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Abstract: Conventional wisdom portrays the United States as open to foreign investment. This Article challenges that narrative by examining key moments when the U.S. government has not welcomed foreign investment. First, it shows that Anti-Asian sentiment has spurred the creation of U.S. investment law over the past forty years. Second, it attributes this concern about Asian investment to outmoded paradigms about Asia. Third, it shows fear of Asia may have also influenced government decision-making, and may continue in the foreseeable future. Finally, it prescribes solutions that state actors—judicial, executive, legislative—can take to ensure that government decisions are motivated by proper concerns.

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I. INTRODUCTION

In July 2014, the D.C. Circuit Court of Appeals found that President Obama violated the due process rights of Ralls, a Delaware company owned by two Chinese nationals.[1] Ralls had acquired four wind farms in northern

[1] Ralls Corp. v. Comm. on Foreign Inv., 758 F.3d 296 (D.C. Cir. 2014). The case is extraordinary for a couple of reasons. First, many believed that Ralls had no right to contest the decision of the Obama

Oregon, one of which was located within restricted airspace of the U.S. Navy.[2] Six months after the acquisition, President Obama, acting on the recommendation of the interagency Committee on Foreign Investment in the United States, ordered Ralls to divest the wind farms. President Obama cited unspecified but "credible evidence that . . . Ralls . . . might take action . . . to impair the national security of the United States . . . ."[3] Unfortunately, Ralls did not have access to that evidence.

The President's refusal to share certain unclassified evidence with Ralls, and consequent failure to provide Ralls an opportunity to rebut that evidence, violated its due process rights.[4] Hundreds of other wind turbines were located nearby, many within the Navy's airspace.[5] As the court pointed out, many of these turbines were both "foreign-made and foreign-owned."[6] It seems unlikely then, that the divestiture order was motivated solely by the fact of foreign ownership or control.[7] A fuller explanation would take note of the fact that the owners were Chinese. As this Article demonstrates, anti-Asian animus informs government policy and decision-making at the highest levels.[8]

More specifically, this Article probes the intriguing but unexamined issue of why the U.S. government has resisted Asian investment.[9] Investment law and policy are not disciplines frequently mined for anti-Asian bias. Indeed, the prevailing wisdom about U.S. investment policy is its putative openness to foreigners, both externally (the United States pushes other countries to lower their barriers to investment), and internally (the United States retains one of the most open investment policies of any modern state). Nevertheless, this Article marshals evidence, from the 1970s to the present, of hostility to investment from three main sources: the Middle East, China, and Japan. Drawing on congressional testimony, government investigations,

administration in the first place. Second, few expected that the appellate court would side with the plaintiffs, and force the administration to reveal unclassified evidence about the national security threat of the wind farms.

2 *Id*. at 300.

3 Order Regarding the Acquisition of Four U.S. Wind Farm Project Companies by Ralls Corporation, 77 Fed. Reg. 60,281 (Oct. 3, 2012).

4 *Ralls*, 758 F.3d at 319.

5 A detailed map of the area is available online through the Canadian newspaper *Globe and Mail*. *See Too Close for Comfort*, THE GLOBE & MAIL (Oct. 4, 2012), http://www.theglobeandmail.com/report-on-business/too-close-for-comfort/article4590399/?from=4590246.

6 *Ralls*, 758 F.3d at 305.

7 *Id*. Indeed, one of the prior owners of the wind farms was a Greek-owned corporation based in Delaware.

8 *See infra* Part I.B.

9 This Article views Asia expansively, as a geographical region extending from the Middle East (Saudi Arabia and Gulf States) to East Asia (China and Japan). This interpretation may not conform to prevailing notions of Asia as "East Asia" or even "South Asia and East Asia." But proper geography is not the only redeeming feature of this conception of Asia. It also takes account of the long history of Orientalism—discourses that ascribe certain motivations, behaviors and values to Asian people. Part III.A explains Orientalism in detail. *See infra* notes 230–48 and accompanying text.

statements from public officials, and decisions to block individual investments, we see strong discomfort, occasionally boiling over into outright hostility, towards Asian capital. Is the United States as open as scholars, government officials and others purport?

Two disclaimers are necessary. First, I do not suggest all Asians are alike, or somehow constitute a distinct race or ethnicity; I know that Arabs differ from Japanese people. Nor do I contend that the U.S. government opposes all types of Asian investment all of the time. Rather, the construction of U.S. investment law and policy stems from responses to investment from various Asian countries in the 1970s, 1980s and 2000s. At the very least, the United States' reaction to investment from Asia gives rise to the perception of anti-Asian bias. Congress has expressed this resistance most vociferously, fusing populism and nativism to draw attention to certain Asian investments and blocking some of them. Less often, federal agencies have done the same.[10] Such opposition may have sound national security or economic concerns at heart. But because of the Orientalist rhetoric elected and appointed officials often use, they create a perception that the United States opposes investment from certain jurisdictions.[11] Perceptions matter here because many foreign investors, by definition, live outside the United States. When government officials, elected or appointed, denounce "Arab" or Japanese investors, the investor himself may believe the reason for the opposition is due to his race or national origin, as opposed to the security or economic concern the investment may raise.

Second, I do not discount the possibility of other interpretations. Laws, regulations, and agency decisions respond to a variety of concerns, as explored below. Still, the alternative explanations do not fully account for the level or intensity of opposition. To borrow a phrase from employment discrimination, some of these cases may involve "mixed motives," where both legitimate and illegitimate reasons animate a particular decision.[12] This Article posits that illegitimate reasons might have influenced government actors in particular contexts.

This research is salient for several reasons. First, the United States is said to maintain an open policy towards foreign direct investment.[13] Former Commerce Secretary Gary Locke claimed that the United States was more to open to investment than any country in the world.[14] Scholars too frequently

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[10] I thank my colleague Juscelino Colares for this insight.

[11] I explain the concept of Orientalism in greater detail below. *See infra* Part III.B.

[12] *See* Desert Palace, Inc. v. Costa, 539 U.S. 90, 93 (2003).

[13] *See also* Stephen D. Krasner, *U.S. Commercial and Monetary Policy: Unraveling the Paradox of External Strength and Internal Weakness*, 31 INT'L ORG. 635, 638 (1977). Krasner notes two basic characteristics of the U.S. policy towards international economics: (1) "elimination of barriers to the movements of goods, services, technology, and capital across international boundaries," and (2) "the control of such movements by private, as opposed to state-owned, corporations." *Id*.

[14] Secretary of Commerce Gary Locke Delivers Remarks at U.S.–Russia Business Summit, July 2,

make the claim that the United States treats foreign and domestic investors alike.[15] This research questions that narrative by focusing on key moments in the construction of U.S. investment law over the past four decades. I am not the first to detect anti-Asian sentiment in response to individual transactions.[16] But no Article has charted these incidents, extracted their anti-Asian underpinnings, and offered solutions to these problems. We cannot address a failure we do not acknowledge.

Second, this Article contributes to a growing scholarship on racism against Asians and Asian-Americans. In the past quarter century, critical legal scholars have examined selected nodes in the United States' historical treatment of Asians. From the "free white person" requirement of the 1790 Naturalization Act to the global war on terror, the United States has used laws and regulations to subordinate, exclude and alienate (literally, "make other") Asians and Asian-Americans.[17] Despite shifting geopolitical winds, waves of immigration, and the incomplete project of assimilation, "the Asian is always seen as an immigrant, as the 'foreigner-within.'"[18] As this Article shows, anti-Asian sentiment is no historical artifact. It continues to animate statements and, arguably, decisions by high-ranking government actors: senators, representatives, cabinet officials, and agency staff. Collectively, these determinations not only harm Asians and Asian-Americans within our borders by perpetuating stereotypes about trustworthiness, citizenship and belonging, but also antagonize potential investors by suggesting the United States will not accept their capital.

Third, as the fulcrum of global economic power shifts from West to East,[19] more investors will seek out economic opportunity in the United

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2009 (available through Westlaw).

15 *See* Fred L. Morrison, *The Protection of Foreign Investment in the United States of America*, 58 AM. J. COMP. L. 437, 445 (2010) ("[U.S.] law ordinarily treats foreign and domestic investors or businesses alike . . . Foreign investors are normally warmly welcomed.").

16 *See, e.g.*, BILL EMMOTT, THE SUN ALSO SETS: THE LIMITS OF JAPAN'S ECONOMIC POWER (1991). According to Emmott, former Editor-in-Chief of the Economist news magazine, "racism does exist in some attitudes toward Japanese investment in America, Australia and, to a lesser extent, Europe." *Id.* at 146. Emmott cites the Fujitsu-Fairchild transaction as proof of anti-Japanese bias in U.S. investment policy. For more on Fujitsu-Fairchild, *see infra*, Part II.A.

17 At this point, a vast literature examines the legal treatment of Asians and Asian-Americans. A highly incomplete list of important works would include Neil Gotanda, *Asian American Rights and the "Miss Saigon Syndrome," in* ASIAN-AMERICANS AND THE SUPREME COURT 1087 (Hyung-chan Kim ed., 1992); Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241, 1257 (1993); Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, "Foreignness," and Racial Hierarchy in American Law*, 76 OR. L. REV. 261 (1997); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1576 (2002).

18 LISA LOWE, IMMIGRANT ACTS: ON ASIAN AMERICAN CULTURAL POLITICS 5 (1996).

19 *See* CTR. FOR ECON. AND BUS. RESEARCH, *Cebr's World Economic League Table*, (Dec. 26, 2013) http://www.telegraaf.nl/incoming/article22168758.ece/BINARY/+Cebr_World-Economic-League-Table-2013.pdf (listing China, India, Japan, Korea, Indonesia, Taiwan and Saudi Arabia as among the twenty largest economies by 2028).

States. As explained more fully below, investors from the Middle East, China, and Japan have made significant investments in the United States since the 1970s. They may continue to do so, though this cannot be taken for granted. Likewise, investors from other emerging economies may also wish to invest in the United States. U.S. treatment of Asian investment will receive greater scrutiny from Asian investors themselves. Indeed, Chinese media puzzle over the "tinted glasses" that U.S. regulators apparently don when scrutinizing Chinese investment.[20] U.S. media likewise have detected a shift in Chinese investment strategies in the wake of high-profile investment decisions by the United States government.[21]

The Article proceeds in four parts. Part I examines the history of foreign investment law and policy in the United States. In so doing, it makes the claim that the construction of U.S. international investment law is, in large part, a series of reactions to Asian investment. This claim finds support in congressional testimony by members of the House and Senate, statements of appointed officials in various cabinets, acts of political theatre, and other indicia of governmental attitudes towards foreign investment. Having surveyed the bedrock of U.S. investment law, Parts II and III dig into the underlying sentiments and purposes. Part II asks whether the anti-Asian sentiment serves primarily political goals. This part examines national security, economic nationalism and concerns over government control as possible explanations for anti-Asian sentiment. Yet, as Part III makes clear, racially discriminatory attitudes also animate policy decisions and statements, at least in certain situations. Invoking critical legal studies, cultural studies, and racial discrimination lawsuits, Orientalism—a set of outmoded beliefs about Asian culture, people, and societies—continues to inform government thinking and decision-making at the highest levels. Since many decisions are made in confidential settings, the public record—statements by politicians, congressional

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20 *See* 21-SHIJI JINGJI BAODAO [21ST CENTURY ECONOMIC TIMES], *Zhongguo Qiye Ruhe Fangfan Meiguo Touzi Anquan Shencha Fengxian* [*How Can Chinese Companies Guard Against Risks of U.S. Investment Security Review*], (Sept. 7, 2015), http://finance.sina.com.cn/roll/20150907/084423172831.shtml. "Although the American is one of the world's most open markets, its security review process for foreign investment is particularly stringent. For Chinese companies especially, the America's national security review seems to wear 'tinted glasses.' From the early defeat of CNOOC's bid for Unocal and Huawei's thwarted attempts to invest in the United States, to the recent failure by Sany to invest in wind farms, Chinese investors face especially interesting security barriers in U.S. mergers and acquisitions." *See also* Ben White, *Chinese Drop Bid to Buy U.S. Oil Firm*, WASH. POST (Aug. 3, 2005) http://www.washingtonpost.com/wp-dyn/content/article/2005/08/02/AR2005080200404.html ("CNOOC Chairman Fu Chengyu and other executives and directors were shocked by the intensity of the negative reaction from Congress and by signals that the administration did not want to decide whether to accept or reject [CNOOC's bid for Unocal].").

21 *See* Isabella Steger, *Cnooc's Unocal Lessons*, WALL ST. J. (July 23, 2012) http://blogs.wsj.com/deals/2012/07/23/cnoocs-unocal-lessons/ (noting that, since CNOOC' failed bid for Unocal, Chinese firms have sought minority stakes in North American energy companies).

testimony, and actions often unaccompanied by detailed explanation—is often the only place to which outside observers can turn for information. Part IV aims to redress some of these problems by prescribing courses of action for the judicial, executive, and legislative branches.

II. A HISTORY OF FOREIGN INVESTMENT IN THE UNITED STATES

For most of its history, the United States has advocated free capital flows, minimal barriers to foreign investment, and strong protections for U.S. investment in other countries.[22] With certain exceptions—the Alien Property Law (1887), Trading with the Enemy Act (1917)—the United States has largely followed Treasury Secretary Alexander Hamilton's advice: foreign capital "ought to be considered a most valuable auxiliary conducing to put in motion a greater quantity of productive labor and a greater portion of useful enterprise than could exist without it."[23]

Throughout the nineteenth and twentieth centuries, most inbound investment originated in Europe, primarily the United Kingdom (England and Scotland).[24] The long historical relationship between Europe and the United States helped forge U.S. attitudes towards foreign investment. Significant emigration from Western Europe, both before and after the founding of the United States, helped create the conditions for a liberal investment policy. A shared language yoked the United Kingdom, Canada, and the United States, creating an atmosphere of trust and ease of communication that facilitated investment flows. The fact that foreign capital, and the businesses into which they were investing, were owned mostly by white Europeans, and their U.S.-born descendants, likely contributed to the tacit confidence in foreign investment. As one contemporary British investor put it, "When we're in America, we feel it's reasonable to behave like Americans. But that's not so different from behaving like an Englishman."[25] This may be one reason why people from the United States have paid so little attention to British or European

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[22] The most comprehensive treatment of foreign investment in the United States is Mira Wilkinson's two-volume treatise. *See* MIRA WILKINS, THE HISTORY OF FOREIGN INVESTMENT IN THE UNITED STATES TO 1914 (1989) [hereinafter WILKINS I]; MIRA WILKINS, THE HISTORY OF FOREIGN INVESTMENT IN THE UNITED STATES 1914-1945 (2004) [hereinafter WILKINS II].

[23] ALEXANDER HAMILTON, REPORT ON MANUFACTURES: COMMUNICATED TO THE HOUSE OF REPRESENTATIVES (1791). He went on to note that "every farthing of foreign capital . . . laid out in internal meliorations, and in industrial establishments of a permanent nature, is a precious acquisition." *Id*.

[24] *See* WILKINS I, *supra* note 22, at 159. From the late 1890s to the early 1910s, depending on the year, British investors supplied approximately 60% to 80% of FDI into the United States; *see also* WILKINS II, *supra* note 22, at 622 (noting that Britain made the most investment in the United States during 1914 to 1945).

[25] John Burgess, *British Investments in U.S. Outpaces Japan's, Study Finds*, WASH. POST (Jan. 27, 1989), https://www.washingtonpost.com/archive/business/1989/01/27/british-investments-in-us-outpace-japans-study-finds/4ff175c6-018f-4102-b877-203954aa672c/.

investment.

Asian investment, however, provoked a very different reaction. The first Asian capital flows, which entered the United States in the early 1970s, provoked a strong and largely negative reaction. Members of Congress called for restrictions on foreign investment, and set into motion a familiar pattern: (1) capital flows from a particular jurisdiction; (2) negative, often racially tinged statements about the dangers of investment from that country; (3) calls for laws to restrict investment, and occasionally passage of such laws; and (4) empowering the executive branch to stanch foreign investment. We explore this pattern in greater detail below.

