete threats to lose its indisputable place in the world’s hierarchy. At that time, Japanese enterprises turned their attention to high-tech US local companies.⁵² One specific transaction accurately represents this moment. That was when Fujitsu, an important player in the semiconductor sector, attempted to acquire Fairchild Semiconductor Co. If successful, this commercial operation would imply a severe loss to US plans in a cutting-edge industry.⁵³

Back then, President Ronald Regan approved Public Law No. 100-418, known as Omnibus Foreign Trade and Competitiveness Act. In its Section 5021, it was included the “Exon-Florio Amendment” to the 1950 Defense Production Act,⁵⁴ a real watershed in the history of CFIUS. It enables the President of the US to prohibit⁵⁵ commercial transactions⁵⁶ in which a foreign agent takes over

⁵¹ JACKSON, James. The Committee on Foreign Investment in the United States (CFIUS), op. cit., p. 3.

⁵² In fact, Japanese efforts managed to concretely challenge US position in the world-system. CHANCELLOR, Edward. *Salve-se quem puder: uma história da especulação financeira*, op. cit., p. 338-9. “Por mais de três quartos de século, os Estados Unidos mantiveram firmemente sua primazia econômica, mas em meados da década de 1980 sua posição foi ameaçada pelo crescente poderio japonês. A fatia do Japão no comércio mundial excedia 10%, seus superávits comerciais estavam crescendo depressa, as exportações de capital do país faziam lembrar as da Grã-Bretanha no século XIX e a renda per capita japonesa estava a caminho de superar os níveis americanos. A indústria japonesa dominava as novas tecnologia em aparelhos eletrônicos para o consumidor e em várias outras áreas, e seus bancos eram os maiores do mundo em ativos e valor de mercado. (...) Os Estados Unidos estavam em polvorosa. Enquanto o Japão desfrutava seus superávits comerciais, os Estados Unidos registravam déficits cada vez maiores.”

⁵³ BAILEY, David; HARTE, George; SUGDEN, Roger. *Transnationals and Governments: Recent Policies in Japan, France, Germany, the United States and Britain*. London and New York: Routledge, 1994, p. 129-30.

⁵⁴ The amendment was responsible for the insertion of a specific chapter called Review of Certain Mergers, Acquisitions, and Takeover within the 1950 Defense Production Act.

⁵⁵ “[T]he President may take such action for such time as the President considers appropriate to suspend or prohibit any covered transaction that threatens to impair the national security of the United States.” 1950 Defense Production Act, Section 721, (d), (1).

⁵⁶ CFIUS’ regulation is applicable to a wide variety of transactions, which far exceeds usual corporate operations, such as mergers, acquisitions, merger of shares, or incorporation: “The term transaction means a proposed or completed merger, acquisition, or takeover. It includes: (a) The acquisition of an ownership interest in an entity. (b) The acquisition or conversion of

a company engaged in interstate commerce. Such transaction should also threaten to impair the national security of the US. Presidential prohibition becomes then a real possibility if (i) there is not any other law as efficient to protect the country's national security,⁵⁷ and (ii) there is "credible evidence" that such investments would in fact represent a threat to the US national security.⁵⁸

Moreover, "Exon-Florio Amendment" was also responsible for the definition of an administrative procedure through which foreign investment operations are analyzed in a three-step system: (i) initially a preliminary review; followed by, if necessary, (ii) a detailed investigation, and, finally, (iii) the Presidential decision.

Exon-Florio Amendment's extensive powers were regulated by President Ronald Reagan through the Executive Order No. 12661.⁵⁹ One of its provisions delegated part of the Amendment's powers to CFIUS, enabling it to conduct reviews, determine investigations and recommend to US President the prohibition of a specific transaction.⁶⁰ In order to operationalize Exon-

convertible voting instruments of an entity. (c) The acquisition of proxies from holders of a voting interest in an entity. (d) A merger or consolidation. (e) The formation of a joint venture. (f) A long-term lease under which a lessee makes substantially all business decisions concerning the operation of a leased entity, as if it were the owner." Code of Federal Regulation, §800.224.

⁵⁷ Such as: antitrust provisions, environmental law, financial regulation, or the declaration of "national emergency". Besides, it's known that a series of American economic sectors are legally protected from foreign influences, e.g., (i) naval industry; (ii) aeronautical industry; (iii) energy sector; (iv) financial sector; (v) some raw materials. See: SEITZINGER, Michael. Foreign Investment in the United States: Major Federal Statutory Restrictions. Washington: Congressional Research Service, 2013.

⁵⁸ "(d) FINDINGS OF THE PRESIDENT. The President may exercise the authority conferred by subsection (c) only if the President finds that: (1) there is credible evidence that leads the President to believe that the foreign interest exercising control might take action that threatens to impair the national security, and (2) provisions of law, other than this section and the International Emergency Economic Powers Act (50 U.S.C. 1701-1706), do not in the President's judgment provide adequate and appropriate authority for the President to protect the national security in the matter before the President." As the US literature points out, the Presidential prohibition provision was conceived to solve mainly three kinds of threats: (i) transactions with potential to make the US dependent to foreign suppliers of crucial products for the functioning of the US economy; (ii) transactions with potential to transmit US technology or knowhow to a foreign agent, in a damaging way for its national interests; or (iii) transactions with potential to allow the infiltration, vigilance, and sabotage of crucial sectors of the US economy, or for the function of its military industry by a foreign company or Government. MORAN, Theodore; OLDENSKI, Lindsay. Foreign Direct Investment in the United States: Benefits, Suspicions, and Risks with Special Attention to FDI from China, op. cit., p. 55; MORAN, Theodore. Three Threats: An Analytical Framework for the CFIUS Process. Washington: Peterson Institute for International Economics, 2009.

⁵⁹ The Executive Order wasn't specific to the "Exon-Florio Amendment". It regulated the entire 1988 Omnibus Foreign Trade and Competitiveness Act.

⁶⁰ Executive Order n. 12661, Section 3-201.

Florio provisions, the Department of Treasury edited its own regulation in 1991,⁶¹ establishing a system of voluntary notification, triggered directly by the parties.

With these legal innovations, CFIUS was transformed from a small and obscure Committee, unimportant within US economic protection system, to a relevant component of its foreign investment policy.⁶²

2.2. CFIUS' procedure

Therefore, from CFIUS' function, a set of structural provisions were especially designed to create a legal institution capable of performing its intended purposes. It should be now investigated how the procedure was conceived, considering it as the arena in which all those elements gain dynamism.