A. The First Wave of Asian Investment: The 1970s

In the 1970s, the United States experienced major shifts in inbound investment. First, foreign direct investment (FDI) accelerated over the course of the 1970s, nearly quadrupling between 1970 and 1980, and increased significantly after 1973.[26] Though still small when compared to outbound U.S. investment,[27] large amounts of inbound investment sparked concern that the United States was losing its economic sovereignty. Foreign investors controlled increasingly large amounts of land, stocks, treasury bills, and other assets. This led some to state that foreigners were "invading" the United States, taking advantage of U.S. economic stagnation and political turmoil to snap up prized properties and struggling blue-chip companies.[28]

Second, a small fraction of this capital originated in Asia. At this time, the primary investors in the United States were Western.[29] But Japan and a handful of Middle Eastern countries (Kuwait, Iran and Saudi Arabia) began to make sizeable investments, many for the first time. They invested in sectors such as hotels, real estate, mining, banks, airlines, and telecommunica-

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[26] *United States Senate Comm. on Commerce, Impact of Foreign Investments in the United States: Hearings Before Subcomm. on Foreign Commerce & Tourism*, 93rd Cong. (1973) (statement of Sen. Daniel Inouye, Chairman, Subcomm. on Foreign Comm. & Tourism) [hereinafter Tourism Subcomm. Hearings]. Sen. Inouye noted "In the first half of 1973, foreign investment was running at an annual rate of $1.5 billion, up approximately nine times from the $160 million in 1972." *Id.* at 1. Inbound FDI had increased steadily in the prior two decades, doubling between 1950 and 1960, and doubling again between 1960 and 1970. *Id. See also* EARL H. FRY, THE POLITICS OF INTERNATIONAL INVESTMENT 9 (1981).

[27] *See infra* Part IIC.

[28] *See infra* notes 150–57 and accompanying text.

[29] See Bureau of Economic Analysis, *Foreign Direct Investment in the United States: Detail for Position*, SURVEY OF CURRENT BUSINESS, Aug. 1980 through 1990. A helpful chart summarizing this can be found in EDWARD M. GRAHAM & PAUL R. KRUGMAN, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES 43 (2d ed. 1991). Japanese FDI increased steadily from 1980 to 1990. Yet even at its apex, in 1990, Japanese investment was still second to British investment, surpassing Dutch investment only in 1988.

tions. In so doing, they encountered intense and occasionally insensitive scrutiny from the media, congressional hearings, and even popular culture.[30] Contemporary commentators called it "reverse investment."[31] For the first time in U.S. history, investment originated in countries where the United States had long enjoyed the dominant position, by virtue of U.S. corporate presence, economic support, security guarantees, or some combination thereof.[32] Alongside the influx of Asian capital came the realization that international influence was a two-way street. The United States still maintained military, diplomatic and political leverage over these countries, but the economic power no longer tipped so decisively in its favor. This change had lasting reverberations in both the national psyche and foreign policy of the United States.

What were these investments? Who were these investors? In the early 1970s, the first major wave of Japanese investment reached U.S. shores, touching down most prominently in Hawaii's tourism sector.[33] Japanese interests purchased three, of a total of forty-four, golf resorts.[34] Other Japanese

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[30] Most famously, Howard Beale, the fictional anchorman of the Oscar-winning *Network*, served up an anti-Arab diatribe that continues to resonate in U.S. popular culture. He implored his viewers in the following way, "Right now the Arabs have screwed us out of enough American dollars to come right back and, with our own money, buy General Motors, IBM, ITT, AT&T, DuPont, US Steel and twenty other American companies . . . The Arabs are simply buying us . . . I want you to get up right now and write a telegram to President Ford saying 'I'm mad as hell and I'm not going to take this any more. I don't want the banks selling my country to the Arabs.'" *See* NETWORK (United Artists 1976).

[31] Tourism Subcomm. Hearings, *supra* note 26, at 2. The testimony of Hawaiian governor George Ariyoshi is quite revealing on this subject. "We know, of course, of the history of colonialism, and how . . . the powerful nations of the world exploited the natural resources of underdeveloped lands, primarily for the profit of sometimes greedy and very power [sic] entrepreneurs. That age is dying. We are now in the age of multinationals and the rising expectations of smaller and poorer nations. The Arab countries with their sophisticated management of their own oil resources furnish an example of countries which have learned a few lessons from earlier exploiters. And today, too, we have the 'reverse investments' in the United States by foreign investors who come from lands devastated in World War II, rebuilt by American aid in vast quantities, and now often our business competitors. Those 'reverse investment' in many cases can provide jobs, income, and new vocational opportunities for Americans. They can also cause regional conflicts and competitive battles." *Id.* at 5.

[32] For example, the United States helped install the Shah of Iran in 1953, and invested heavily in the state until his fall in 1979. *See generally* Saeed Kamali Dehghan & Richard Norton-Taylor, *CIA admits role in 1953 Iranian coup*, GUARDIAN (Aug. 19, 2013), https://www.theguardian.com/world/2013/aug/19/cia-admits-role-1953-iranian-coup (describing U.S. government support for the overthrow of democratically elected Iranian Prime Minister Mohammed Mosaddeq); Stephen McGlinchey, *How the Shah Entangled America*, NAT'L INTEREST (Aug. 2, 2013), http://nationalinterest.org/commentary/how-the-shah-entangled-america-8821 (describing U.S. military and economic support for the Shah, whom the U.S. helped install after ousting Mosaddeq). Likewise, after World War II, the United States occupied Japan for six years, rewrote its constitution, and attempted to imprint U.S.-style democracy in various Japanese institutions. *See* WARREN I. COHEN, THE CAMBRIDGE HISTORY OF AMERICAN FOREIGN RELATIONS 60 (2013).

[33] Tourism Subcomm. Hearings, *supra* note 26, at 45–46 (statement of Frank F. Fasi, Mayor of Honolulu).

[34] *Id.* at 14 (statement of Edward Greaney, Deputy Director, Department of Planning and Economic

investors bought high-end hotels, including three prominent establishments on Waikiki Beach.[35] In addition to condominiums and real estate parcels of various sizes, Japanese investors purchased 11% of Hawaii's available hotel rooms.[36] While certain plots were quite large, Japanese investors ended up owning less than 1% of Hawaiian land.[37] Despite their relatively small size, however, these purchases triggered resentment, as explored more fully below.[38]

A far more pressing concern was Middle Eastern investment, particularly from Kuwait, Iran, and Saudi Arabia. These transactions stoked significant public and congressional concern.[39] They staked out significant, but not controlling, positions in well-known companies.[40] Kuwaiti investors, including the Kuwaiti government,[41] invested in both real estate and corporate stock. A Kuwaiti government official explained his country's strategy in the following terms:

> We are studying dozens of proposals for equity investment from American companies, many of them well-known names. We are much more interested in long-term growth investment in productive enterprise than we are in fixed-interest direct obligations. For this we see the best opportunities in the big American economy and in West Germany.[42]

Real estate investments included Kiawah Island, off the coast of South Carolina, where Kuwaitis sought to develop luxury resorts.[43] The son of Kuwait's prime minister purchased the Hilton Hotel in downtown Baltimore for

Development, State of Hawaii).

[35] *Id.*

[36] *Id.* The development office produced a list of Japanese investments for the hearing. *See* Chronological Listing of Major Japanese Investments in Hawaii (showing Japanese acquisitions of land, supermarkets, hotels, real estate, golf courses and others). *Id.* at 19–20.

[37] *Id.* at 68.

[38] *See* Bruce Benson, *Foreign Investors Stir Hawaii*, WASH. POST (Dec. 31, 1973), at A4 (noting Senator Inouye received over 100 letters in 1975 "with complaints relating mostly to Japanese [investments]. You seldom hear anything about British investments, for example . . . .").

[39] Roberta Hornig, *Arab Money No Threat, Simon Says*, WASH. STAR (Feb. 26, 1975) (transcribing an interview with Treasury Secretary William Simon).

[40] Joseph Lawrence, *Should America Welcome Saudi Investment?*, INDEPENDENT PRESS-TELEGRAM (Oct. 31, 1975), at 31.

[41] One reason for some U.S. citizens' discomfort with Arab investment was the difficulty in delineating private from public money. As one contemporaneous article put it, "the government officials making the decisions on petrodollar aid and trade are related to, in business with, or even the same person as the private investor who puts his money into allied projects." Jim Hoagland, *Private/Public Line Blurs*, WASH. POST (Sept. 18, 1975), at A1.

[42] Lawrence, *supra* note 40.

[43] *See* John McDermott, *Even on Kiawah, Nothing Lasts Forever*, POST & COURIER (June 9, 2013), http://www.postandcourier.com/business/even-on-kiawah-nothing-lasts-forever/article_474399f9-4669-5674-b920-8308df491304.html. The Kuwait Investment Company purchased Kiawah Island in 1974 to

$20 million.[44] Outside of the United States, Kuwaiti investors bought "boutique" real estate in London, Paris, and Egypt;[45] and took a 14% stake in Daimler-Benz, the German manufacturer of Mercedes-Benz automobiles.[46]

Iran, a nominal U.S. ally until 1979,[47] likewise invested in a range of industries, including aviation. The country's main aim in making these investments was economic development.[48] Iran negotiated, but ultimately did not consummate, a $300 million stake in the then-troubled (later bankrupt) Pan Am Airlines.[49] Instead, it purchased jets from TWA.[50] The Bank of Iran also extended a $75 million loan to the financially troubled defense contractor Grumman, at least part of which went to a $1.7 billion dollar fighter-jet purchase.[51] Iranian banks also invested in real estate, including a $500 million project with offices, apartments, and a shopping mall in New Orleans.[52] As part of its diversification scheme, Iran also made significant investments in Egypt[53] and purchased a 25% interest in Krupp, the West German steel maker.[54]

Saudi Arabia, another nominal U.S. ally, sought a safe place to deposit its newfound wealth. Many investors chose bank deposits, corporate stocks, and U.S. treasury bills.[55] One Saudi official stated that his government sought primarily portfolio investment, but would not seek to control more than 5% of the shares of any particular U.S. company.[56] Indeed, according to one U.S. spokesperson for a Saudi bank, Saudi investors did not want "to be involved

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develop a world-class resort. The Kuwaitis sold the island in 1988 to KRA, a real estate development firm. *Id.*

44 Peter Arnett, *Wave of Foreign Investment Washing Across U.S.*, WASH. POST (July 24, 1979), D7, D9.

45 Michael Ross, *Persian Gulf Oil States: New Power Center Arising?* NASHUA TELEGRAPH (Mar. 10, 1975).

46 *See id.*

47 This is not to suggest that the United States and Iran have been close allies. The United States helped overthrow democratically elected Prime Minister Mosaddeq, and installed the Shah of Iran, in 1953. The United States provided military and financial support for the Shah until his 1979 ouster. JAMES G. BLIGHT, BECOMING ENEMIES 35–36 (2012).

48 *See* Hornig, *supra* note 39, at A6.

49 Marilyn Berger & Jack Egan, *Pan Am, Iran Eye Deal*, WASH. POST (Feb. 1, 1975), A1, A10.

50 *Id.* at A10.

51 *See* Jack Egan, *Petrodollar Glut Raises Foreign Investment Questions*, WASH. POST, (Dec. 10, 1974), D10 (noting that Iran offered the loan when Grumman's financial situation threatened the production of the plane); *See* Jim Hoagland, *Lockheed & the Arab Investors*, WASH. POST (Dec. 7, 1974), at A18.

52 Thomas Brooks, *Iran Bank Puts up Development Cash*, WASH. POST (Nov. 13, 1976), at E10.

53 Jim Hoagland, *Shah Pushing Closer Ties to Arab Nations*, WASH. POST (May 27, 1974), at A21.

54 *Iran Buys 25.01% Share of Krupp Conglomerate*, WASH. POST (Oct. 20, 1976), at C11. This deal followed Iran's 1974 purchase of a 25.04% interest in a Krupp subsidiary that produced steel.

55 Thomas W. Lippman, *Saudis Look West to Invest Year's $17 Billion Surplus*, WASH. POST (Feb. 14, 1977), at D11; Youssef M. Ibrahim, *U.S.-Arab Interests Form Banking Unit*, N.Y. TIMES (Mar. 20, 1978), at D1.

56 Hobart Rowen, *Saudi Sees Little U.S. Investment*, WASH. POST (June 8, 1975), at A2.

in any takeover operations, and will go only where [they] are wanted."[57] These investors must have been aware of the resentment and frustration many people from the United States directed towards the Saudi government after the oil shocks of the 1970s. They likely sought to keep a low profile to avoid suspicion.[58]

Saudi investors also acquired substantial interest in U.S. banks, including the Commonwealth Bank of Detroit.[59] In addition to being a safe place to invest, banks taught Saudi financiers about the operations of the U.S. financial system. As Ghaith Pharaon, the primary investor in the Detroit deal, noted, the bank provided connections to industrial giants like General Motors, Dow Chemicals, and Parke-David pharmaceuticals. These companies sought to invest in Saudi Arabia.[60]

This may seem like a lot of money, but despite the rhetoric, Asian investment was dwarfed by Western holdings. In 1976, OPEC countries, as the U.S. government then classified them, owned less than 1% of foreign direct investment in the United States.[61] Their share of U.S. portfolio investment exceeded this percentage, reaching a peak of 11% of total foreign-owned investment for one year before settling down into the low single digits.[62] With such modest holdings, OPEC—even at its brief apex—lacked the financial clout to sink the U.S. economy.

1. Congress Reacts

Congress reacted to the first wave of Asian investment in several ways. Members of Congress introduced over a dozen bills to scrutinize, restrict, or

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57 *Id.* The article describes how Kuwaiti, Saudi and Emirati merchant families formed an investment bank, Petra, to invest in the U.S. stock market.

58 *See also* Edward Cowan, *U.S.-Saudi Talks to Open This Week,* N.Y. TIMES (Feb. 23, 1975), at 5 ("Persian Gulf states want to know what industries Washington regards as closed to foreign investment or what the investment limits might be.").

59 *Foreign Investment Act: Hearing Before the Subcomm. on Securities, Comm. on Banking, Housing and Urban Affairs*, 94th Cong. 58, 81 (1975) (statement of James L. Pate, Ass. Sec'y for Econ. Aff., Dep't. of Comm.) [hereinafter Foreign Investment Act Hearings].

60 William K. Stevens, *Saudi Sees U.S. Bank as a 'Catalyst,'* N.Y. TIMES (Feb. 4, 1975), at 43. The deal incited significant local opposition, "most noticeably from the Jewish community." One Detroit lawyer, who claimed to own 59 shares of preferred stock, said he did not want to see Arabs or any other foreigners get "a stranglehold on America." *Id.* at 54.

61 Information about investment positions in the United States are gleaned from the Commerce Department's Bureau of Economic Analysis (https://www.bea.gov/scb/date_guide.asp). Ida May Mantel, *Foreign Direct Investment in the United States, 1976,* SURVEY OF CURRENT BUSINESS 26, 35–37 (Oct. 1977), http://bea.gov/scb/pdf/1977/1077cont.pdf.

62 *See* Russell B. Scholl, *The International Investment Position of the United States: Developments in 1975*, SURVEY OF CURRENT BUSINESS 29, 32 (Aug. 1976) (listing total foreign-owned assets), https://www.bea.gov/scb/pdf/1976/0876cont.pdf. *See also* Christopher L. Bach, *OPEC Transaction in the U.S. International Accounts, 1972-1977*, SURVEY OF CURRENT BUSINESS 21, 22 (Apr. 1978) (listing assets owned by OPEC countries), http://bea.gov/scb/pdf/1978/0478cont.pdf.

require public disclosure of foreign investment.[63] In the end, only two bills became law, serving primarily to collect information on foreign investment.[64]

Anti-Asian sentiment first appeared in Congressional hearings on Japanese investment in Hawaii.[65] Bankers, journalists, officials, and businessmen described a sharp uptick in Japanese investment in the early 1970s.[66] They also noted the widespread and generally negative reaction of many Hawaiians.[67]

A recurring theme at the hearings, conducted by Japanese-American Senator Daniel Inouye, was "anti-Japanese racism."[68] The Governor of Hawaii testified that citizens of Hawaii expressed "fear and suspicions about the motives of foreign investors."[69] He also noted "how unrewarding and dangerous" such attitudes were.[70] A Hawaiian newspaper publisher, reflecting on recent media coverage, observed "racial undertones to the negative reactions" of the general public towards Japanese investment and Asian investment more generally.[71] The publisher cited examples where Japanese investments aroused public attention and contrasted that with the lack of "public indignation or emotional response" toward investors from Britain or Canada.[72]

Some anti-Japanese sentiment may have stemmed from Japan's 1941 attack on Pearl Harbor, which prompted the United States to enter World War II. Despite a generation of cooperation, and a strong political alliance between the two countries, some people from the United States may have borne a grudge against the citizens of a former enemy. This is not to justify animosity against Japanese investment, but rather to suggest a possible explanation for its origins.