CFIUS current procedure is due to 2007 Foreign Investment and National Security Act (FINSa), since it altered the original 1950 Defense Production Act. FINSa was later regulated by President George W. Bush, through the Executive Order No. 13456. The procedure was basically divided into three stages: (i) firstly a 30-day review for a general and preliminary analysis, in order to identify whether the "covered transaction" might be approved, or if it presents hard evidences that it "threatens to impair the national security of the United States". Such evidences may include possible effects regarding the US "homeland security", "critical infrastructure", or "critical technologies". If the review recognizes the existence of such threat, the next stage is (ii) a 45-day investigation. As a last resort, (iii) the President will have 15 days to emit his opinion.⁶³

⁶¹ Provisions which were inserted in the US Code of Federal Regulations, Title 31, Subtitle B, Chapter VIII, and Part 800, which will hereinafter be mentioned only as "CFR".

⁶² JACKSON, James. The Committee on Foreign Investment in the United States (CFIUS), op. cit., p. 7. It should be recognized that Exon-Florio Amendment has also caused deep perplexity in some American authors and it was edited. An example of them might be found in: GREIDINGER, Marc. The Exon-Florio Amendment: A Solution in Search of a Problem. In: American University International Law Review, vol. 6, n. 2, 1991. p. 111ff.

⁶³ According to CFIUS' specialized literature, this procedure has gained a fourth stage with time. This additional step is preliminary and informal, and is characterized by the negotiation between the parties and CFIUS regarding the whole transaction. This way it is possible to discuss fundamental clauses with a wider deadline. CFIUS might even suggest that the transaction is not likely to be approved, discouraging the parties to spend more time and resources in a dead-end

After submitting a transaction for CFIUS analysis, it is not possible to freely withdraw it.⁶⁴ The transaction's waiver by parties, after its submission, may cause specific legal consequences. It is possible, for instance, that operation's future approval might be subjected to specific conditions, which will be addressed in greater depth later on.

At last, provided that parties consummate their transaction and decide not to submit the transaction to CFIUS, the procedure may be started by US President or any CFIUS member. In this case, parties of a given business deal will be indefinitely subjected to Committee's possible interventions (which range from divests to any other mitigation measure).⁶⁵

2.2.1. Review: First procedural stage

Review is the first 30-days procedural stage.⁶⁶ CFIUS has the power to analyze all covered transactions, in order to evaluate whether (i) transaction threatens to impair national security, (ii) foreign acquirer is controlled by a foreign Government; or (iii) transaction leads to foreign control on any critical infrastructure.⁶⁷ Covered transactions are any commercial or corporate operations resulting⁶⁸ in foreign control of an engaged company in interstate commerce in the US.⁶⁹ Department of Treasury's regulation comprehends even

operation. JACKSON, James. The Committee on Foreign Investment in the United States (CFIUS), op. cit., p. 9.

⁶⁴ 1950 Defense Production Act, Section 721, (c), (ii).

⁶⁵ 1950 Defense Production Act, Section 721, (d): "UNILATERAL INITIATION OF REVIEW — Subject to subparagraph (F), the President or the Committee may initiate a review under subparagraph (A) of (i) any covered transaction; (...)."

⁶⁶ 1950 Defense Production Act, Section 721, (e).

⁶⁷ According CFR, §800.208: "The term critical infrastructure means, in the context of a particular covered transaction, a system or asset, whether physical or virtual, so vital to the United States that the incapacity or destruction of the particular system or asset of the entity over which control is acquired pursuant to that covered transaction would have a debilitating impact on national security."

⁶⁸ Emphasizing how functionalized CFIUS procedure is, because its legal effects depend on the tangible results of a given transaction.

⁶⁹ CFR, §800.207. Department of Treasury regulation defines which kinds of transactions will not be subjected to CFIUS scrutiny. In accordance to CFR, §800.302 those are: (i) transactions for the "solely for the purpose of investment", including (i.a) acquisition of less than 10% of the invested company's equity capital, or (i.b) an acquisition of securities by a personal acting as a securities underwriter, "in the ordinary course of business and in the process of underwriting"; (ii) transactions in which the investor occupies a passive position; (iii) acquisition of any part or of assets of an US company, if they do not constitute a U.S. business; among other transactions.

transactions that result in external control (ab extra controlling power⁷⁰). Covered transactions consequently include loan contracts, for instance, through which the foreign loaner acquires access to US company's profits, specific corporate decisions, etc.⁷¹

In order to assess transaction's effects, the Committee might consider elements such as: (i) domestic production needed for projected national defense requirements, (ii) capacity of domestic industries to meet such requirements, including availability of human resources, products, technology, materials, and other supplies and services, (iii) nationality of these goods and services suppliers, (iv) potential effects of proposed or pending transaction on sales of military goods, equipment, or technology to any threatening country, (v) potential effects of proposed or pending transaction on US international technological leadership in areas affecting US national security, (vi) potential national security-related effects on US critical infrastructure, (vii) potential effects on US energetic security, (viii) potential national security-related effects on US critical technologies, (ix) whether the acquirer is a foreign government-controlled agent; (x) if government-controlled, (x.a) adherence of the subject country to nonproliferation control regimes, (x.b) the relationship of such country with the US, specifically on its record on cooperating in counterterrorism efforts, and (x.c) potential for transshipment or diversion of technologies with military applications, (xi) long-term projection of United States requirements for sources of energy and other critical resources and material, and (xii) such other factors as the President or the Committee may determine to be appropriate.⁷²

A major part of the review's interpretation elements is clearly economic-related. Those factors allow CFIUS to provide institutional protection to the US economic sovereignty, against challenges of an increasingly vigorous international competition. These structural elements are therefore perfectly

⁷⁰ Controlling power is usually catalogued in five different species: (i) majority control; (ii) minority control; (iii) managerial control; (iv) totalitarian control; or (v) external control. Regarding external control, see: COMPARATO, Fábio Konder; SALOMÃO FILHO, Calixto. *O Poder de Controle na Sociedade Anônima*, op. cit., p. 77ff. Brazilian Competition Authority's definition is also an eloquent example: AC nº 08700.004957/2013-72; Applicants: Monsanto do Brasil Ltda. e Bayer S.A.; Reporting Commissioner: Alessandro Octaviani, j. 01/22/ 2014.

⁷¹ CFR, §800.303.

⁷² 1950 Defense Production Act, Section 721, (f).

aligned with CFIUS' function to defend US hegemonic position conquered after Second World War.