Congress also convened hearings to review Middle Eastern investment in the United States. Unlike the Japanese tourism hearings, where participants reported on anti-Japanese pronouncements, the Senators themselves

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63 Peter Milius, *Arabs Investing Cautiously: Feared Intrusions into U.S. Economy Not Developing*, WASH. POST (June 1, 1975), at 2.

64 These include the Foreign Investment Study Act, Pub. L. No. 93-479 (1974), and the International Investment and Trade in Services Survey Act of 1976, Pub. L. No. 94-472 (1976). Both collect information on inbound investment.

65 *See* Tourism Subcomm. Hearing, *supra* note 26, at 33 (statement of Kideo Kajikawa, President, Honolulu Japanese Chamber of Commerce). Indeed, according to one speaker, the term "foreign investments in Hawaii" means "Japanese investments, even though there are numerous investors from the continental United States, Great Britain, Canada and other countries in the world." *Id*.

66 *Id*. at 68 (statement of Russell A. Taussig. Prof. Finance, Univ. Hawaii) While Japanese investment in Hawaii remained constant for the 1970s, it increased 20% in 1971 and 50% in 1972).

67 *Id*. at 67. One report indicated that 66% of Hawaiian residents opposed additional Japanese investment in Hawaii.

68 *Id*. at 30. This was not the only reason cited for public outcry to Japanese investment.

69 *Id*. at 4 (statement of Hon. George Ariyoshi, Governor of Hawaii).

70 *Id*.

71 *Id*. at 39–40 (statement of George Mason, President, Crossroads Press, Inc.).

72 *Id*. at 40.

expressed discriminatory sentiment. Take the following conflation of Arabs with Nazis by New York republican, Jacob Javits:

> The Arabs say [there is a war going on]. They say they put a boycott on the world. They jacked up the price [on oil] in order to make the world do what they want to do in the war against the Israelis. That is what they say. You know, we learned from Hitler, you have to take them at their word.[73]

Senator Javits's testimony is extraordinary in many ways. The use of the indeterminate word "Arabs" condemns an entire ethnicity for the actions of a tiny elite. The comparison to Hitler likewise defies logic. Yet it forms part of the oppositional discourse politicians use to raise suspicions about foreign investment.

Javits also feared that "Arabs" would take over U.S. blue-chip companies. When that happens, "control will be exercised by people who as a group are technologically backward [and] subject to the direction of governments which have no mastery of the complexities of the multinational corporation and its operations or of the public interest involved."[74] Javits incited fear of Asian capital by suggesting that Arabs, who lacked the intelligence to manage multinational corporations, would try to "take over" U.S. companies. Javits was hardly alone in his fear of Arabs.

Senator Howard Metzenbaum, Democrat of Ohio, also voiced concern about "Arab" control of U.S. companies. He believed that OPEC nations would use their newfound wealth "to acquire uncontested control of 51 percent of the voting stock in eleven of our largest companies [including] A.T. & T., Boeing, Dow Chemical, General Dynamics, General Motors, IBM, ITT, Lockheed, United Airlines, U.S. Steel and Xerox."[75] He further surmised that "by 1979, the OPEC nations would have enough surplus dollars . . . to buy 100 percent of all of the stock of all of the companies listed on the [New York Stock Exchange]."[76]

Metzenbaum decried the "nouveau riche OPEC nations" for their "reckless disregard for public responsibility. They are determined that with their wealth they will go where they want, and do what they please. As is so typical of the nouveau riche, they expect to use their wealth to exercise economic, political and social pressure."[77] Despite Metzenbuam's characterizations, Middle Eastern investors primarily sought to diversify their portfolios, develop domestic industries, gain exposure to capital markets, and learn about

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[73] Foreign Investment Act Hearings, *supra* note 59, at 41 (statement of Sen. Jacob Javits, Member, Senate Banking Committee).

[74] *Id.* at 44.

[75] *Id.* at 58 (statement of Ret. Sen. Howard Metzenbaum).

[76] *Id.*

[77] *Id.* at 59.

corporate governance. Many of the blue-chip companies in which they invested—Pan Am, AT&T, Krupp—deployed advanced technologies. If anything, Middle Eastern investors were using capital to modernize their economies, and reduce their reliance on oil revenues.

To be sure, geopolitics incited some of the anti-Arab sentiment. The Oil Producing and Exporting Countries (OPEC)—of which Saudi Arabia, Iran, and Kuwait were all members—quadrupled the price of gasoline in 1973. The "oil shocks," which contributed to America's longest economic recession since the Great Depression,[78] as well as high unemployment rates and a long period of inflation surely contributed to resentment against Middle Eastern investment.[79] In this harsh economic climate, Middle Eastern investors proved easy scapegoats, despite the fact that their economic presence benefited capital-starved U.S. businesses.

Arab investors seized on congressional attitudes.[80] One Saudi official noted that Congress's reaction made some Saudis believe their investments were not secure in the United States.[81] He overstated his claim that, "We are not going to invest in the Western world at all."[82] But his concern was valid. Congressional testimony sends strong signals to outside observers, particularly those unfamiliar with the rough and tumble of congressional politics. A critical remark about foreign investors may score easy points for a U.S. politician, but it could also appear as front-page news in the foreign country so criticized.[83]

2. The Birth of CFIUS

By 1975, the use of the term "foreign investment" signaled anxiety over Asian investment. Congressional hearings revealed tensions about Japanese investment in Hawaii and Middle Eastern portfolio investment. Members of Congress responded with a spate of bills to restrict foreign investment.[84]

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78 *See* NAT'L BUREAU OF ECON. RESEARCH, *U.S. Business Cycle Expansions and Contractions*, http://www.nber.org/cycles.html (last visited Nov. 26, 2016) (listing various recessions from the 1850s to the present).

79 *See* U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, *Labor Force Statistics from the Current Population Survey*, http://data.bls.gov/timeseries/LNU04000000?years_option=all_years&periods_option=specific_ periods&periods=Annual+Data (last visited Nov. 26, 2016).

80 Hobart Rowen, *Investing Plan Cut by Arabs*, WASH. POST (Apr. 23, 1975), at F2. The article describes a Treasury official's visit to the Middle East, where he found officials in Abu Dhabi, Kuwait and Qatar disturbed over U.S. fears that Arab investors sought to take control of U.S. companies. The officials stressed that they are mainly interested in minority positions of a portfolio nature and in real estate.

81 Hobart Rowen, *Saudi Sees Little U.S. Investment*, WASH. POST (June 8, 1975), at A2. Saudi officials told a Treasury official that the Saudi government is interested in portfolio investments "not to exceed 5 per cent of any one company."

82 *Id.*

83 Ikuo Kabashima & Hideo Sato, *Local Content and Congressional Politics: Interest-group Theory and Foreign-policy Implications*, 30 INT'L STUDIES QUARTERLY, 295, 297 (1986).

84 John C. Culver, *Foreign Investment in the United States*, 16 FOREIGN POLICY 159 (1974).

The Ford Administration sought to allay congressional concerns and maintain America's traditionally open investment environment[85] by establishing the Committee on Foreign Investment in the United States, (CFIUS).[86] Through CFIUS, the Ford Administration maintained executive branch control over investment policy; it would retain the United States' traditional openness to foreign investment and reinforce political alliances across Asia. By bringing together eight federal agencies,[87] CFIUS ensured that foreign investment still flowed into the United States and broadly served the national interest.

CFIUS is commonly regarded as the genesis of U.S. investment law. Together with the 1988 Exon-Florio Amendments and the 2007 Foreign Investment and National Security Act, CFIUS forms a key plank of the regulatory apparatus.[88] At its inception, then, U.S. investment law responded to fear of Asian investment. In continuing this historical overview, this foundational concern resurfaces regularly.

B. The Second Asian Wave: The 1980s

The second major wave of Asian investment reached U.S. shores in the 1980s. While the first wave of Japanese investment into Hawaii faced *local* resistance, its second wave incurred a hostile reception of national proportions in the 1980s. Why? Japan's economic success in the 1960s and 1970s made it the United States' main economic rival by the 1980s.[89] Across a wide range of products—television sets, stereos, cars, motorcycles, computers, semiconductors—Japanese companies manufactured goods often superior in quality and generally comparable (or lower) in price than their U.S. counterparts.

At the same time, Japan maintained relatively high barriers to trade and

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[85] Jack Egan, *U.S. to Propose Informal Foreign Investment Curbs,* WASH. POST (Mar. 2, 1975), at F1 (noting the Ford Administration's fear that the broad-brush approach of the proposed Foreign Investment Act could trigger retaliation against U.S. investments abroad, or reduce foreign investment in the US).

[86] Exec. Order No. 11,858, 40 Fed. Reg. 20,263 (May 7, 1975). While membership has changed over the years, the current composition includes the heads of the following departments and offices: Treasury, Justice, Homeland Security, Commerce, Defense, Energy, State, Science and Technology Policy. *See* U.S. DEP'T OF TREASURY, *Composition of CFIUS*, http://www.treasury.gov/resource-center/international/foreign-investment/Pages/cfius-members.aspx (last visited Nov. 26, 2016).

[87] Executive Order 11858 lists the Secretaries of State, Treasury, Defense, and Commerce; the U.S. Trade Representative; the Chairman of the Council of Economic, the Attorney General, and the Director of Office and Management and Budget. *Id.* at 1(a).

[88] This Article does not discuss the 1992 Byrd Amendment, which expanded CFIUS' investigatory remit to include government-controlled investments. *See* JAMES K. JACKSON, CONG. RESEARCH SERV., RL34082, EXON-FLORIO FOREIGN INVESTMENT PROVISION, COMPARISON OF H.R. 556 & S. 1610 13 (2007).

[89] Japan was the world's third largest economy in 1970, behind the United States and Soviet Union.

investment. This hurt U.S. exporters looking to break into the Japanese market, and it also created barriers for U.S. investors.[90] The result was an increasingly large trade deficit between Japan and the United States—one that persists to this day.[91] This imbalance heightened tensions between the two countries and led to a series of negotiations, accommodations, and agreements to defuse tensions.

Japanese investment increased over the course of the 1980s. By 1990, Japan was the largest investor in the United States.[92] Japanese investors were active in banking, manufacturing (cars, electronics, machinery), and real estate.[93] The Japanese government also accumulated large quantities of U.S. government debt. From the point of view of the trade deficit, Japanese direct investment should have been welcome. When Honda builds a factory in Ohio (or Nissan in Tennessee, Toyota in Kentucky, or Mitsubishi in Illinois), it manufactures cars in the United States. These products contribute to U.S. manufacturing, reduce U.S. purchases of Japanese goods, and theoretically reduce the trade deficit.[94]

Yet many in Congress criticized Japanese investment.[95] They highlighted the negative effects of Japanese economic relations with the United States, introduced bills to restrict foreign investment, and engaged in political

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[90] *See* Thomas J. Schoenbaum, *Trade Friction with Japan and the American Response*, 82 MICH. L. REV. 1647, 1656 (1984) (noting Japanese efforts to lower barriers to trade and investment in the 1970s and 1980s); Peter Reynolds, *Foreign Investment in Japan: The Legal and Social Climate*, 18 TEX. INT'L L. J. 175, 186–89 (1983) (describing three increasingly less restrictive phases of Japanese investment policy from World War II to 1983).

[91] In 2013, the U.S. logged a $73.4 billion trade deficit with Japan, though it is rarely mentioned in major media. One reason might be the U.S.'s $318.7 billion trade deficit with China, which tends to capture more headlines. *See* U.S. CENSUS BUREAU, *Trade in Goods with China*, https://www.census.gov/foreign-trade/balance/c5700.html (last visited Nov. 4, 2016).

[92] GRAHAM & KRUGMAN, *supra* note 29, at 22.

[93] *See id.* at 24–28; Cristina Lee, *Japan's US Investments Top $10 Billion*, J. COMM., Aug. 12, 1987 (discussing Japanese investment in electrical machinery, general machinery and transportation equipment).

[94] Of course, international investment also helps transfer advanced technologies to the United States, and employs U.S. workers.

[95] Many Members of Congress expressed anti-Japanese sentiment in congressional hearings. This article, however, focuses only on those statements relating to Japanese trade and investment. For additional statements, *see* Associated Press, *Some Japanese-Americans hear bigotry in harsh trade talks*, NASHUA TELEGRAPH, Apr. 11, 1985. The article recounts several anti-Japanese statements made by U.S. Members of Congress, in congressional hearings. Senator John Danforth complained the Japanese "are sucking the world dry." Senator Ernest Hollings noted the Japanese "love all those bowings – they have been doing that for 25 years and getting away with it." Senator John Heinz noted when the "Japanese get their little fork into U.S. – or chopsticks . . . they really to stick it to us." Representative Richard Schulze submitted into testimony a letter, describing a Japanese negotiating technique, that read "The Japs even have a word for it called '*harage'* which basically means saying one thing when you really mean the opposite." The congressman is referring to *haragei* (literally, "stomach art"), a form of indirection where one expresses his intention through non-verbal means, rather than direct language.

theatre. They linked Japanese investment to twentieth century colonial expansion, surmising that Japan once again aspired to "worldwide dominance" in the semiconductor industry.[96] Representative Helen Bentley pursued the analogy even further, referencing the "corporate war machines of both Germany and Japan."[97] She cited Japan's colonial project in the early twentieth century as proof of its imperial ambitions in the 1980s.[98]

U.S.–Japan economic tensions came to a head when Toshiba, a Japanese computer company, sold advanced tools to Russia, violating an international agreement to ban high-tech exports to the Soviet bloc.[99] Members of Congress immediately denounced Japan. They congregated on Capitol Hill before a group of reporters, smashed a Toshiba radio, and called for a consumer boycott of Toshiba products.[100]

The recital revealed much about congressional anxiety over Japan. First, by holding the performance on Capitol Hill, Members of Congress made their statement on highly symbolic ground. Second, the violence itself was striking. To the extent the general public saw members of Congress, at least in the mid-1980s, it was typically in scripted speeches on the House floor. Publicly smashing a radio departs from the decorous behavior normally associated with elected representatives. Third, and most germane to this Article's thesis, the violence only targeted a Japanese entity. Kongsberg, a Norwegian state-owned defense contractor, also sold sensitive software to the Soviet Union in the same transaction.[101] Yet no one in Congress burned a Kongsberg effigy, or publicly directed animosity towards the European company. Later, the Senate banned both Toshiba and Kongsberg from exporting equipment

[96] *Semiconductors and the Electronics Industry: Hearing Before the Subcomm. on Science, Tech., and Space*, 101st Cong. 70 (1990) (statement of Peter H. Mills, Senior Vice President, Administration, Sematech).

[97] 136 Cong. Rec. H2036-04 (1990) (statement of Rep. Bentley).

[98] *Id.* at H2038. Representative Bentley's proof of recent Japanese imperialism was the construction of Japanese schools in the United States, and retirement homes in Australia.

[99] John Burgess, *Japan Worries that Scandal Has Hurt Relations with U.S.*, WASH. POST, (July 16, 1987), at E1. The Coordinating Committee for Multilateral Export Controls (Cocom) was established to restrict transfer of strategic technology to the Soviet Union and other communist nations. The enforcement mechanism depended upon the voluntary cooperation of the various members. *See generally* Wende A. Wrubel, *The Toshiba-Kongsberg Incident: Shortcoming of Cocom, and Recommendations for Increased Effectiveness of Export Controls to the East Bloc*, 4 AM. U.J. INT'L L. & POL'Y 241, 244, 265 (1989).

[100] Dave Skidmore, *State Department Says Punitive Efforts May Backfire*, ASSOCIATED PRESS (July 1, 1987).