2.2.2. Investigation: transaction's detailed scrutiny

A detailed investigation will be initiated if, during the previous review, one of these three conditions is achieved: (i) it was found that the transaction actually threatens to impair US national security, without due mitigation during the review stage, (ii) acquiring company is directly or indirectly controlled by a foreign Government, (iii) transaction would result in the control of any US critical infrastructure by a foreign entity, without the due mitigation during the review stage.⁷³

If any of the Committee's members answers positively to any of these factors, an investigation will be started.

During an investigation, a designated lead agency within the Committee⁷⁴ will negotiate necessary conditions with parties, making sure that no threats remain to impair US national security. The efforts toward mitigation of transaction's threats may include the amendment of contractual clauses, conclusion of Mitigation Agreements,⁷⁵ or any other measure deemed necessary.⁷⁶

⁷³ 1950 Defense Production Act, Section 721, (b), (2), (B).

⁷⁴ 1950 Defense Production Act, Section 721, (k), (5).

⁷⁵ Since 2007 CFIUS officially concluded 82 mitigation agreements during its procedure. According to the Committee, these agreements involved: (i) ensuring that only authorized persons have access to certain technology and information, (ii) the appointment of members of the board of directors, (iii) establishment of guidelines and terms for handling existing and future contracts with the US Government, (iv) ensuring only US citizens handle certain products and services, and ensuring that certain activities and products are located only in the US, (v) notifying US Government in advance of foreign national visits to the US business for approval, (vi) notifying US Government of any awareness of any vulnerability or security, (vii) providing US Government with the right to review certain business decisions and object if they raise national security concerns. COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES. Annual Report to Congress Public Version, 2014, p. 23.

⁷⁶ 1950 Defense Production Act, Section 721, (l), (1). Considering CFIUS' intrusive powers to mitigate any possible threat to US national security, it is not a surprising fact that a great deal of companies simply give up the transaction during the Committees analysis. However, the transaction's withdrawal also produces legal effects, allowing CFIUS to (i) adopt precautionary measures to prevent the transaction's execution, (ii) define a specific schedule for the transaction's resubmission, and (iii) adopt measures in order to identify conducts related to the consummation of transaction before its formal approval. 1950 Defense Production Act, Section 721, (2).

At the end of the 45-days investigation, the Committee might approve the transaction or suggest its suspension or prohibition to US President, who is not by any means bounded by this recommendation.

2.2.3. Presidential Decision

As previously stated, US law granted its President powers to prohibit the consummation of covered transactions which threaten US national security. Such powers cannot however be utilized freely. The prohibition is a discretionary act,⁷⁷ which is inserted in a legal framework. In this sense, a transaction might be forbidden, considering this extreme measure, provided it is: (i) subsidiary, only when the rest of US legal instruments are insufficient to protect US national interests in the specific case, and (ii) justified, only when based on credible evidence that foreign investment actually threatens to damage US national security.⁷⁸

If the above requirements are met, US President will have authority to take virtually any possible measure to obstruct the threatening transaction's execution. According to 1950 Defense Production Act, Section 721, (d), (1), the President might take "such action for such time as the President considers appropriate to suspend or prohibit any covered transaction that threatens to impair the national security of the United States."

President's decisions are not subjected to judicial supervision, in line with "Exon-Florio Amendment"⁷⁹ and US jurisprudence,⁸⁰ which is another element of CFIUS' legal structure in perfectly alignment to its function.

⁷⁷ See: LEAL, Victor Nunes. Poder discricionário e ação arbitrário da administração. In: Problemas de Direito Público. Rio de Janeiro: Forense, 1960, p. 278.

⁷⁸ 1950 Defense Production Act, Section 721, (d), (4), (A) and (B).

⁷⁹ "The actions of the President (...) shall not be subject to judicial review." 1950 Defense Production Act, Section 721, (e).

⁸⁰ Ralls vs. Committee on Foreign Investment in the United States. U.S. District Court for the District of Columbia.

2.3. Controlling power and CFIUS procedure: legal malleability and hermeneutics amplitude

Exon-Florio Amendment⁸¹ itself doesn't provide any definition to "controlling power".⁸² This concept is nevertheless a key element for the functional comprehension of which transactions must be submitted to CFIUS' prior approval.

Covered transactions are the ones which could result in control of a US business by a foreign person.⁸³ Therefore, it is essential to understand what characterizes control, in order to apprehend how it could be transferred.

Mentioning "controlling power" in Brazil arouses automatically the classical definition proposed by COMPARATO and SALOMÃO FILHO.⁸⁴ In Brazil's dogmatic legislation, the definition of controlling power is contained in Article 116 of Brazilian Corporations Law (Law No. 6.404/76⁸⁵). It is mainly based on the idea of stock majority, a formalistic approach to the phenomenon of corporate control. The notion of "transfer of control" couldn't be different, involving the "transaction, or the set of transactions, involving securities equipped with voting rights (...) through which a third party, or set of third parties representing the same interests, acquires a company's corporate control (...)." ⁸⁶

If US regulation made use of a definition such as Brazilian's, restrict and formalistic, CFIUS' scope of action would be considerably diminished.

⁸¹ That is: 1950 Defense Production Act, Section 721.

⁸² It only determines that: "The term 'control' has the meaning given to such term in regulations which the Committee shall prescribe.". 1950 Defense Production Act, Section 721, (a), (2).

⁸³ In order to ensure legal malleability to concept of controlling power, US regulation deliberately utilised an open terminology. It is clear the rule's teleology, attempting to cover transactions regardless of the legal forms conceived by the parties. According to the CFR, §800.301, (a), is subjected to CFIUS analysis a "transaction which, irrespective of the actual arrangements for control provided for in the terms of the transaction, results or could result in control of a U.S. business by a foreign person."

⁸⁴ COMPARATO, Fábio Konder; SALOMÃO FILHO, Calixto. *O Poder de Controle na Sociedade Anônima*, op. cit., p. 43 e ss.

⁸⁵ "Entende-se por acionista controlador a pessoa, natural ou jurídica, ou o grupo de pessoas vinculadas por acordo de voto, ou sob controle comum, que: a) é titular de direitos de sócio que lhe assegurem, de modo permanente, a maioria dos votos nas deliberações da assembléia-geral e o poder de eleger a maioria dos administradores da companhia; e b) usa efetivamente seu poder para dirigir as atividades sociais e orientar o funcionamento dos órgãos da companhia." Brazilian Civil Code is also considerably formal: "Art. 1.098. É controlada: I - a sociedade de cujo capital outra sociedade possua a maioria dos votos nas deliberações dos quotistas ou da assembléia geral e o poder de eleger a maioria dos administradores; (...)"

⁸⁶ (Free translation). CVM Rule No. 361/02, Article 29, Paragraph 4.

Determining the idea of “controlling power” based on abstract equity capital rates, disregarding practical exercise of power within the company, is certainly incompatible with the function held by the Committee within US economy.

As a genetic element in CFIUS’ structure, the only definition to “controlling power” which would be compatible to its function is wide and malleable – encompassing as many transactions as possible, in such a way that the Committee may closely investigate the concrete effects of a transaction.

Considering CFIUS’ scope of action, “control” was object to the Department of Treasury’s regulation. For the application of this kind of economic police power, “control” means

“the power, direct or indirect, whether or not exercised, through the ownership of a majority or a dominant minority of the total outstanding voting interest in an entity, board representation, proxy voting, a special share, contractual arrangements, formal or informal arrangements to act in concert, or other means, to determine, direct, or decide important matters affecting an entity; in particular, but without limitation, to determine, direct, take, reach, or cause decisions regarding the following matters, or any other similarly important matters affecting an entity: (1) The sale, lease, mortgage, pledge, or other transfer of any of the tangible or intangible principal assets of the entity, whether or not in the ordinary course of business; (2) The reorganization, merger, or dissolution of the entity; (3) The closing, relocation, or substantial alteration of the production, operational, or research and development facilities of the entity; (4) Major expenditures or investments, issuances of equity or debt, or dividend payments by the entity, or approval of the operating budget of the entity; (5) The selection of new business lines or ventures that the entity will pursue; (6) The entry into, termination, or non-fulfillment by the entity of significant contracts; (7) The policies or procedures of the entity governing the treatment of non-public technical, financial, or other proprietary information of the entity; (8) The appointment or dismissal of officers or senior managers; (9) The appointment or dismissal of employees with access to sensitive technology or classified U.S. Government information; or (10) The amendment of the Articles of Incorporation, constituent

agreement, or other organizational documents of the entity with respect to the matters described in paragraphs (a) (1) through (9) of this section.”⁸⁷

It is clear that CFIUS understands control as the concrete degree of influence over the invested company’s strategic decisions, rather than abstract numbers established beforehand and decoupled from material power flows.

2.4. Critical infrastructures, key-resources and critical sectors: the window for the Committee’s exercise of economic police power

In order to ensure CFIUS with strategic discretion for its activities, three important elements were recently added to its legal framework: (i) critical infrastructures, (ii) key-resources, and (iii) critical sectors. They made possible for the Committee to address in greater depth actual economic issues during its procedure, which would presumably be centered exclusively in the protection of “national security”.

The expression “critical infrastructures” was introduced to Committee’s regulation by the 2001 Public Law No. 107-56, known as the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act),⁸⁸ which conceptualizes them as “systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters.”⁸⁹ Considering wide variety of economic sectors that are contained in such definition, granting CFIUS with broad interpretative possibilities, Public Law also lists some industries with a high probability of producing the above-mentioned effects, including: (i) telecommunications, (ii) energy, (iii) financial

⁸⁷ CFR, §800.204.

⁸⁸ Public Law adds to the 1950 Defense Production Act its Section 721, (a), (5), the following provision: “The term ‘national security’ shall be construed so as to include those issues relating to ‘homeland security’, including its application to critical infrastructure.” When it comes to the expression “national security”, there’s no specific regulation containing its definition. On this matter: TIPLER, Christopher. Defining ‘National Security’: Resolving Ambiguity in the CFIUS Regulations. In: University of Pennsylvania Journal of International Law, vol. 35,n. 4, 2014, p. 1223ff.

⁸⁹ USA PATRIOT Act, Section 1016, (e).

services, (iv) sanitation, (v) transport, (vi) physical or virtual infrastructure required for the maintenance of national security, public services, economic prosperity or US quality of life.⁹⁰

Later, 2002 Public Law No. 107-296, known as Homeland Security Act, inserted to the list of critical infrastructures those key-resources, either public or private, which are essential for US economy's "minimum operations".⁹¹

In 2013, after Presidential Policy Directive No. 21 (PPD-21), sixteen critical sectors were formally added to US critical infrastructure: (i) chemical, (ii) commercial facilities, (iii) communications, (iv) critical manufacturing, (v) dams, (vi) defense industrial base, (vii) emergency services, (viii) energy, (ix) financial services, (x) food and agriculture, (xi) government facilities, (xii) healthcare and public health, (xiii) information technology, (xiv) nuclear reactors, materials, and waste, (xv) transportation systems, and (xvi) water and wastewater systems.⁹²

Considering that all the provisions related to critical infrastructures, key-resources and critical-sectors were incorporated to national security's legal and genetic core, which is protected by CFIUS, it is clear that the Committee's duties comprehend the US domestic markets regulation. CFIUS monitors and safeguards the country's most strategic assets – making its activities functionalized to the protection of US economic sovereignty.

Based on the above-considerations, when CFIUS' functional and structural foundations were duly clarified, this essay's efforts should be now focused on the Committee's practical performance. Thus, it will be possible to wonder whether CFIUS means (its structure) is suitable to its ends (function).⁹³

⁹⁰ USA PATRIOT Act, Section 1016, (b), (2) and (3).

⁹¹ Homeland Security Act, Section 2, (9).

⁹² Available at: <https://www.whitehouse.gov/the-press-office/2013/02/12/presidential-policy-directive-critical-infrastructure-security-and-resil>.

⁹³ Regarding an "ends and means adequacy" analysis: COMPARATO, Fábio Konder. A Transferência Empresarial de Tecnologia para Países Subdesenvolvidos: um Caso Típico de Inadequação dos Meios aos Fins. In: Revista da Faculdade de Direito da Universidade de São Paulo, vol. 77, 1982, p. 277ff.

3. CFIUS: social effectiveness analysis

Considering CFIUS' social effectiveness, three different periods should be highlighted separately. First, immediately after its establishment, the capitalist system was going through a severe crisis. At that time, the Committee had a merely advisory role, helping US state to understand imminent international transformations to the global order.

As previously described, in 1988, CFIUS gained greater powers, when new international regulatory pattern ("financialization") was exacerbated. The Committee earned new weapons with "Exon-Florio Amendment" and consequently initiated a new stage with respect to its social effectiveness history.⁹⁴

CFIUS seems to have entered the third phase regarding its efficacy in 2012, when China' investments towards the rest of the world⁹⁵ (including the US) have drastically increased, in the attempt to purchase the ruins that 2008 financial crisis had legated. CFIUS' intervention became considerably more active in face of Chinese threat.