[101] David E. Sanger, *Retaliation Demanded in High-Tech Diversion*, N.Y. TIMES (June 17, 1987), at D1.

to the United States for a number of years.[102] Nonetheless, the political theater and negative characterizations targeted only Toshiba, not Kongsberg.[103]

1. CFIUS Responds to Japan: Fujitsu & Fairchild

Toshiba was not the only Japanese company to make headlines in the United States. Shortly before the radio-smashing incident, a proposed Japanese investment thrust CFIUS into national headlines.[104] The Japanese computer company Fujitsu sought to buy Fairchild, a pioneering high-tech company once known as "the progenitor of Silicon Valley."[105] In 1979, French multinational Schlumberger purchased Fairchild for $425 million.[106] Schlumberger tried to revive the company's fortune[107] but seven years later decided to sell its stake to Fujitsu for $200 million.[108] However, CFIUS's investigation into the transaction,[109] as well as strong opposition from cabinet officials,[110] pushed Fujitsu to withdraw its bid.[111]

When U.S. Deputy Trade Representative Mike Smith (then in Brazil) heard that Fujitsu dropped its bid, his reaction was telling. According to the *Los Angeles Times*, Smith "jumped from his chair, thrust both fists high over his head in a traditional Japanese salute and trumpeted: 'Banzai! Banzai!'"[112] Smith's conduct evoked Japanese fighter pilots from World War II, who

[102] . . . *But Not That*, WASH. POST (July 3, 1987) at A26 ("Reverting to the politics of the sledgehammer in the U.S.–Japanese alliance would massively and stupidly compound the damage done by the Toshiba affair.").

[103] As Senator Jake Garn testified before the Senate Subcommittee on International Finance and Monetary Policy, "[i]t's time that an example be made of Toshiba . . . We ought to really hurt Toshiba and let the word out to high-technology manufacturers around the world." Sanger, *supra* note 101.

[104] *See, e.g.*, Stuart Auerbach, *Cabinet to Weigh Sale of Chip Firm: Fujitsu Bid Provokes Unusual U.S. Move*, WASH. POST (Mar. 12, 1987) at E1 (recounting Commerce Secretary Malcolm Baldridge's comments to a group of reporters that Fujitsu's takeover should be blocked); David E. Sanger, *Japanese Purchase of Chip Maker Canceled After Objections in the U.S.*, N.Y. TIMES (Mar. 17, 1987), at A1.

[105] Andrew Pollack, *Fairchild Being Sold to National: Schlumberger Accepts Offer*, N.Y. TIMES (Sept. 1, 1987), at D1.

[106] Victor F. Zonana, *Schlumberger Will Sell Its Ailing Fairchild Unit: National Semiconductor Will Pay $122 Million; Analysts Describe Deal for Chip Maker as a 'Steal,'* L.A. TIMES (Sept. 1, 1987), at 1.

[107] *See* Eduardo Lachica, *Pentagon Split on Implications of Bid by Fujitsu for Fairchild Semiconductor*, WALL ST. J. (Dec. 29, 1986), at 4. Fairchild was bleeding tens of millions of dollars a year by the mid-1980s.

[108] Pollack, *supra* note 105.

[109] Lachica, *supra* note 107.

[110] Auerbach, *supra* note 104.

[111] National Semiconductor, a U.S. high-technology firm, ultimately bought Fairchild for $122 million in 1987. Christine Winter, *National Semiconductor to Buy Fairchild*, CHICAGO TRIB. (Sept. 1, 1987), § 3, at 3.

[112] Donna K. Walters & William C. Rempel, *Trade War Victim: One-Time Winner is Out of Chips*, L.A. TIMES (Dec. 1, 1987), at 5.

shouted "Banzai" before smashing their planes into enemy warships.[113] Four decades after the end of World War II, Smith's triumphalism displays discomfort, if not outright hostility, towards Japan. Since the U.S.T.R. participates in the CFIUS process, it is possible to impute Smith's anti-Japanese sentiment to CFIUS itself.

Another cabinet official viewed Fujitsu's bid "as part of a master plan of the Japanese to take over the U.S. information industry."[114] A degree of caution seems warranted before imputing such positions to U.S. official policy. These positions are, however, indicative of strong anti-Japanese sentiment in the executive branch.

2. Congress Responds: Exon-Florio Amendments

This outpouring of anti-Japanese sentiment did not merely express negative stereotypes about Asians. It also had legislative consequences. The Exon-Florio Amendment is the most significant development in U.S. international investment law since the establishment of CFIUS. In 1988, Congress passed the Exon-Florio amendments to the Defense Production Act of 1950. The newly revised law empowered the President to block foreign investments that, in his estimation, threatened national security.[115]

According to its sponsors, Senator James Exon and Representative James Florio, the law was a direct response to Fujitsu's attempted acquisition of Fairchild and was designed to bolster U.S. national security.[116] However, as we will explore below, the "national security" ramifications of foreign investment are often exaggerated, as they were here. Instead, anti-Asian sentiment animated opposition to foreign investment and generated support for the Exon-Florio amendments in particular.[117]

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[113] Literally "10,000 years," roughly equivalent to "Long live X" (in English) or "Viva X" (in Spanish).

[114] William C. Rempel & Donna K.H. Walters, *The Fairchild Deal: Trade War: When Chips Were Down*, L.A. TIMES (Nov. 30, 1987), at 2.

[115] 50 U.S.C. app. § 2170 (2013).

[116] *See* Jose E. Alvarez, *Political Protectionism and United States International Investment Obligations in Conflict: The Hazards of Exon-Florio*, 30 VA. J. INT'L L. 1, 56 (1989). Senator Exon invoked both the Fujitsu takeover and the failed takeover attempt of the Goodyear tire company by British investor, James Goldsmith, in his remarks. *See* 100 CONG. REC. S8881 (1988) (statement of Sen. Exon). Representative Florio complained to his colleagues on the House floor that, during the Fujitsu "takeover," the "President found that he had very little authority to act. This provision will give the President important powers to protect our national security." *See* 100 CONG. REC. H8143 (1988) (statement of Rep. Florio).

[117] Alvarez describes the animosity towards the Fujitsu acquisition in largely political terms. For example, he notes that industry observers compared the Fujitsu takeover to "selling Mount Vernon to the redcoats." *See* Alvarez, *supra* note 116, at 57. However, as we have seen, congressional opposition to the deal frequently involved racist caricature and thinly veiled attacks on Japanese characteristics.

C. The Third Asian Wave: The 2000s

By the turn of the millennium, after nearly a decade of economic stagnation, Japan was no longer viewed as a threat to U.S. prosperity. Two groups from Asia took its place. After decades of economic growth, China represents a potential threat to U.S. national interests. Additionally, "Arab" investment has once again emerged as a source of tension.

1. Chinese Investment

Chinese investment has attracted an enormous amount of attention in the past decade. Yet China, like the Middle East and Japan in the 1970s, remains a relatively minor source of U.S. foreign direct investment. Chinese investment amounted to $2.42 billion in 2013, making it the fourteenth largest investor in the United States—after South Korea, Norway, and Mexico.[118] That same year, China provided approximately 1% of the $236 billion dollars of inbound investment.[119]

Despite its relatively small size, Chinese investment in certain sectors has attracted a significant amount of attention. In 2005, the state-owned China National Offshore Oil Company (CNOOC) bid on Unocal, the U.S. oil company. Congress's reaction was swift and severe. Members of Congress portrayed CNOOC's potential acquisition as a threat to national security,[120] a challenge to market-based economics,[121] and evidence of China's "national strategy of domination of energy markets and the Western Pacific."[122] Representative Duncan Hunter suggested the transaction would reduce U.S. leverage in the global war on terror because China would gain control of Unocal's pipelines in Asia.[123] In addition, Unocal—in conjunction with other major oil companies—had worked closely with Central Asian governments

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[118] *Foreign Direct Investment in the United States: 2014 Report*, ORG. FOR INT'L INVESTMENT 5 (2014), http://www.ofii.org/sites/default/files/FDIUS2014.pdf. Norway's economy is about one-twentieth the size of China's.

[119] *Id.* at 3.

[120] This was the topic of a three-hour congressional hearing before the House Armed Services Committee.

[121] Forty-one members of Congress asked President Bush to stiff review the deal, citing increased competition for U.S.-based companies in the global oil market, technology transfer implications, and Chinese subsidies to its domestic gas industry. Dennis K. Berman, *Cnooc's Unocal Bid Draws U.S. Legislators' Scrutiny*, WALL ST. J. (June 24, 2005). Moreover, since CNOOC offered a higher price than Chevron ($67 per share, against Chevron's $60), many skeptical commentators believed the deal amounted to a rejection of market capitalism. Of course, it could have been that Unocal was worth more to CNOOC than it was to Chevron. China's appetite for natural resources in the 2000s was vast.

[122] *National Security Implications of the Possible Merger of the China National Off-shore Oil Corporation (CNOOC) with Unocal Corporation: Hearing Before the Comm. On Armed Serv. H.R.*, 109th Cong. 110–12 (2005) (statement of James Woolsey, former Director of C.I.A.).

[123] *Id.* (statement of Rep. Duncan Hatcher, Chair, H. Armed Services Comm.) [hereinafter Hatcher Statement].

to develop a pipeline linking Turkmenistan, Afghanistan, and Pakistan.[124] Unocal withdrew from the consortium in 1998, but it had already spent years negotiating with the Taliban by that time.[125] It also had set up pipelines in Burma.[126] Both experiences, as well as potential U.S. government involvement in setting up these projects, would have raised national security concerns. Given the various risks associated with working in these areas, Unocal may very well have partnered with U.S. government officials on such deals.

Some expressed concern about government ownership of a domestic oil company.[127] CNOOC Limited is 70% owned by the Chinese government, while the remaining 30% of its shares are publicly traded on the New York and Hong Kong stock exchanges.[128] Others feared the Chinese government would "lock up" Unocal's oil supplies, keeping them out of U.S. hands.[129]

Outside Washington, DC, some expressed doubt about these concerns. In an article entitled "Bogus fears send the Chinese packing," the *Economist* theorized that Unocal's oil reserves were not large enough to jeopardize world oil markets or disrupt U.S. access.[130] Others characterized Congress's national security concerns as "disingenuous."[131]

The CNOOC transaction was the first in a string of Chinese acquisitions opposed by the federal government. Between 2008 and 2011, CFIUS blocked three investments from the Chinese telecommunications company, Huawei.[132] In 2012, the House Intelligence Committee issued a report highlighting national security concerns about Huawei.[133] Interestingly, the Committee's report adduced no evidence of a national security threat, at least in

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[124] Paul Hueper, *Energy investment a priority*, PETROLEUM ECONOMIST (Dec. 2, 2002).

[125] *See Taleban in Texas for talk on gas pipeline*, BBC (Dec. 4, 1997), http://news.bbc.co.uk/2/hi/world/west_asia/37021.stm.

[126] *See* Doe v. Unocal, 395 F.3d 932 (9th Cir. 2003) (alleging human rights violations in connection with Unocal's construction of a pipeline in Burma).

[127] Hatcher Statement, *supra* note 123.

[128] DICK K. NANTO ET AL., CONG. RESEARCH SERV., RL33093, CHINA AND THE CNOOC BID FOR UNOCAL: ISSUES FOR CONGRESS 7 (2006).

[129] Brad Foss, *Experts say national security threats not clear in CNOOC bid for Unocal*, ASSOCIATED PRESS (June 28, 2005) (quoting Richard D'Amato, chairman of U.S.–China Economic and Security Review Commission).

[130] *See Bogus fears send the Chinese packing*, ECONOMIST (Aug. 2, 2005) http://www.economist.com/node/4244565.

[131] William Pesek, Jr. *No fury like a bidder scorned?*, INT'L HERALD TRIB. (Feb. 27, 2006). Pesek describes racism in the European reaction to a proposed acquisition of French Arcelor by Mittal Steel—a company based in Rotterdam and founded by Indian-born Lakshi Mittal.

[132] *See* Scott M. Flicker & Dana M. Parsons, *Huawei – CFIUS Redux: Now It Gets Interesting*, PAUL HASTINGS (Mar. 2011), https://www.paulhastings.com/docs/default-source/PDFs/1868.pdf (noting CFIUS scuttled Huawei investments in 3Com in 2008, 2Wire and Motorola in 2010, and 3Leaf in 2011).

[133] *See* H.R., PERMANENT SELECT COMM. ON INTELLIGENCE, *Investigative Report on the U.S. National Security Issues Posed by Chinese Telecommunications Companies Huawei & ZTE* (Oct. 8, 2012), https://intelligence.house.gov/sites/intelligence.house.gov/files/documents/huawei-zte%20investigative%20report%20(final).pdf ("Intelligence Report"). It is fairly unusual for a House committee to issue a report that singles out a company (or two) in this way.

the unclassified version made available to the public. In lieu of evidence, the report cited Huawei's evasiveness to questions posed by members of Congress.[134] The report also conflated Huawei with China, as if all Chinese entities, even privately held ones, acted on behalf of the state.[135] In sum, it repeated many of the mistakes of earlier interactions between the U.S. government and Asian investors.

2. Arab Investment: Dubai Ports World

The terrorist attacks of September 11, 2001, once again provoked anti-Arab sentiment in broad swathes of the United States. The twenty-one 9/11 hijackers hailed from Arab states, including allies such as Saudi Arabia, Egypt, and the United Arab Emirates.[136] But that does not mean every Arab person or investor represents a threat to U.S. national security. Still, many people from the U.S. engage in racial profiling of anyone who appears "Middle Eastern, Arab or Muslim."[137]

The animosity was displayed most prominently when Dubai Ports World's ("DPW"), owned by the Dubai sovereign wealth fund, proposed an acquisition of the English port operator, Peninsular and Oriental Steam Navigation Company ("P&O"). At the time, DPW was one of the world's largest port operators, running sixty terminals on six continents.[138] Had the investment gone through, DPW would have acquired one of the world's oldest port operators, as well as the ability to operate a very small number of terminals in the United States.[139]

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[134] The first recommendation, for example, state that the "United States should view with suspicion the continued penetration of the U.S. telecommunications market by Chinese telecommunications companies." The sweeping nature of this statement, the failure to distinguish *which* Chinese companies pose a threat, and the lack of evidence of Huawei's wrongdoing pose major challenges to the report's credibility. *Id.* at vi.

[135] Huawei is a private company owned by its employees. Its founder, Ren Zhengfei, worked as an engineer with the People's Liberation Army in the 1980s. To be sure, its ownership structure is far from transparent. But one cannot thus conclude that it operates exclusively at the behest of the Chinese government, or Chinese Communist Party. *See generally* Curtis J. Milhaupt & Wentong Zheng, *Beyond Ownership: State Capitalism and the Chinese Firm*, 103 GEO. L.J. 665 (2015).

[136] Fifteen came from Saudi Arabia, two from the United Arab Emirates, one from Egypt and one from Lebanon. *See* CNN LIBRARY, *September 11th Hijackers Fast Facts*, CNN (last updated Sept. 5, 2016), http://www.cnn.com/2013/07/27/us/september-11th-hijackers-fast-facts/.

[137] Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1576 (2002) (describing five types of racial profiling that led to the detention of over twelve hundred non-citizens). *Id.* at 1576.

[138] *See* DP WORLD VANCOUVER, *Who We Are*, https://www.dpworld.ca/about-us/ (last visited Nov. 26, 2016).

[139] Jonathan Weisman & Bradley Graham, *Dubai Firm to Sell U.S. Port Operations*, WASH. POST (Mar. 10, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/03/09/AR2006030901124.html.

DPW submitted the transaction for CFIUS review in late 2005,[140] enlisting the support of political operatives from both parties: former President Bill Clinton, former Secretary of State Madeline Albright, and former Senate majority leader Bob Dole.[141] CFIUS approved the investment on January 17, 2006, provoking a congressional maelstrom that would ultimately scupper the deal

Both on and off the floor, members of Congress used charged language to derail the deal. Representative Barney Frank rebuked the Bush Administration for its "lapse in judgment" by approving the investment in the first place.[142] He stated:

> Someone should have said to the people from Dubai that they are very nice people with whom we have no particular quarrel, but they should not take it personally if we explain to them that in the current context in the world, having *people from their part of the world controlling shipping* was likely to cause more trouble than it was worth . . . [143]

Representative Frank used more genteel language than Senators Javits and Metzenbaum did in the 1970s. But the assumption remains unchanged: Arabs cannot be trusted. The trouble with Frank's statement is that it engages, albeit politely and discreetly, in racial profiling. It disqualifies an investor not on its own merits—whether it can produce the good or deliver the service—but due to its ethnicity.