At any rate, for many years, CFIUS' activities remained rather opaque, even for US state. In 2007, Congress approved Public Law No. 110-49, known as Foreign Investment and National Security Act (FINSA), with the objective of shedding some light at the Committee's procedure and creating mechanisms of Congressional supervision.⁹⁶ CFIUS became then obliged to present an Annual Report to the Congress. A public version of this document is available

⁹⁴ At this time, in 1990, President George Bush utilized those powers to block the acquisition of the Seattle-based MAMCO Manufacturing, Inc., dedicated to production of metal gears for aerospace industry, by China National Aero-Technology Import and Export Corporation (CATIC), which at the time had intimate relation with China's Aerospace Industry Department. See: BUSH, George. Message to the Congress on the China National Aero-Technology Import and Export Corporation Divestiture of MAMCO Manufacturing, Incorporated, Washington, 1990. Available at: <http://fas.org/nuke/guide/china/contractor/90020112.html>. By the edition of Exon-Florio Amendment, some authors criticized the measure, considering it insufficient to adequately fulfill its function. See: CAPPUCCI, Robert. Amending the Treatment of Defense Production Enterprises Under the U.S. Exon-Florio Provision: A Move Toward Protectionism or Globalism. In: Fordham International Law Journal, vol. 16, n. 3, 1992. p. 672ff.

⁹⁵ SALIDJANOVA, Nargiza. Going Out: An Overview of China's Outward Foreign Direct Investment. Washington: U.S.-China Economic & Security Review Commission, 2011, p. 1.

⁹⁶ JACKSON, James. The Committee on Foreign Investment in the United States (CFIUS), op. cit., p. 1.

at the Department of Treasury's website.⁹⁷ Based on these Reports this topic aims at discovering which is CFIUS efficacy, considering its function and structure.

A social effectiveness analysis such as this will be based on the available data up to this moment. Therefore, the investigation will have to focus on the third stage of CFIUS' activities.

3.1. CFIUS decision standards

Respecting the concrete data related to CFIUS, it is necessary to point out that the power of prohibiting an actual economic transaction in the US was employed only twice.⁹⁸ The first time, as above-mentioned, was in 1990 during the Presidency of George Bush.⁹⁹ The other was in 2012, during the Presidency of Barack Obama.¹⁰⁰ Nevertheless, for a series of motives, the small number of prohibitions does not mean, for example, that the Committee has a low social impact, or that it conducts its reviews condescendingly.

It is really hard to measure (because of its very nature) the impact of the initial and "informal" part of CFIUS' procedure, through which the interested parties preliminarily approach the Committee in order to discuss the transaction's terms. It is not possible to determine how many transactions cease to occur because of CFIUS' deterrence at this point.¹⁰¹

Considering the available information since 2005,¹⁰² it is possible to notice (in accordance to Figure 1 below) that the total number of notifications suffered a drastic downturn in 2009. This decrease was probably due to the

⁹⁷ Available at: <https://www.treasury.gov/resource-center/international/foreign-investment/Pages/cfius-reports.aspx>.

⁹⁸ HEIFETZ, Stephen; GERSHBERG, Michael. Why are Foreign Investments in Domestic Energy Projects now under CFIUS Scrutiny? In: Harvard Business Law Review, vol. 3, 2013, p. 205.

⁹⁹ When the purchase of MAMCO Manufacturing Inc. was blocked.

¹⁰⁰ When the Chinese group Sany, through its subsidiary Ralls Corp., attempted to purchase four wind farms that belonged to Terna Energy USA.

¹⁰¹ GRAHAM, Edward; MARCHICK, David. U.S. National Security and Foreign Direct Investment. Washington: Institute for International Economics, 2006, p. 58; CASSELMAN, Joshua. China's latest 'threat' to the United States: the failed CNOOC-UNOCAL merger and its implications for Exon-Florio and CFIUS. In: Indiana International & Comparative Law Review, vol. 17, n. 1, 2007, p. 161.

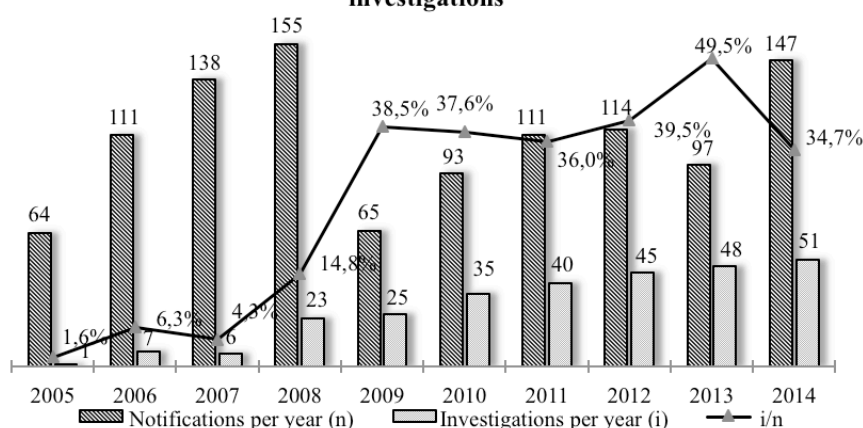
¹⁰² It is worth mentioning that CFIUS Annual Report to Congress related to 2007 contains some information regarding the 2005-2007 period.

financial crisis that broke out in 2008 and interrupted a consistent rising trend of transactions submitted to CFIUS. The number of notifications has increased since then. In 2014, 147 transactions were submitted.

On the other hand, in spite of the decrease of the number of submitted transactions, CFIUS has played a role considerably more active since 2009. This is consistent with the Committee's function: it was conceived as a tool to help the US in a critical period of "capital globalization", and gained greater dexterity after the 2008 collapse (the greatest crisis in the history of capitalism since 1929 Wall Street Crash).

The absolute number of investigations determined by CFIUS has quadrupled in the 2007-2009 period. Considering that during this same period the number of total submitted transactions had brutally shrunk, the proportion of submission versus investigations rose from 5% to 40%. It is clear that CFIUS (and consequently the US) started to carefully wonder which classes of foreign investment would be allowed to enter the country.

Figure 1 - Trends in the number of notifications and investigations

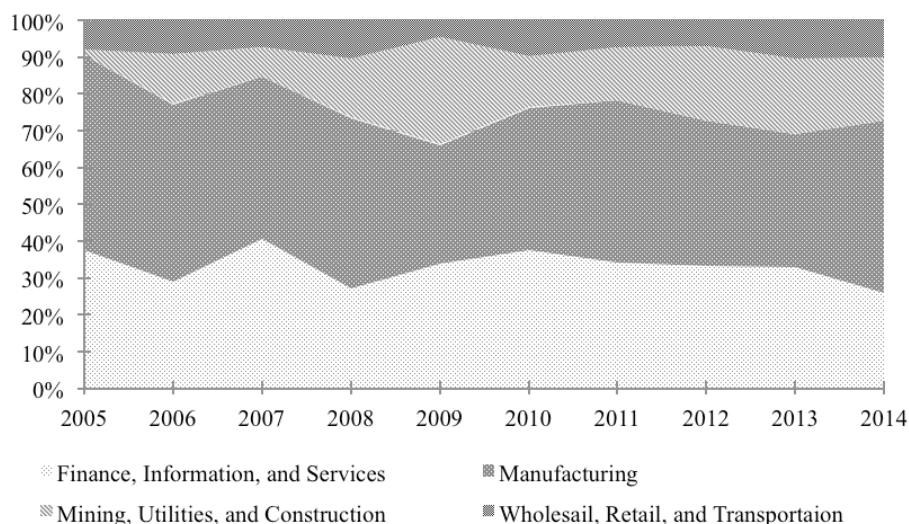


Source: CFIUS Annual Reports to Congress, related to the years 2007-2014

Regarding the economic sectors affected by foreign investments, they seem to respect a relatively stable proportion over the past few years, in accordance to Figure 2. Even so, Mining, Utilities and Construction sector presented a slight increase in the period, peaking in 2009. Accordingly, the observed increase on the number of investigations conducted by CFIUS might be due to a special concern with that particular economic sector. Economic

activity exploited by the US acquired company is not however a credible explanation for the increase on the number of investigations.

Figure 2 - Notifications per economic sector

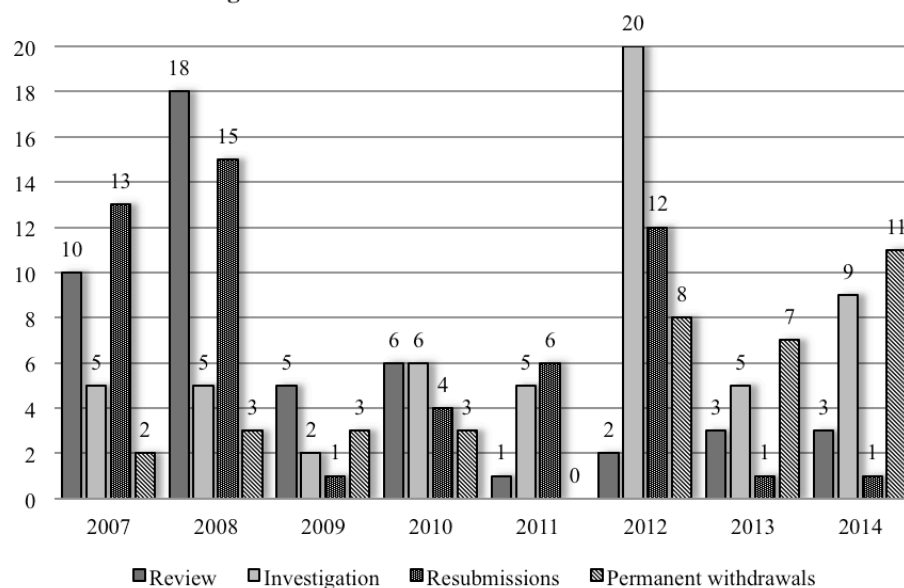


Source: CFIUS Annual Reports to Congress, related to the years 2007-2014

Although the number of investigations increased since 2008, that does not imply itself an improvement of the Committee's capacity of discouraging unwelcome transactions (making parties withdrawal their notification).¹⁰³ After the analysis of withdrawn notifications since 2007, in respect to Figure 3 below, some considerations arise. Initially, it is worth mentioning that most part of renounces, proximately until 2010, occurred in review stage. The number of withdrawals resubmitted afterwards was significantly greater than the number of permanent renounces. Such a fact may indicate that throughout CFIUS procedure, the Committee negotiated with the parties specific adaptations to transaction's terms. Hence, the operation could be later resubmitted and then approved.

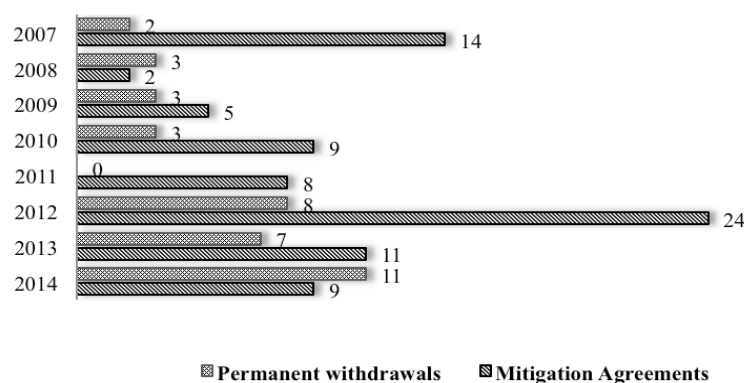
In 2012, CFIUS' activities profile seems to have drastically changed. The numbers of withdrawals greatly increased. It is important noticing that the number of permanent renounces had also reached a historical peak.

¹⁰³ JACKSON states that since 1990 about 50% of the submitted transactions that were subjected to an investigation ended up withdrawing the notification permanently. JACKSON, James. The Committee on Foreign Investment in the United States (CFIUS), op. cit., p. 9.

Figure 3 - Trends in the number of Withdrawals

Source: CFIUS Annual Reports to Congress, related to the years 2007-2014

The recent high number of investigations and withdrawals might suggest that CFIUS decided to adopt a stronger enforcement of its powers. It is likely that the Committee began to pressure the parties, determining specific clauses and conditions for the transaction's approval (even if those conditions made the operation economically unfeasible). The trend in the number of Mitigation Agreements concluded between CFIUS and the postulant parties, which has grown three times from 2011 to 2012, appears to corroborate this hypothesis.