Representative Duncan Hatcher also denounced the transaction, calling Dubai "a bazaar for terrorist nations to receive prohibited components from sources from the free world and the nonfree world."[144] Senator Frank Lautenberg invoked religious allegory, intoning, "[d]on't let them tell you that it's just a transfer of title. Baloney. We wouldn't transfer the title to the Devil; we're not going to transfer it to Dubai."[145] Such language uses new forms of anti-Arab rhetoric (i.e. terrorism, religion) to dress up old antagonisms.[146]

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[140] *Id.*

[141] Stephanie Kirchgaessner, *Bill Clinton helped Dubai on ports deal*, FIN. TIMES (Mar. 1, 2006), https://www.ft.com/content/60414c4c-a95e-11da-a64b-0000779e2340; Jeffrey H. Birnbaum, *Role of Sen. Dole's Husband at Issue*, WASH. POST (Feb. 24, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/02/23/AR2006022301882.html; John Cranford, *Defining 'Ours' in a New World*, CQ WEEKLY (Mar. 3, 2006).

[142] *One Year After Dubai Ports World, Hearing Before the Comm. on Fin. Serv., Comm. on Foreign Inv. in the U.S. (CFIUS)*, 110th Cong. 12 (2007) (statement of Rep. Barney Frank, Chair, H. Comm. on Fin. Serv.).

[143] *Id.*

[144] *National Security Implications of the Dubai Ports World Deal to Take Over Management of U.S. Ports: Hearing before the H. Armed Serv. Comm.*, 109th Cong. 3 (2006).

[145] *Id.*

[146] Many scholars agree that Islamophobia constitutes a "new racism," to be placed alongside previous biological, cultural, and social constructions of race. *See generally* Nasar Meer and Tehseen Noorani, *A Sociological Comparison of Anti-Semitism and Anti-Muslim Sentiment in Britain*, 56 SOC. REV. 195, 198

In the end, Congress passed a bill prohibiting the acquisition of "any leases, contracts, rights or other obligations of P&O Ports by Dubai Ports World," or "any other legal entity affiliated with or controlled by DPW."[147] DPW withdrew its bid the following day. Representative Jerry Lewis fired a celebratory salvo, calling the annulment "a rifle shot crack to block the Dubai Ports World deal only. This is a national issue. This is a national security bill. We want to make sure that the security of our ports is in America's hands . . . ."[148]

Just two months earlier, CFIUS, under President George W. Bush, approved the transaction. While the Department of Homeland Security raised objections about the sale to DPW,[149] U.S. intelligence agencies found no "derogatory information" about DPW. DPW also agreed to cooperate with law enforcement officials in the future, whereupon Homeland Security gave its approval.[150] It is unlikely that Homeland Security lacked salient information about a major national security threat. But it is even more unlikely that a member of Congress possessed information about a national security threat that Homeland Security did not.

3. Congress Reacts: Foreign Investment & National Security Act of 2007

Congress responded to the Unocal and Dubai Ports World incidents by passing the 2007 Foreign Investment and National Security Act (FINSA). As it did with Exon-Florio, Congress empowered the executive to scrutinize and restrict foreign investments, this time by expansively defining national security.[151] The concept now included critical technologies, critical infrastructure (including energy assets), the "capacity of domestic industries to meet national defense requirements, including the availability of human resources, products, technologies, materials, supplies and services," as well as other features.[152]

Members of Congress, just as they did with the Exon-Florio amendments, attributed the passage of FINSA to Asian investment. Senator Chris Dodd observed the following during congressional hearings:

> Concern within Congress about a transaction that would transfer control of terminal operations to a company owned by a Persian Gulf

(2008).

[147] JAMES K. JACKSON, CONG. RESEARCH. SERV., RL33388, THE COMM. ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) (2016).

[148] *House Panel Votes to Block Ports Deal*, FOX NEWS (Mar. 9, 2006).

[149] *DHS Protested Port Takeover*, ASSOCIATED PRESS (Feb. 26, 2006), http://www.military.com/NewsContent/0,13319,89396,00.html.

[150] *Id.*

[151] Defense Production Act of 1950, § 2170(b)(1)(D), (as amended 2007).

[152] Defense Production Act of 1950, § 2170(f)(2), (as amended 2007).

> emirate through whose financial system funds had been transferred to the terrorists who carried out the September 11, 2001 attacks upon the United States, and that had been a central conduit for nuclear weapons components being smuggled to hostile regimes, provided further impetus for review of the manner in which foreign transactions were being analyzed by CFIUS.[153]

Once again, Congress linked Dubai with terrorism. The concern was not simply, as Representative Hunter suggested, that Dubai was a porous weapons entrepôt that armed hostile regimes. Senator Dodd suggested that banks based in Dubai helped finance the 9/11 attacks. The implication being that such transactions made the country a dangerous port operator. Banks in Britain, Canada, Germany, and the United States also helped finance the terrorist attacks,[154] but that did not disqualify port operators from these jurisdictions from operating ports in the United States.

The differential treatment reserved for Arab investment did not go unnoticed. President George W. Bush asked, "Why all of a sudden a Middle Eastern company is held to a different standard than a British one?"[155] Likewise, General John Abizaid, commander of U.S. Central Command, said he was "very dismayed by the emotional responses some people have put on the table here in the United States that really comes down to Arab and Muslim-bashing."[156] Still, the political response, and to some extent the public response, disfavored Arab and Asian investment.[157] Even after four decades of investment, United States officials still found reasons to reject or suspect capital flows from Asia. It is important to note that, at least as far as my research shows, no official has publicly adduced a foreign investment that harmed U.S. national security.

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[153] *Foreign Investment and National Security Act of 2007*, 153 CONG. REC. S8753 (daily ed. June 29, 2007) (statement of Sen. Dodd), http://www.gpo.gov/fdsys/pkg/CREC-2007-06-29/html/CREC-2007-06-29-pt1-PgS8753.htm.

[154] This list would include, at the very least, Standard Chartered, Western Union, Dresdner Bank (Hamburg), First Union Bank (New Jersey), SunTrust Bank (Fort Lauderdale), Citibank, Bank of America (San Diego), Union Bank of California, Royal Bank of Canada, National Commercial Bank (Saudi Arabia), Saudi British Bank (Saudi Arabia), UAE Exchange Centre (Dubai), Hudson United Bank (New Jersey), Dime Savings (New Jersey). *See* National Commission on the Terrorist Attacks upon the United States, *The Financing of the 9/11 Plot*, http://govinfo.library.unt.edu/911/staff_statements/911_TerrFin_App.pdf. The Commission is an independent, bipartisan entity tasked with preparing "a full and complete account of the circumstances surrounding the September 11, 2001 terrorist attacks." *See* National Commission on Terrorist Attacks upon the United States, http://govinfo.library.unt.edu/911/about/index.htm.

[155] Lauren Etter, *Dubai: Business Partner or Terrorist Hotbed?*, WALL ST. J., Feb. 25, 2006, at A9.

[156] Holly Yeager & Edward Alden, *Arab ally senses that Bush no longer has control in Washington*, FIN. TIMES, Mar. 10, 2006, at 8.

[157] *Id.* (noting that members of Congress said they were "flooded with calls and letters from Americans angered by the deal").

III. POLITICAL EXPLANATIONS OF ANTI-ASIAN SENTIMENT

Having outlined a series of decisions, statements, and policies that reflect anti-Asian sentiment, we now turn to a related inquiry. How should we interpret them? Do they reflect simple racism? Political opportunism? A cautious reaction to national security threats? Anxiety about the wane of U.S. power? The following two parts analyze a matrix of factors that underlie these anti-Asian expressions. In this Part, we explore four common explanations of resistance to foreign investment frequently found in political science literature. The goal is to determine if the repeated bouts of anti-Asian sentiment described in Part I should be understood merely as political expedients. Or do they promote an Asia-phobic platform? Political explanations partially explain resistance to Asia in certain contexts. But they do not discount the possibility of other explanations of the anti-Asian sentiment described above.

A. Economic Nationalism

For the economic nationalist, "the main thrust of government is to protect the economic well-being of its citizenry," even if that involves harming other countries.[158] As a set of policy prescriptions, economic nationalism typically aims to reduce imports, stimulate domestic production, and raise exports.[159] On a macroeconomic level, this ensures a favorable balance of payments; a country will avoid trade deficits, maintain stable exchange rates, and keep government spending in check. On a microeconomic level, economic nationalism maximizes domestic employment, while keeping onshore both high-technology goods and the facilities that produce such goods.[160]

Economic nationalism raises several issues with regards to foreign investment. Foreign investors act differently than local ones. They operate in new environments without the deep knowledge, strong connections, and cultural embeddedness of local investors. Foreign investors often import more raw materials or components from their home countries, dropping local suppliers.[161] They may show less deference to local customs, or have little interest in the environment, labor practices, and surrounding communities.[162] Finally, they may repatriate their profits back to their home countries, depriving host countries of capital for jobs, investment, research and development, and other uses.

[158] EARL H. FRY, THE POLITICS OF INTERNATIONAL INVESTMENT 44 (1983).
[159] *Id.*
[160] *Id.*
[161] Joel P. Trachtman, *FDI and the right to regulate: Lessons from trade law*, *in* The Development Dimension of FDI: Policy- and Rule-Making Perspectives, 189, 192, UNCTAD/ITE/IIA/2003/4, unctad.org/en/Docs/iteiia20034_en.pdf.
[162] *Id.*

The economic nationalist casts a suspicious eye on any foreign investment. Yet the United States, to the extent it has an investment policy,[163] has largely eschewed economic nationalism. As described in Part I, the United States has welcomed (most) foreign investment, and called on other states to lower their barriers to foreign investment.[164] To be sure, broad policy goals need not constrain individual acts or statements. If a particular transaction threatens the national interest, the government should step in to block the deal.

The issue then becomes, how does blocking foreign investments advance U.S. economic interests? Let us examine a couple of the deals discussed above. Economic nationalism may partially explain resistance to Middle Eastern portfolio investment. It is possible that a foreign investor could buy a sufficient number of shares to force a hostile takeover, as James Goldsmith attempted to do with Goodyear in the 1980s.[165] But hostile takeovers by foreign companies are exceedingly rare.[166] Moreover, it is usually companies that engage in foreign hostile takeovers.[167] As noted, Middle Eastern investors, whether individuals or government investors, sought primarily to diversify their portfolios.[168] In no case did Middle Eastern investors attempt to acquire a company, much less seek to tank companies in which they had bought shares. Instead, fear of the unknown, buoyed by a widespread anxiety about Arabs,[169] prompted the resistance to portfolio investment.

What about the Fujitsu-Fairchild case? Certainly, economic nationalism weighed on the minds of several federal officials. The Defense Department worried that Fujitsu would refuse to sell microchips used in military systems to U.S. computer makers.[170] This would render U.S. companies excessively

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[163] Several writers opine that the United States until recently lacked a basic policy on inbound investment. *See* Robert T. Kudrle & Davis B. Bobrow, *U.S. Policy Toward Foreign Direct Investment*, 34 WORLD POL. 353, 364 (1982); ROBERT A. PASTOR, CONGRESS AND THE POLITICS OF U.S. FOREIGN ECONOMIC POLICY, 1929–1976, at 217 (1980) ("Until 1973, a host government investment policy was something other governments had [but not the US]" . . . .).

[164] *See* Mark Vallianatos, *Multilateral Agreement on Investment: International flows of private investment have risen sharply in recent years*, FOREIGN POL'Y IN FOCUS, July 1, 1997, fpif.org/multilateral_agreement_on_investment ("Washington has long used diplomatic pressure, international advocacy, and the leverage of bilateral and multilateral aid to encourage nations to deregulate foreign investment (not to mention some sordid episodes of gunboat diplomacy and covert operations against governments perceived as threatening large U.S. investors").

[165] For more on the hostile takeover, *see infra*, notes 266–67 and corresponding text.

[166] According to a G.A.O. report, fewer than one percent of acquisitions involve foreign hostile takeover. In 1987, for instance, just over one-tenth of one percent (4 of 3,524) of acquisitions were foreign hostile takeovers. Several years saw an even smaller percentage. *See* U.S. GEN. ACCOUNTING OFFICE, FOREIGN INVESTMENT: FOREIGN HOSTILE TAKEOVERS OF U.S. FIRMS, Dec. 1988, 6, http://www.gao.gov/assets/90/88258.pdf.

[167] Martin Tolchin, *Hostile Bids By Foreigners On the Rise*, N.Y. TIMES, Dec. 27, 1988, at D1.

[168] *See supra*, note 34.

[169] *See supra*, note 25.

[170] Sanger, *supra* note 104.

reliant upon foreign suppliers for sophisticated electronics.[171] Defense also expressed concern about a domino effect; the acquisition of one U.S. semiconductor company would lead to the downfall of the entire U.S. chip industry, and extinguish U.S. productive capacities.[172] The Commerce Department likewise seized on the deal as a way to gain leverage over Japan, and compel the Japanese government to reduce trade frictions in other sectors.[173] In sum, the transaction came to represent the larger U.S.–Japan trade imbalance. As one senior U.S. official put it, "If Japan can come in and buy this company, it can come in and buy them all over the place. We don't want to see the semiconductor industry under Japanese control."[174] Facing such a threat, the U.S. government needed to "get tough" with Japan.

At the same time, contemporary analysts called the concerns of economic nationalism a "smokescreen."[175] First, the United States could still exert leverage over an entity owned by Fujitsu. The Defense Department had many military contracts with Fairchild, and could have worked with other suppliers if a Japanese-owned Fairchild failed to supply them.[176] Second, if military contracts were indeed a concern, CFIUS could have negotiated a mitigation agreement to ensure that sensitive technologies remained in the proper hands.[177] If Fairchild produced sensitive military technology, that part of the business could be split off and sold to a domestic company.[178] With a bit of negotiation, the government and the parties could likely have reached an agreement.

Likewise, concerns that corporate Japan would come to dominate the U.S. technology sector seem misplaced. Fairchild, by the mid-1980s, was hemorrhaging hundreds of millions of dollars per year.[179] Schlumberger

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[171] *Id.*

[172] Peter T. Kilborn, *2 in Cabinet Fight Sale To Japanese: U.S. Bar Asked On Fujitsu Deal For Chip Maker COMPANY NEWS Japan-Fairchild Deal Opposed*, N.Y. TIMES, Mar. 12, 1987, at D1.

[173] Sanger, *supra* note 104.

[174] Kilborn, *supra* note 172.

[175] Sanger, *supra* note 104.

[176] Kilborn, *supra* note 172.

[177] During the review process, CFIUS may negotiate a mitigation agreement to ensure that particularly sensitive technologies remain in the proper hands. This can involve installing firewalls, requiring reporting obligations, and even selling off parts of the company to other domestic companies. Steptoe & Johnson, *CFIUS Report: Significant Increase in Scuttled Deals*, Jan. 8, 2014, www.steptoe.com/publications-9273.html.

[178] When Chinese company Wanxiang bought U.S. technology firm A123, Wanxiang agreed to sell the sensitive military contracts to a third party U.S. firm. *See* Julie Wenrau, *Navitas key to sale of A123 to Chinese firm*, CHI. TRIB., Jan. 30, 2013, at 2.1.

[179] *See* Daniel F. Cuff, *Schlumberger Plans $485 Million Charge*, N.Y. TIMES, Dec. 13, 1985, at D4 (noting that Fairchild's parent company would take a $485 million charge against earnings from the troubled Fairchild division, which was expected to lose $140 million in 1985); Funding Universe, *National Semiconductor Corporation History*, http://www.fundinguniverse.com/company-histories/national-semiconductor-corporation-history (noting that Fairchild lost a total of $265 million in 1985 and 1986).

bought Fairchild in 1979 for $425 million, and planned to sell it, seven years later, for $200 million. But for the U.S. government's intervention, it probably would have. Ultimately, a U.S. company bought Fairchild for $122 million, a "steal" according to contemporary analysts.[180] Schlumberger, the French multinational that purchased the company without controversy in 1979, incurred a 70% loss on its seven-year investment.

The Fairchild deal did not reflect the state of the U.S. semiconductor industry. According to current research, the United States produces 51% of the world's semiconductors, while Japan produces just 12%.[181] In the end, Fairchild lost the autonomy to select its business partner, a key feature of the market economy.[182] Government intervention ultimately decided the fate of the transaction. Fairchild executives pursued Fujitsu specifically, believing that company's investment would strengthen Fairchild's position in the United States, and keep high-tech jobs there.[183]

Economic nationalism offers plausible reasons to oppose certain foreign investments. On closer inspection, however, some of these concerns melt away. A pure economic nationalist would oppose any foreign investment. A less committed one might express concern about the fate of a particular domestic industry, and genuine fear that a foreign investment from a rival country might further imperil that industry. It is important to note that, at least in the contexts described here, the domestic industry did not wither away, and that, in retrospect, such concerns may have been exaggerated.

B. National Security

Government actors frequently oppose foreign investments on national security grounds. In reality, few foreign investments pose credible threats to national security.[184] This incongruity should give us pause. As a former chairwoman of the U.S. International Trade Commission put it, "clothespin, peanut, pottery, shoe, pen, paper and pencil manufacturers have tried to justify

[180] Victor Zonana, *Schlumberger Will Sell Its Ailing Fairchild Unit: National Semiconductor Will Pay $122 Million; Analysts Describe Deal for Chip Maker as a 'Steal,'*, L.A. TIMES, Sept. 1, 1987, at 1.

[181] Falan Yinug, *Made in America: The Facts about Semiconductor Manufacturing*, SEMICONDUCTOR IND. ASSOC. 3 (2015), http://www.semiconductors.org/ clientuploads/Industry%20 Statistics/FINAL%20Made%20in%20America%20white%20paper%20%2008192015%20as%20 posted.pdf.

[182] William C. Rempel & Donna K.H. Walters, *The Fairchild Deal: Trade War: When Chips Were Down*, L.A. TIMES, Nov. 30, 1987, at 2.

[183] Kilborn, *supra* note 172.

[184] *See* THEODORE H. MORAN, THREE THREATS: AN ANALYTICAL FRAMEWORK FOR THE CFIUS PROCESS ix (2009) (positing that the vast majority of foreign investments pose no genuine national security risk).

government protection by invoking national security."[185] One could add several other globally traded commodities—pork,[186] oil,[187] and steel[188]—that members of Congress have recently dubbed national security threats in opposing individual transactions.[189]

Foreign investment threatens national security in three ways.[190] First, a foreign acquisition may render other U.S. companies, such as defense contractors, excessively reliant upon a foreign-owned entity. If the foreign-owned entity delays or withholds certain goods, the contractor may be unable to complete its task, potentially disrupting national security. Second, the foreign-owned entity could deploy its newly gained technology to harm U.S. national interests. Third, the foreign-owned entity could use the acquisition to surveil, infiltrate, or sabotage U.S. national interests.[191] These issues are addressed in turn.

Before one can credibly claim that a foreign investment poses a threat to national security, certain conditions must be met. In the first scenario—denial or delay to defense contractor supply chains—we must know how readily available the particular good or technology is. Are substitutes easily accessible? Could one find a new product or producer? Would it be costly? If the foreign-invested entity denies the good or service, could U.S. entities find the good elsewhere in the market? Semiconductors (Fujitsu), oil (CNOOC), and capital (Middle Eastern portfolio investment) are not unique commodities. Instead, they are largely interchangeable. If U.S. consumers cannot buy gas at Unocal, they could do so at Shell, Texaco, Citgo, or other

[185] Susan Liebeler & William H. Lash III, *Exon-Florio: Harbinger of Economic Nationalism*, CATO REV. BUS. & GOV. 44, 49 (1993).

[186] Marilyn Geewax, *Can a Huge Hog Deal Pose a National Security Risk?*, NPR, May 31, 2013 (noting opposition from Charles Grassley, Republican of Iowa, and Rosa DeLauro, Democrat of Connecticut); *See also* Nathan Halverson, *Who's behind the Chinese takeover of the world's biggest pork producer*, PBS (Sept. 12, 2014), http://www.pbs.org/newshour/bb/whos-behind-chinese-takeover-worlds-biggest-pork-producer/ (noting comments from Senator Debbie Stabenow, Democrat of Michigan, who described food as a strategic resource that should be as important to the U.S. government as oil).

[187] *See supra* notes 120–26 and accompanying text.

[188] *See* Wendy Leung et al., *Anshan Steel Postpones U.S. Investment on Objection*, BLOOMBERG NEWS, Aug. 19, 2010 (quoting Representative Tim Murphy as saying a Chinese acquisition of a U.S. steel maker would both undermine the domestic steel market and pose "serious national security concerns").

[189] Given that pork, oil and steel are globally traded commodities, it is difficult to imagine how a foreign acquisition of a domestic producer could seriously jeopardize their availability. Presumably, other suppliers of the commodity exist, either inside or outside the United States. Even personal computers—hardly a rare commodity—were thought to present national security concerns when a Chinese company sought to buy IBM's personal computer division. *See* Steve Lohr, *Is I.B.M.'s Lenovo Proposal a National Security Threat?*, N.Y. TIMES, Jan. 31, 2005, at C6 (describing a letter from three Members of Congress to the Treasury Secretary seeking a review of the proposed transaction).

[190] This analysis draws on Theodore Moran's useful three-part schema to determine national security threats from foreign acquisitions. *See* MORAN, *supra* note 184, at 19.

[191] *Id.*

stations. It is difficult to see how these investments, had they been consummated, would harm the national interest.

In the second scenario, the foreign entity uses its newly acquired technology or capacity to harm U.S. national interests. Citing the above examples, Fujitsu would produce Fairchild's semiconductors, or CNOOC would direct the flow of Unocal oil.[192] Neither scenario would necessarily disrupt or injure the U.S. economy, defense industry, or other national interest. Moreover, how likely is this to happen? The answer hinges upon how advanced, and how widely known, the technologies are. If Fairchild manufactured a semiconductor that could not be easily reproduced, Fujitsu could then use that technology against U.S. national interests. It could refuse to sell the semiconductor to military contractors. This would pose a problem, though not an insoluble one. Information about the product, including harmful uses, emerges in the CFIUS review process. If evidence, as opposed to speculation, shows that the technology harms national interests, CFIUS can (and often does) negotiate a mitigation agreement.[193] For example, it could require Fujitsu to sell off the militarily sensitive portions of Fairchild's business.

The national security implications of the CNOOC acquisition likewise require some probing. Taking congressional witnesses at their word,[194] CNOOC would either deprive the United States of oil reserves or absorb sensitive seismic technologies. The threat of diminished oil access, as discussed, seems highly improbable, both because oil is a globally traded commodity, and because Unocal had a rather limited supply. Moreover, CFIUS could have ordered Unocal to sell its seismic technology business to a third party. Structured in this way, the transaction still would have denied the Chinese government, CNOOC's main shareholder, access to putatively sensitive technologies. Such a measured, evidence-based response would ensure proper decision-making at the highest levels. It would guarantee that Chinese investors, like any other foreign investors, enjoy access to the U.S. market—something the United States is keen to accomplish in China and other places.[195]

That leaves the third threat: infiltration or sabotage by a foreign government. The Dubai Ports World acquisition, or an investment by Chinese technology firm Huawei, conceivably posed this type of threat. In Dubai Ports

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[192] During a congressional hearing, experts claimed that Unocal possessed seismic technology that could measure underground nuclear test explosions. A congressional advisor warned that "China does not have this technology, and it would be dangerous for them to obtain it." Robert Collier, *Backlash to Chinese bid for Unocal/Bush urged to block takeover because of energy, security fears*, SFGATE (June 24, 2005), http://www.sfgate.com/news/article/Backlash-to-Chinese-bid-for-Unocal-Bush-urged-2626223.php.

[193] One study suggests that, between 2009 and 2011, eight percent of all cases CFIUS reviewed used legally binding mitigation agreements. Organization for International Investment, *Understanding the CFIUS Process*, 3 (2013), http://www.ofii.org/sites/default/files/OFII_CFIUS_Primer.pdf.

[194] Unocal denied that it possessed these sensitive seismic technologies. Collier, *supra* note 192.

[195] Citing free trade and efficiency concerns, Exxon CEO Lee Raymond said it would be a "big mistake" for the United States to block CNOOC's acquisition of Unocal. *Id.*

World, Congress feared an Arab-owned company would inadequately supervise U.S. ports.[196] At the very least, it would provide less security than a British-owned company.[197] How serious was the threat that DPW would sabotage ports or otherwise compromise national security?

First, it is federal agencies, not private companies, that maintain the safety of U.S. ports. Customs and Border Patrol performs this service by inspecting cargo that arrives into U.S. ports.[198] Attaching responsibility for port safety to the port operator is like attaching responsibility for airport security to United or Delta. Moreover, no one in Congress adduced evidence of DPW's neglect in operating other ports around the world.

Second, CFIUS reviewed, and then authorized, the DPW transaction. High-level officials from State, Defense, Treasury, Homeland Security, and others testified before Congress that their respective department's review had been "rigorous," "in-depth" and "comprehensive."[199] Even *within* a single department, several agencies conducted independent reviews.[200] CFIUS's approval was not given casually. In addition, the Department of Homeland Security—as the agency responsible for port safety—negotiated an assurance letter with DPW,[201] requiring DPW to participate in ongoing anti-terrorism initiatives, to enforce certain security protocols, and to provide law enforcement—without a subpoena—information on terminal operations, employees, and security programs.[202] Yet these extraordinary measures did not satisfy Congress, which ultimately passed a law specifically prohibiting DPW's acquisition.

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[196] It is important to note that the issue was not *foreign* ownership of a U.S. ports operator, as a British company (P&O) then owned the ports. The issue was specifically about whether a Dubai-based company should be trusted to operate ports in the United States.

[197] David E. Sanger & Eric Lipton, *Bush Would Veto Any Bill Halting Dubai Port Deal*, N.Y. TIMES, Feb. 22, 2006, at A1 (citing concerns of Bill Frist, Dennis Hastert, Charles Schumer, and Hilary Clinton).

[198] The Department of Homeland Security's Customs and Border Patrol ("CBP") "is responsible for conducting immigration and customs inspections for aliens entering the United States at officials border crossings . . . . CBP also is responsible for conducting customs-related inspections of cargo at ports of entry and for ensuring that all goods entering the United States do so legally." U.S. GOV'T ACCOUNTABILITY OFF., GAO-07-375, HOMELAND SECURITY: PROGRESS HAS BEEN MADE TO ADDRESS THE VULNERABILITIES EXPOSED BY 9/11, BUT CONTINUED FEDERAL ACTION IS NEEDED TO FURTHER MITIGATE SECURITY RISKS 19 (2007), http://www.gao.gov/assets/260/255650.pdf.

[199] *See generally* National Security Implications of the Acquisition of Peninsular and Oriental Steamship Navigation Company by Dubai Ports World: Hearings Before the Sen. Comm. on Armed Services, 109th Cong., 2d sess., Feb. 23, 2006 (containing statements by high-level officials from Defense, State, Treasury, and Homeland Security) [hereinafter Dubai Hearings], http://www.gpo.gov/fdsys/pkg/CHRG-109shrg32744/html/CHRG-109shrg32744.htm.

[200] *See id.* at 8 (statement of Gordon England, Dep. Sec. Def.) (noting the Army, Navy, Air Force, Defense Security Service, Defense Intelligence Agency, the National Security Agency, Transportation Command and Defense Information Systems Agency).

[201] *See id.* at 11 (statement of Robert Kimmitt, Dep. Sec. Treasury).

[202] *Id.* at 14 (statement of Michael Jackson, Dep. Sec. Homeland Security). The letter also included an enforcement mechanism that permitted DHS to seek remedies for false or misleading representations, as well as omission of material information. *Id.*

What about Huawei, the Chinese electronic and telecommunications company with close ties to the Chinese Army? Security analysts were split on whether Huawei investments would facilitate cyber-espionage or otherwise compromise U.S. national security.[203] As one scholar put it, commentary "remained divided" between those who found a bona fide threat to national security, and those who succumbed to "anti-Chinese hysteria and behind-the-scenes maneuvering by . . . U.S. competitors."[204] In at least this case, then, foreign investment *may* have presented a national security risk. At the very least, one cannot definitively rule out the possibility.[205] Later, a report by the U.S. House Intelligence Committee underscored the *potential* threat of Huawei acquisitions, though it presented no evidence of cyber-espionage to date.[206] Given the underlying uncertainties surrounding technological infiltration and surveillance, one should approach the national security rationale cautiously. Better still would be concrete evidence of a national security threat, particularly when a company—such as Huawei or Dubai Ports World—operates in scores of other jurisdictions without reports of security breaches.

In sum, one can never fully exclude the possibility that a foreign investment will threaten national security. That does not mean, however, any charge of a security threat can be taken at face value. Government actors (among others) should specify the nature of the harm and consider ways to avoid the potential threat. In the final analysis, the possibility that a foreign investment would harm national security is ineradicable, but that does not excuse government officials from articulating their concerns in a clear manner.

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[203] MORAN, *supra* note 184, at 28.

[204] *Id.*

[205] We now know, in the wake of revelations by Edward Snowden, that U.S. internet and technology companies collaborated with the National Security Agency to insert entry points (or "back doors") into various products, which in turn allowed the U.S. government to spy on other governments. *See* Nicole Perlroth, Jeff Larson & Scott Shane, *N.S.A. Able to Foil Basic Safeguards of Privacy on Web*, N.Y. TIMES, Sept. 6, 2013, at A1. It is conceivable, then, that other governments may work with their own national champions to do the same thing in the United States.

[206] In 2012, the House Intelligence Committee released a very damning report about Huawei and ZTE (another Chinese telecommunications company). The report uses very tough language to describe the threat to national security that these two companies supposedly pose. Yet, in the publicly released version, the report cites no evidence of spying by either Huawei or ZTE. Joseph Menn, *White-House ordered review found no evidence of Huawei spying*, REUTERS (Oct. 18, 2012), http://www.reuters.com/article/us-huawei-spying-idUSBRE89G1Q920121018. Instead, the report criticizes the companies' refusals to cooperate with the confidential investigation, and to explain their relationships with the Chinese government and Communist Party. U.S. House of Representatives, Permanent Select Committee on Intelligence, *Investigative Report on the U.S. National Security Issues Posed by Chinese Telecommunications Companies Huawei and ZTE*, 112th Cong., Oct. 8, 2012, https://intelligence.house.gov/sites/intelligence.house.gov/files/documents/Huawei-ZTE%20Investigative%20Report%20(FINAL).pdf.

C. RECIPROCITY

A third refrain emphasizes the lack of reciprocity[207] between the United States and various Asian countries.[208] According to Curtis Milhaupt, the "largest underlying cause of friction over Japanese FDI in the 1980s was the perception that while the United States was open to Japanese investment and imports, U.S. firms faced substantial barriers to trade in Japan."[209] The principle of reciprocity holds that Country A's treatment of foreign investors from Country B should be no better, or worse, than Country B's treatment of foreign investors from Country A.[210] Specifically, if the U.S. government allows a Chinese company to invest in the U.S. technology sector, the Chinese government should permit a U.S. company to invest in the Chinese technology sector.[211]

To be sure, reciprocity undergirds much of international investment law, including many bilateral investment treaties. At the same time, the United States has traditionally maintained an open investment environment—far more open than many of its trading partners. To insist on reciprocity would seriously challenge even traditional partners like Canada (which requires authorization for every foreign investment),[212] France (which requires scrutiny of investments in the fields of water, public health and transportation),[213] and

[207] This is also known as the principle of equality, most favored nation, or non-discrimination. While these concepts have differences in nuance, they basically address the same issue: treating foreign investors as favorably as domestic ones. *See* KRISTA NADAKAVUKAREN SCHEFER, INTERNATIONAL INVESTMENT LAW: TEXT, CASES & MATERIALS 13 (2013).

[208] *See, e.g.*, *Reciprocal Trade and Investment: Hearing Before the Subcomm. on Int'l Trade of the Comm. on Fin., Sen. Fin. Comm*., 98th Cong. 1. (1983). The hearing discussed the Reciprocal Trade and Investment Act, a bill to "ensure that U.S. exporters receive fair and equitable market access opportunities in foreign markets . . . [by] negotiating mandates in the areas of trade in services, high technology products and investment performance." (statement of Sen. Danforth, Chair, Sen. Fin. Comm.). The bill was widely seen as targeting "the contrived and unfair trade barriers in Japan." *Id.* at 8 (statement of Sen. David Boren, Member, Sen. Fin. Comm.).