Figure 4 - Trends in the number of Mitigation Agreements

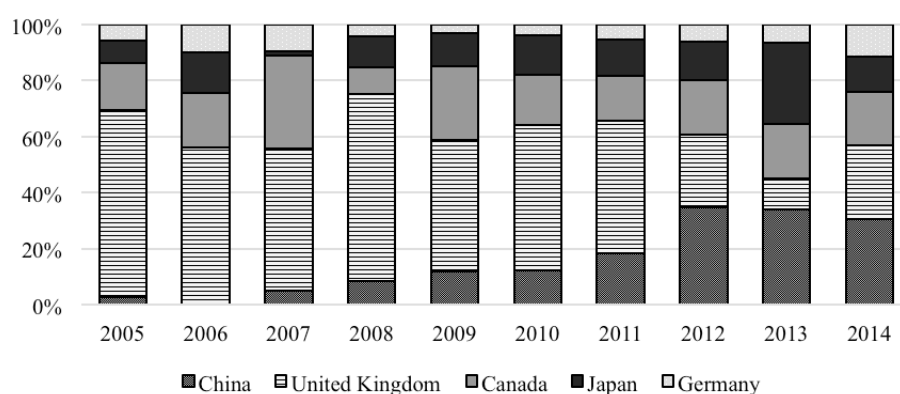
Source: CFIUS Annual Reports to Congress, related to the years 2007-2014

In order to identify the actual role played by CFIUS in the protection of US economic sovereignty, it is fundamental now to determine what happened in 2012 that altered so deeply Committee's action pattern (making it corrosive to foreign investment). The next item shall propose a hypothesis to justify such a phenomenon: an improvement in the Chinese capitals inflows towards the US.

3.2. CFIUS and the Chinese explosion

CFIUS' standard behavior alteration, mainly after 2012, may be explained by transformation on the national profile of the acquiring companies of US businesses. Figure 5 shows most frequent origins of notifying companies over time.

Figure 5 - Trends in the number of notifications from five countries



Source: CFIUS Annual Reports to Congress, related to the years 2007-2014

From the Figure, it is possible to conclude that, until 2011, from all the companies involved in CFIUS procedures, the main origin was the United Kingdom. Nonetheless, in accordance to the Committee there was no

“credible evidence demonstrating a coordinated strategy on the part of the Government of the United Kingdom to direct its firms to acquire U.S. companies with critical technologies. In addition, the strong political and economic relationship, including the extensive two-way sharing of even the most sophisticated

technologies, tends to make such activity unnecessary and, if discovered, potentially counterproductive.”¹⁰⁴

To the Committee’s eyes, UK investments in the US caused no major concerns that would justify its active control under the 1950 Defense Production Act.

In 2012, on the other hand, a sudden turn in the number of Chinese-related operations took place. Abruptly, China became the leader home country regarding the notified transactions before CFIUS.¹⁰⁵ GRAHAM and MARCHICK, observing the increase on Chinese FDI towards the whole world, affirmed that: “The growth of outward Chinese investment, including into the United States, has forced agencies in the Committee on Foreign Investment in the United States (CFIUS) to confront its national implications.”¹⁰⁶ Figure 6 shows the evolution of the proportion of transactions with Chinese origins in relation to all the other transactions submitted to CFIUS.¹⁰⁷

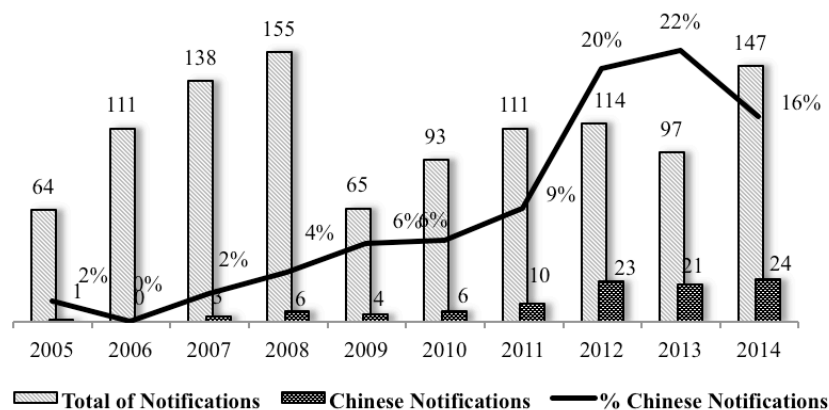
¹⁰⁴ CFIUS’ leniency occurred in spite of the fact that the United Kingdom was also the main purchaser of US critical technologies under the Committee’s supervision. UK companies were the leading buyers of technologies belonging to industries such as: (i) Information, (ii) Biotechnology, (iii) Chemistry, (iv) advanced industry, (v) military electronics, and (vi) spatial systems. COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES. Annual Report to Congress Public Version, 2008, p. 45-6.

¹⁰⁵ Specialists on the Committee have argued that the wrath caused by Chinese investments towards the US by the end of the 2000’s and the beginning of the 2010’s is similar to that caused thirty years earlier by Japanese efforts. See: SAUVANT, Karl. Is the US ready for FDI from China? Overview. In: SAUVANT, Karl (ed.). Investing in the United States: Is the US Ready for FDI from China? Cheltenham: Edward Elgar Publishing Limited, 2009, p. 15-6: “How to deal with the liability of foreignness? What, in particular, can Chinese firms – and, for that matter, firms from other countries – do to prosper in the US? The answer to this question has many facets – and it can draw on the experience of firms from Japan that were in a situation similar to that of Chinese firms today when they entered the US in the 1980s. (...). During the 1980s, the macroclimate of US-Japanese relations was characterized by trade frictions, exchange rate controversies, concerns about the nature of the Japanese economy (‘Japan Inc.’), fears about Japan’s economic ascendance, and cultural misperceptions.”

¹⁰⁶ GRAHAM, Edward; MARCHICK, David. U.S. National Security and Foreign Direct Investment, op. cit., p. 101.

¹⁰⁷ The increase on Chinese investments towards the US has triggered discussion on CFIUS adequacy to deal with such a threat. Some sustain that the Committee should be strengthened in the face of new circumstances. See: CASSELMAN, Joshua. China’s latest ‘threat’ to the United States: the failed CNOOC-UNOCAL merger and its implications for Exon-Florio and CFIUS. In: Indiana International & Comparative Law Review, op. cit., p. 156ff. The suggestion to improve CFIUS structure involved: (i) expansion of the “national security” concept, (ii) the expansion of Congressional powers, allowing it to prohibit transactions for which the President remained silent, (iii) the extension of the procedure’s duration, (iv) CFIUS’ chair replacement, (v) strengthening of CFIUS accountability before the Congress, or (vi) tighten up the rules related to the withdrawal of previously notified transactions.

Figure 6 - Trends in the number of Chinese notifications



Source: CFIUS Annual Reports to Congress, related to the years 2007-2014

It is interesting to observe that CFIUS was not the only US instrument concerned with the avalanche of Chinese investments in US economy. The House Permanent Select Committee on Intelligence published, still in 2012, a Report in which Chinese companies' increasing appetite for US communication enterprises was a real threat to national security. That Committee has even recommended a series of new policies to address such a hazard, which ranged from changing sectorial legal framework (forbidding market access to companies in any way related to a national state) to the prohibition of a specific transaction¹⁰⁸ (the aforementioned acquisition by Huawei Technologies of intellectual property rights from 3Leaf Systems, a mere US\$ 2 million business¹⁰⁹)

Also in 2012, U.S.-China Economic and Security Review Commission published another Report warning about "dangerous" Chinese investments. According to that document, Chinese state-led system (marked by public promotion measures and economic orientation) could result in economic distortions which would be able to raise national security concerns. The greatest threat was the possibility of Chinese state-related (directly or

¹⁰⁸ UNITES STATES. Investigative Report on the U.S. National Security Issues Posed by Chinese Telecommunications Companies Huawei and ZTE. Washington: House Permanent Select Committee on Intelligence, 2012.

¹⁰⁹ CFIUS effectively recommended its prohibition. Huawei, however, instead of waiting for the President's decision preferred to voluntarily divest the recently bought assets. Available at: <http://www.forbes.com/sites/johnvillasenor/2012/11/14/if-you-want-to-buy-an-american-company-ask-permission-not-forgiveness/#2a758ca73ad9>.

indirectly) companies make investment decisions based on strategic behaviors, not on “strict” market considerations. Such investments would occur under conditions that the US market wouldn’t be able to match, considering the public subsidies that Chinese companies allegedly receive.¹¹⁰ The Report, among several other measures, suggests that CFIUS regulation should be altered, in order to: (i) determine the obligatory notification of any corporate control transaction of which a company directly or indirectly held by Chinese state is one of the parties, (ii) establish a new test to evaluate the economic benefits arising from a transaction, beyond the current national security threat exam, and (iii) forbid foreign investments over industries which are not open for US companies in the investment’s country of origin.¹¹¹

Conclusion

At last, it is possible to conclude that comprehending CFIUS (as a legally organized institution) is directly connected to its surrounding political-economical context. The Committee was established in 1975, and back then deep transformations were taking place over the international political economy. For the first time, the position the US reached after Second World War had been contested.

Initially, CFIUS played an internal role under the Executive Branch, keeping the President informed and helping the US to fully understand the “capital globalization” movement that had started. In 1988, after “Exon-Florio Amendment”, the Committee was suddenly transformed from a minor organ in the US “legal organization of the political-economical accumulation

¹¹⁰ Regardless of these “threats” sustained by the U.S.-China Economic and Security Review Commission, MAZZUCATTO has thoroughly described the widespread public-owned network of public incentives to Research & Development (specifically for the Science, Technology & Innovation sectors) in the US, organized around organs like DARPA and dedicated to support US private sector to introduce new products into the market. See: MAZZUCATTO, Mariana. *O Estado Empreendedor: desmascarando o mito do setor público vs. setor privado*, op. cit., p. 91ff.

¹¹¹ U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION. Report to Congress: Executive Summary and Recommendations, 2012, p. 23.

space”,¹¹² to a pivotal element on its foreign investment and domestic markets regulation. After the Amendment, the US President gained powers to prohibit a US company’s corporate control acquisition by a foreign enterprise, and most of the ancillary powers for the practical execution of this Amendment was delegated to CFIUS. Thus, US managed to ensure its sovereign entrance in the new international competition regime.¹¹³

From this functional profile, the US built a solid legal structure to provide practical conditions for CFIUS to fulfill its objectives. This legal structure concerned a dynamical procedure under which the Committee’s malleable elements could have effect. Those elements involved a realistic definition of “controlling power”, or a wide variety of concepts designed to clarify the content of “national security” (which includes critical infrastructures, key-resources and critical sectors).

The social effectiveness of CFIUS’ legal statutes is considerably greater than a shallow analysis could imply. Despite having officially led to the obstruction of only two transactions, there is a whole set of transactions which are substantially adapted to cope with US sovereign interests, or which are even canceled during the procedure. In this sense, a lot of effective measures might be taken with the intention of mitigating the threats of a given transaction. There is a chance some negotiations even cease to be considered because of the existence of an organ such as CFIUS.

The Committee’s efficacy was demonstrated through examination of its behavior after 2012, when the number of US companies’ control acquisitions by Chinese-related enterprises has drastically increased. This phenomenon triggered an improvement in CFIUS’ investigations, mitigation agreements and, as a consequence, the number of permanent withdrawals regarding previously submitted transactions.

¹¹² BERCOVICI, Gilberto e MASSONETTO, Luís Fernando. A Constituição Dirigente Invertida: A Blindagem da Constituição Financeira e a Agonia da Constituição Econômica. In: Boletim de Ciências Econômicas (Faculdade de Direito da Universidade de Coimbra), vol. XLIX, 2006, p. 59.

¹¹³ This hypothesis is shared, among others, by: CASSELMAN, Joshua. China’s latest ‘threat’ to the United States: the failed CNOOC-UNOCAL merger and its implications for Exon-Florio and CFIUS. In: Indiana International & Comparative Law Review, op. cit., p. 155: “The United States has long encouraged an open investment policy, with nearly every U.S. president since Herbert Hoover taking such a stance. Yet with an increasingly interdependent and connected world came the need to place limitations on a purely open-door investment policy.”

CFIUS' above-mentioned function, structure and social effectiveness could generate confusion when compared to other parts of US economic police powers, which have equally experienced thorough makeovers along the described period. On the contrary, the rest of US economic regulation apparatus was reformed under a neoclassical paradigm, from which the national-states should gradually withdrawal from the economy. This school of thought applied to economic regulation processes is synthesized by the rise of Chicago School to the supremacy of US antitrust policies.

However, far beyond an irreconcilable regulatory conflict, the apparent contradiction between CFIUS' fierce interventionism and, for example, Chicago's antitrust, it represents a coordinated movement, aiming at the creation of a robust legal framework for the protection of the US economic sovereignty. Considering specifically antitrust discipline, these new legal standards promoted high rates of economic concentration within the US. In view of the increasing international competition standards, which allowed US companies to improve their competitiveness in the global markets. In this sense, CFIUS is the other face of the US Janus, ensuring powerful conglomerates allowed by the new antitrust orientation wouldn't be acquired by foreigners and instrumentalized against US interests.

Therefore, it is possible to conclude CFIUS is still a paramount element for the assurance of US economic sovereignty, even if this concept seems to have gone out-of-date both in Brazilian political practice and academic researches.

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