[209] Curtis Milhaupt, *Lessons from Japan's experience in the 1980s* in INVESTING IN THE UNITED STATES: IS THE U.S. READY FOR FDI FROM CHINA? 185, 193 (Karl P. Sauvant ed., 2009).

[210] In this way, reciprocity resembles most favored nation status: the host country can treat foreign investors no less favorably.

[211] Take the case of 3com and Huawei. In 2003, the Chinese government approved the establishment of a joint venture between the two companies. In 2008, 3com bought 49% share of Huawei. Later, when Huawei tried to enter the U.S. market, CFIUS did not grant its approval, signaling it would block the investment if it had gone forward.

[212] Canada is one of the few countries to review and require approval for all foreign investments. Canada also places greater restrictions on foreign equity ownership than similarly wealthy developed countries. *See* Y. Beth Riley, *Foreign Direct Investment Restrictions in Canada*, 3–4 (March 2011), https://www.bennettjones.com/Publications/Articles/Foreign_Direct_Investment_Restrictions_in_Canada.

[213] Fabrice Fages, François Mary & Bénédicte Bremond, *Latham & Watkins Client Alert Commentary No. 1688: New French Regulations Tighten Control on Foreign Investments* (May 16, 2014), https://www.lw.com/thoughtLeadership/New-French-Regs-Tighten-Control-on-Foreign-Investments

Germany (which extends preferential treatment to European investors, but not U.S. investors or other non-Europeans).[214] It would be counterproductive to review inbound investment with reference to the home state's investment law.

Moreover, insisting on reciprocity would dilute the United States' longstanding commitment to lowering investment barriers. If the United States advocates merely for replicating the investment law of its trading partners, as reciprocity would require, the United States would forego much of the work it has done on the multilateral level.[215] It would also run counter to the United States' long-held policy on foreign investment.[216] The idea of reciprocity may have intuitive appeal, but it would be nearly impossible to implement. In any event, it would set the United States back decades in its efforts to lower international obstacles to trade and investment. Reciprocity, then, does not provide a sufficiently persuasive reason to oppose foreign investment.

D. Government Involvement

A final political explanation concerns the degree of government activity in foreign investment decisions. Sovereign wealth funds, state-owned enterprises ("SOEs"), and "state-controlled" enterprises play an increasingly important role in international commerce and foreign investment.[217] Undoubtedly, some of these investments have political goals, as opposed to the strict

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(explaining how France screens foreign investment in a wide and growing array of sectors). Under a 2014 decree, the French Ministry of Economy expanded its investigatory remit from traditionally accepted strategic areas (national defense and information technology) to new areas such as energy, water, public health, transport and telecommunications). *Id.*

[214] Under a 2009 amendment to the Foreign Trade Act, Germany can block a non-European investor from acquiring 25% or more of the voting rights in a German company. The regulation also applies to European investors when there are "indications of an abusive or circumventory structuring that is intended to undermine the control of the acquisition." Freshfields Bruckhaus Deringer LLP, *New Restrictions on foreign investments in Germany*, 1, May 2009. In other words, Germany treats European investors more favorably than U.S. investors, among other non-European, investors). This would clearly violate the most favored nation clause of any Bilateral Investment Treaty.

[215] *See* U.S. Dep't of State Bureau of Economic and Business Affairs, *Multilateral Agreement on Investment (MAI): The Facts*, Mar. 23, 1998 ("The MAI draft text reflects U.S. investment laws, regulations and practices. Its achievement will be in bringing other countries up to the standards the United States already applies to all investors—domestic and foreign.").

[216] *See, e.g.*, 19 U.S.C. § 2901(11)(A)(i), (ii) (explaining that "[t]he principal negotiating objective of the United Sates regarding foreign direct investment are to reduce or to eliminate artificial or trade-distorting barriers to foreign direct investment, to expand the principle of national treatment, and to reduce unreasonable barriers to establishment; and to develop internationally agreed rules, including dispute settlement procedures. . . ."); Foreign Inv. in the U.S.: Hearings Before the Subcomm. on Int'l Fin. of the S. Comm. on Banking, Hous.. and Urban Affairs, 93rd Cong. (1974).

[217] *See generally* Wouter P.F. Schmit Jongbloed et al., *Sovereign Investment: An Introduction*, *in* SOVEREIGN INVESTMENT: CONCERNS AND POLICY REACTIONS (Karl P. Sauvant et al. eds., 2012).

pursuit of profits.[218] This need not, in itself, cause concern. As we saw above, many Middle Eastern governments have used foreign investment to gain expertise, transmit knowledge and experience back to their home countries, and develop various domestic industries (aviation, banking, telecommunications, etc.). Nevertheless, there is a concern that the foreign government will deploy the investment as a "Trojan Horse"; it would first infiltrate the United States, gain a foothold here, and then harm the acquired company, domestic economy, or other national interest. In other words, national security remains the paramount issue, particularly "in sensitive or strategic industries," while lack of transparency comes a close second.[219]

Anxiety over government involvement has informed discussions about foreign investment for decades. In the 1970s, U.S. government officials expressed concern that the OPEC states, with their newfound wealth and "nouveau riche sensibilities," would invest with "political purposes," just as they had curtailed oil exports for political reasons.[220] And yet, contemporaneous accounts from cabinet officials played down the threat of foreign-government investment. One State Department official opined, "Our experience has been that foreign corporations with substantial government ownership have generally responded to market forces when making investments in the United States."[221] Moreover, just as with private enterprises, government investors must obey the panoply of U.S. government laws and regulations. Even then, some members of the U.S. government acknowledged that state-held capital is not that different from privately held capital.

More recent surveys suggest that government investment strategies do not differ significantly from institutional investor strategies.[222] Recent studies show that strategies of sovereign wealth funds and mutual funds largely converge: both seek financial gains regardless of the political regimes in which they invest.[223] Other studies show that sovereign wealth funds led by government officials invest more at home than when they are led by foreign managers.[224] This weakens the link between politics and foreign investment because more "politicized" investors are less likely to invest abroad in the first

[218] *See id.* at 11.

[219] *Id.*

[220] Hearing Before the Subcomm. on Int'l Fin. of the S. Comm. on Banking, Hous., and Urban Affairs, 93rd Cong. (1974) (statement of Sen. Adlai E. Stevenson).

[221] Hearing Before the Subcomm. on Int'l Fin. of the S. Comm. on Banking, Hous., and Urban Affairs, 93rd Cong. (1974) (statement of William J. Casey, Under Sec'y of State for Econ. Affairs).

[222] Jongbloed et al., *supra* note 217, at 14. The authors find that policy-makers' concerns about political bias in strategic or sensitive industries are not well founded. The authors specifically cite Rep. Duncan Hatch as an example of this unsubstantiated concern. *Id.*

[223] Rolando Avendaño & Javier Santiso, *Are Sovereign Wealth Fund Investments Politically Biased? A Comparison With Mutual Funds*, *in* SOVEREIGN INVESTMENT: CONCERNS AND POLICY REACTIONS 240–41 (Karl P. Sauvant et al. eds., 2012).

[224] Shai Bernstein, Josh Lerner & Antoinette Schoar, *The Investment Strategies of Sovereign Wealth Funds*, 27 J. ECON. PERSPECTIVES 219, 227 (2013).

place. According to Paul Rose, sovereign wealth funds have largely sought returns on the assets themselves, and "thus far have not made . . . investment[s] in the United States for strategic political purposes."[225]

Congress has expressed alarm over Chinese investment and potential government influence in cases where the investor is a government entity (like CITIC or CNOOC) or has close ties to the government (Huawei). Members of Congress have raised numerous concerns: the Chinese government could gain access to sensitive technologies, spy on the U.S. military from nearby installations, disrupt oil supplies, engage in cyber-espionage by manipulating computer software, and so on. Yet, as explained above, few of these concerns present national security threats. The purchase of a plane parts manufacturer by a state-owned Chinese company may sound dangerous, but the parts themselves were neither sensitive nor used in classified applications.[226] Likewise, a Chinese state-owned enterprise's bid for a U.S. oil company may indeed threaten U.S. oil supplies, but oil is a globally traded, fungible commodity. Even if the Chinese-invested enterprise diverted oil from the United States to China, it would remain readily available on world commodity markets.

Moreover, recent scholarship suggests that Chinese SOEs, like sovereign wealth funds, act substantially similar to multinational corporations.[227] Since many SOEs are listed on stock exchanges, they are subject to market disciplines and shareholder concerns. They must also abide by the regulations of the stock exchanges and the laws of host countries. If anything, Chinese SOEs are "still learning the rules of the road": overpaying for certain assets, treading clumsily into new environments, and ignoring local customs of doing business.[228] That does not necessarily make state-controlled or state-owned enterprises bigger threats to U.S. national interests than other multinational enterprises.

Finally, pursuant to the Foreign Investment and National Security Act of 2007, *any* government-controlled entity investing in the United States—whatever its purpose—undergoes a national security investigation.[229] CFIUS could annul the transaction, require that the capacity to produce sensitive technologies remain in the United States, or devise a mitigation agreement to account for the sensitive technology. Of course, foreign-controlled entities must still obey laws on trade secrets, export controls, economic espionage, and so on. In short, though the issue is frequently raised, investment by government-owned entities has thus far not harmed U.S. national interests in the

[225] Paul Rose, *Sovereigns as Shareholders*, 87 N.C. L. REV. 83, 87 (2008).

[226] *See* Tom Brown, *Mamco: Victim of China Anger? Firm May Have Been Target of Opportunity*, SEATTLE TIMES, Feb. 6, 1990, at D1.

[227] Wendy Dobson, *China's State-Owned Enterprises and Canada's FDI Policy*, UNIV. OF CALGARY SCH. OF PUB. POLICY SPP RESEARCH PAPER, Mar. 2014, at 1, https://www.policyschool.ca/wp-content/uploads/2016/03/chinas-soes-dobson.pdf.

[228] *Id.* at 17.

[229] 50 U.S.C. app. § 2170(b)(1)(B).

ways predicted.

One can never definitely rule out the possibility that a foreign-government investor might harm U.S. interests, but decades of experience should make us wary of such speculation. Those who would challenge an investment based on national security concerns should have the burden both to state specifically the nature of their concern, and to marshal evidence as to how the investment would endanger national security.

In short, the above cited reasons do not fully account for the anti-Asian sentiment directed at foreign investment. Economic nationalist concerns sound plausible at first blush, but typically cannot withstand more exacting scrutiny. Similarly, one cannot definitively say that a government-controlled entity would never harm the national interest of the United States.

Still, after forty years, no conclusive evidence has yet emerged to support the claim that a foreign investment has endangered U.S. national security. Of course, this does not mean that no foreign investment could ever harm U.S. national security or its national interests. Continued vigilance is warranted. But the absence of such an investment is significant. If political explanations cannot fully account for the periodic rashes of anti-Asian sentiment, what other possibilities are there?

IV. RACIAL EXPLANATIONS OF ANTI-ASIAN SENTIMENT

Contemporary racial discrimination takes various forms, from the violence of police shootings to the micro-aggressions of college campuses.[230] This Part establishes a framework to understand anti-Asian discrimination by drawing on racial discrimination jurisprudence, cultural theory, and critical legal studies. It then reviews the statements and actions of government officials during the three waves of Asian investment to show the role that race plays in both the construction of U.S. investment law, and in individual decisions regarding foreign investment.

Before proceeding with this analysis, however, two points require clarification. First, the United States has been neither monolithic nor uniform in opposing Asian investment. Congress's response to particular waves of Asian investment correlates with the rising economic status of particular

[230] Police shootings of unarmed African-American men have generated controversy, headlines and debates around the United States since the August 2014 shooting of Michael Brown. *See* Monica Davey & Mitch Smith, *Justice Dept. Will Investigate Chicago Police*, N.Y. TIMES, Dec. 6, 2015, at A10. Psychologists define microaggressions as "brief and commonplace daily verbal, behavioral or environmental indignities, whether intentional or unintentional, that communicate hostile, derogatory or negative racial slights and insults to the target person or group." *See* Derald Wing Sue et al., *Racial Microaggressions in Everyday Life: Implications for Clinical Practice*, 62 AM. PSYCH. 271, 273 (2007). *See generally* Brandon Griggs, *Do U.S. Colleges Have A Race Problem?*, CNN (Nov. 10, 2015), http://www.cnn.com/2015/11/10/us/racism-college-campuses-protests-missouri (discussing racially charged events on U.S. college campuses).

countries. The rise of Middle Eastern economies in the 1970s, coupled with the oil shocks, led to wide-scale animosity against investors from those countries. Similarly, the growth of the Japanese economy, and the trade imbalance in particular, engendered fear and suspicion in the United States throughout the 1980s.[231] Since the Japanese bubble burst in 1990, however, the Japan threat theory has largely abated. Currently, China's economic rise dominates headlines and stirs up anxiety of imminent U.S. demise.[232] But the United States still has a larger economy,[233] richer per capita population,[234] a more dominant international currency (in fact, the globally dominant currency),[235] and a stronger military.[236] Some tensions in the U.S.–China relationship are clearly warranted.[237] But we must be careful that such anxieties do not influence decisions on investment policy, which may have little to do with the underlying tension.

Second, investments from smaller Asian states—Taiwan, South Korea, and Singapore, among others—have generated comparatively little controversy. It is not the case, then, that the United States rejects all Asian investment. Rather, only when the Asian state exerts a degree of geopolitical influence do U.S. officials perceive it as a threat to principles of the market economy, U.S. primacy in world affairs, or the "American way of life."[238]

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231 Specifically, the "Arab threat" discourse of the 1970s coincided with the first signs of Arab economic influence in the United States (and the world). The opposition to Japanese investment reached its peak during the zenith of Japan's economic growth. And animosity towards Chinese investment has mirrored China's own economic rise.

232 *See* Jeffery M. Jones, *In U.S., Majority Still Names China as Top Economic Power*, GALLUP ECON. (Feb. 26, 2013), http://www.gallup.com/poll/160724/majority-names-china-top-economic-power.aspx (describing results of poll wherein 53% of U.S. citizens said China was the world's largest economy, while 32% correctly identified the Unites States). Using *per capita* gross domestic product (i.e., GDP divided by population), the average U.S. citizen makes roughly ten times what the average Chinese citizen makes.

233 The World Bank estimates that, in 2014, China's economy ($10.36 trillion) was about 60% as large as the United States' ($17.42 trillion). *See* The World Bank, United States, www.worldbank.org/en/country/unitedstates (last visited Nov. 18, 2016).

234 The average person in the United States annually earns $54,725, whereas the average Chinese earns $7,437.

235 The International Monetary Fund's recent decision to include the Chinese renminbi in its basket of world currencies is certainly an important step in the internationalization of that currency. Yet there can be no doubt that "the dollar still dominates in finance and trade . . . ." Keith Bradsher, *I.M.F. Adds China's Currency to Elite Global Financial Club*, N.Y. TIMES, Nov. 30, 2015, at A1.

236 *See* David Axe, *Why China is Far From Ready to Meet the U.S. on a Global Battlefront*, REUTERS, June 22, 2015, at A1.

237 Cyber-security, intellectual property theft, and China's military buildup in the South China Seas stand out as areas where U.S. and Chinese interests are visibly misaligned.

238 The threat to the "American way of life" is a common trope in congressional discussions. "From Wall Street to Main Street, Americans are nervous about China's effect on the American economy, American jobs, on the American way of life." Hearing on U.S.–China Relations Before the S. Comm. on Fin., 109th Cong. (2005) (statement of Sen. Max Baucus). Baucus later served as United States Ambassador to China under the second Obama administration.

This geopolitical concern is not, however, free of racial or ethnic bias, for why should we presume that investors from Asian countries seek to harm U.S. national interests?

A. Analytical Framework

U.S. law recognizes two types of evidence of racial discrimination. The first, direct evidence, takes place when an employer tells an applicant, "We are not going to hire you because you are Asian." But as the Supreme Court has noted, "[o]utright admissions of impermissible racial motivation are infrequent and plaintiffs often must rely upon other evidence."[239] In prosecuting racial discrimination claims, plaintiffs frequently turn to the second type: indirect or circumstantial evidence.[240] This includes, *inter alia*, suspicious timing of adverse actions, ambiguous statements made by superiors, systematically better treatment of persons outside of plaintiff's protected group, and other "bits and pieces of evidence" from which inferences of discriminatory intent may be drawn.[241] Circumstantial evidence thus comes in various forms, from vague verbal assertions to better treatment of different ethnic groups.

For purposes of this framework, most evidence of racial discrimination discussed falls into the second category, indirect evidence. Like most racial discrimination lawsuits, this presents interpretive challenges. But the challenge is compounded by the fact that the U.S. government is not a single person or entity. Rather, it is a composite organ of agencies, elected officials, and appointed positions, employing thousands of people that change over time, presidential administrations, and election cycles. Government bodies themselves fluctuate; new agencies form while others dissolve or, more frequently, merge into existing ones. For these reasons, the proposed framework does not adhere strictly to racial discrimination law, which targets discrimination by a single actor or set of actors. Instead, the primary purpose is to show the discriminatory nature of various government actions and statements,[242] as well as their harmful consequences.[243]

What, then, constitutes a racially discriminatory statement? Scholars of cultural studies and critical legal studies have developed an expansive vocabulary to describe the images, techniques and discourses Western writers use

[239] Hunt v. Cromartie, 526 U.S. 541 (1999).

[240] I am grateful to Andrew Pollis for this suggestion.

[241] Abuelyaman v. Ill. State Univ., 667 F.3d 800, 809 (7th Cir. 2011) (quotations omitted).

[242] In racial discrimination lawsuits, the defendant gets the opportunity to refute the evidence that he acted in a discriminatory manner. Since the "federal government" is neither a discrete entity, nor a defendant in this exercise, we adopt the more modest goal of showing the actions and statements of its representatives reflect racial bias.

[243] Racial discrimination plaintiffs must also show that the discrimination constituted a "determinative factor" in an "adverse action" against them. *See* Thomas v. Eastman Kodak Co., 183 F.3d 38, 57 (1st Cir. 1999).

to criticize, categorize, and control Asian subjects. The seminal text in revealing Western prejudices about Asia is Edward Said's *Orientalism*. In describing centuries of Western thinking about Asia, Said posits four main principles or "dogmas":

> [1] One is the absolute and systematic difference between the West, which is rational, developed, humane, superior, and the Orient, which is aberrant, undeveloped, inferior. [2] Another dogma is that abstractions about the Orient . . . are always preferable to direct evidence drawn from modern Oriental realities. [3] A third dogma is that the Orient is eternal, uniform, and incapable of defining itself . . . . [4] A fourth dogma is that the Orient is at bottom something either to be feared (the Yellow Peril, the Mongol hordes, the brown dominions) or to be controlled (by pacification, research and development, outright occupation whenever possible).[244]

For Said, and many writing in his wake, Western observers adopt a baseline of images, stereotypes, and conventions to view Asia.[245] Said's own work focused primarily on European representations (literary, artistic, and philosophical) of Arabs during the eighteenth and nineteenth centuries. These images portrayed Arabs as weak, passive, backward, irrational, and even prehistoric.[246] More important, Said drew clear parallels between the historical images of Arabs and U.S. government policy towards the Middle East.[247] Thus, stereotyped views of Asians may exert influence on the formulation and execution of U.S. foreign policy.[248]

But what about the rest of Asia? Can the concept of Orientalism cover so broad a swath? Some would say "no." China is different from Kuwait. And the immense variety of languages, cultures, religions, and ethnicities found in Asia simply defies an all-encompassing term like Orientalism.[249]

But many scholars would reply "yes." Gayatri Spivak and Homi Bhabha have applied Said's insights to reveal orientalist understandings of South Asia.[250] Scholars have also extended the Orientalist critique to Southeast

[244] EDWARD W. SAID, ORIENTALISM 300–01 (1978).

[245] In this paper, I use the more current term Asian, instead of Oriental.

[246] SAID, *supra* note 244, at 49 ("On the one hand there are Westerners, and on the other there are Arab-Orientals; the former are . . . rational, peaceful, liberal, logical, capable of holding real values, without natural suspicion; the latter are none of these things.").

[247] *Id.* at 47–49. Said cites articles written by U.S. State Department officials (including Henry Kissinger) that claim that citizens of developing countries experience "empirical reality" differently from Westerners. Moreover, some of these articles claim "the art of subterfuge is highly developed in Arab life." *Id.*

[248] *See generally* JOHN KUO WEI TCHEN & DYLAN YEATS, YELLOW PERIL! AN ARCHIVE OF ANTI-ASIAN FEAR (2014) (linking contemporary anti-Asian discourses to European colonialism and the enlightenment).

[249] I thank Sharona Hoffman for this point.

[250] Gayatri C. Spivak, *Can the Subaltern Speak?*, *in* MARXISM AND THE INTERPRETATION OF

Asia.[251]

With regards to Japan, the recourse to stereotypes, feelings of superiority, and the sense of an unbridgeable divide between East and West recur regularly in Western conceptions of Japan. As David Morley and Kevin Robins write:

> The West can never see Japan directly. . . . [The] Japanese were always destined to be seen through the fears and fantasies of Europeans and Americans. Japan is the Orient, containing all the West most lacks and everything it most fears. Against Japanese difference, the West fortifies and defends what it sees as its superior culture and identity. And so the West's imaginary Japan works to consolidate old mystifications and stereotypes . . . .[252]

Orientalism also helps explain Western interactions with China. As Teemu Ruskola shows, the West's concern that China lacks law has had serious consequences for both the United States and China, including the abridgement and violation of the rights of Chinese citizens and Chinese-Americans.[253]

Orientalism's wide remit is not entirely surprising. Racial prejudice rarely relies on analytic precision, scientific evidence, or geographical correctness.[254] One does not usually form racist attitudes after calm and deliberate reflection, or extended experience alongside the other group. It has a material presence and rhetorical force, if not an internal consistency. Instead, as

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CULTURE 271 (Cary Nelson & Lawrence Grossberg eds., 1988) (dissecting Western analyses of Indian cultural practices, including sati); *see generally* HOMI K. BHABHA, THE LOCATION OF CULTURE 96 (2004) (showing how stereotyped views of colonial subjects helped articulate differences, and subsequently the *subordination*, of Indians in the British imperial project).

[251] *See* JUDY TZU-CHUN WU, RADICALS ON THE ROAD: INTERNATIONALISM, ORIENTALISM AND FEMINISM DURING THE VIETNAM WAR (2013) (introducing a "radical Orientalism" practiced by U.S. activists during the Vietnam War); John Kleinen, *Framing "the Other". A critical review of Vietnam war movies and their representation of Asians and Vietnamese*, 1 ASIA EUR. J. 433 (2003) (critiquing Orientalist depictions of Vietnamese soldiers and citizens in U.S. and French films of the 1970s and 1980s); Ananda Rajah, *Orientalism, Commensurability, and the Construction of Identity*: A Comment on the Notion of Lao Identity, 5 SOJOURN: J. SOC. ISSUES IN SE. ASIA 308, 310 (1990) (noting the influence of French Orientalism on the conception of Lao national identity).

[252] *Id.* at 168.

[253] *See* TEEMU RUSKOLA, LEGAL ORIENTALISM: CHINA, THE UNITED STATES, AND MODERN LAW 58 (2013); Timothy Webster, *The Legal Precedents of American Orientalism*, 62 AM. J. COMP. L. 807, 812 (2014) (book review).

[254] To be sure, scientists in the nineteenth and early twentieth centuries mobilized scientific methods and concepts to investigate race. But their efforts, such as craniology, failed to propose a compelling scientific basis for racial difference. *See generally* ELAZAR BARKAN, THE RETREAT OF SCIENTIFIC RACISM: CHANGING CONCEPTS OF RACE IN BRITAIN AND THE UNITED STATES BETWEEN THE WORLD WARS 2–4 (1992).

Gerald Torres argues, racism is about domination, dehumanization, and differentiation.[255] As Naoki Sakai has argued:

> The Orient does not connote any internal commonality among the names subsumed under it; it ranges from regions in the Middle East to those in the Far East. One can hardly find anything religious, linguistic, or cultural that is common among these varied areas. . . . The principle of its identity lies outside itself: . . . the Orient is that which is excluded and objectified by the West in the service of its historical progress.[256]

In other words, Orientalism says as much about our preoccupations with our position in global affairs as it does about the empirical reality or shared commonality of any particular Asian country or people. It may lack a consistent doctrinal basis, but it also provides a powerful set of images, stereotypes, and discourses that can be mobilized to oppress, dominate, or persecute an ill-defined group of people.[257] U.S. officials generalize about Asians—whether Arabs, Chinese, Japanese, or others—with surprising ease. This stands in direct contrast to the *specific* way in which they discuss investors from the West.

Critical legal scholars have also applied Said's basic insight to examine the treatment of Asians and Asian-Americans in the U.S. legal system. Three themes in particular resonate with the present inquiry. First, Asians and Asian-Americans remain *foreign*. Even though the first waves of Asian immigrants came to the United States in the early to mid-19th century, long before many Europeans passed through Ellis Island, Asian-Americans continue to be seen as outsiders—unknowable entities never fully incorporated into the U.S. body politic.[258] This ineradicable foreignness prevents Asians and Asian-Americans from finding widespread acceptance within U.S. society.[259]

Second, by virtue of this "alienness," Asians are frequently considered

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[255] *See generally* Gerald Torres, *Introduction: Understanding Environmental Racism*, 63 U. COLO. L. REV. 839 (1992).

[256] Naoki Sakai, *Modernity and Its Critique: The Problem of Universalism and Particularism*, *in* POSTMODERNISM AND JAPAN 93, 117 (Masao Miyoshi & H.D. Harootunian eds., 1989) (emphasis added).

[257] There is a similar flexibility with the term in "Latino" in this regard. In the U.S. context, "Latino" can refer to people who have been in the United States for several generations, or just recently arrived. Latinos may come from Puerto Rico, Cuba, Dominican Republic, Brazil, Argentina, Guatemala, Mexico or many other countries. Of course, Orientalism covers a much broader territory (geographically, culturally, linguistically, ethnically), but the stereotyping impulse is the same. *See* Gene Demby, *Poll Focuses on Views from a Wide Array of Latino Americans*, NAT'L PUB. RAD. (Jan. 21, 2014).

[258] *See generally* Keith Aoki, *"Foreign-ness" & Asian American Identities: Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes*, 4 UCLA ASIAN PAC. AM. L.J. 1, 18 (1996).

[259] Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, "Foreignness," and Racial Hierarchy in American Law*, 76 OR. L. REV. 261, 296 (1997) (noting the "ongoing conflation of the domestic and international" in contemporary discussions of Asian-American identity).

threats to national security. From the Yellow Peril[260] to Wen-Ho Lee,[261] Asians incite mistrust among the U.S. public, media, and political classes that is largely disproportionate to the threat they actually pose.[262] The *Korematsu* decision, where the Supreme Court upheld President Roosevelt's order to intern 121,000 Japanese-Americans (including 70,000 citizens), reinforces the view of Asians as disloyal to the United States, and allegiant to their home countries.[263]

Third, because of the putative security threat, the rise of Asia is linked to the decline of the United States. Here too, the Yellow Peril discourse is the intellectual forebear. Consider the figure of Dr. Fu Manchu—the "yellow peril incarnate in one man," as his creator Sax Rohmer once described him.[264] A staple of twentieth-century novels, films, comic books, and radio programs, Fu Manchu used his "Western intellect and Eastern cunning to try to destroy Western Civilization and beat it at its own game of world conquest."[265] Fu Manchu may seem like an outdated embodiment of earlier racist times. But contemporary politicians deploy similar language to oppose Asian investment. Middle Eastern investors would buy stocks in U.S. companies only to take control and crash them.[266] Japanese companies would acquire, and then devour or destroy, their U.S. competitors, especially in the technological fields.[267] Chinese enterprises will lock up oil reserves in other parts of the world, choke off U.S. supply, and replace the United States as world hegemon.[268]

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[260] *See generally* TCHEN & YEATS, *supra* note 248.

[261] Wen Ho Lee was a Taiwan-born physicist at Los Alamos Nuclear Laboratory. He was accused of espionage, fired from his job, indicted on fifty-nine counts of mishandling government information. He was ultimately cleared on all counts, save one: mishandling computer files. *See* Neil Gotanda, *Comparative Racialization: Racial Profiling and the Case of Wen Ho Lee*, 47 UCLA L. REV. 1689 (2000). Lee later sued the U.S. government and several media organizations for violating his privacy rights; the terms of their settlement agreement included payment of $1.6 million dollars to Dr. Lee. *See* JONES DAY, *Jones Day wins favorable settlement for Dr. Wen Ho Lee*, http://www.jonesday.com/jones-day-wins-favorable-settlement-for-dr-wen-ho-lee-06-05-2006/ (last visited Nov. 18, 2016).

[262] For example, Asians comprise 5.6% of the U.S. population, but make up only 1.2% of total arrests. Likewise, they are charged with committing 1.2% of its crimes. *See* FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2012 (2012), https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/43tabledatadecoverviewpdf.

[263] *See generally* Korematsu v. United States, 323 U.S. 214 (1944). Korematsu often ranks alongside *Dred Scott* and *Plessy* as the worst Supreme Court decisions of all times. *See* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380 (2011) (surveying the "weak constitutional analysis" of four Supreme Court decisions, including Korematsu); Carol J. Williams, *Legal scholars examine the U.S. high court's 'Supreme Mistakes,'* L.A. TIMES, Apr. 2, 2011 (describing a Pepperdine Law School conference—featuring Professors Akhil Amar, Erwin Chemerinsky, Daniel Farber, and others—reviewing the worst Supreme Court decisions).

[264] SAX ROHMER, THE INSIDIOUS DR. FU-MANCHU 26 (1913).

[265] TCHEN & YEATS, *supra* note 248, at 5.

[266] *See supra* notes 74–76 and accompanying text.

[267] *See supra* notes 92–100 and accompanying text.

[268] *See supra* notes 120–129 and accompanying text.

B. Middle Eastern Investment

Congress's reaction to Middle Eastern investment in the 1970s instigated the first U.S. laws and regulations on international investment. Senators Jacob Javits and Howard Metzenbaum raised numerous concerns about investment from the Middle East. Specifically, they complained of Arab "technological backwardness," "nouveau riche" sensibilities, and "reckless disregard for public responsibility." It is not simply the derogatory content of these remarks. The broader issue is the failure to investigate the motivations of "Arab investors" before attempting to restrict their access to the United States. To paraphrase Said, abstract caricature was preferred to direct evidence of the danger posed by these investors.

These two senators, among others, introduced bills to restrict, limit, or require public disclosure of foreign investments.[269] No bill mentioned Asian investment by name, yet they responded to the infusion of Middle Eastern portfolio investment.[270] In the end, only one of the proposed bills that sought to "collect limited amounts of information" on foreign investment became law.[271] One might argue, then, that there was no "action," just a lot of acrimonious speech. Yet congressional pressure spurred President Ford into establishing CFIUS. But for Congress, the Ford Administration would probably not have created CFIUS. The Committee was born in a moment of congressional hostility toward Middle Eastern investment.[272]

Middle Eastern investors themselves noted the government's condemnatory attitude.[273] In private meetings with U.S. officials, Saudi investors reportedly reassured their counterparts that they did not seek to take over or destroy U.S. companies.[274] As one Saudi petroleum official noted, perhaps with an oblique nod to the former ownership of Saudi natural resources by

[269] Peter Milius, *Arabs Investing Cautiously: Feared Intrusions into U.S. Economy Not Developing*, WASH. POST, June 1, 1975, at 2.

[270] Jack Egan, *Administration Fights Limits for Foreign Investments*, WASH. POST, Mar. 5, 1975 ("The Foreign Investment Act of 1975 . . . is basically aimed at investment by Middle East oil producers . . . ."). Edward Cowan, *U.S.-Saudi Talks To Open This Week: Washington Is Hopeful as a Variety of Economic Accords Are Weighed*, N.Y. TIMES, Feb. 24, 1975, at 5 (noting that the bilateral talks would include discussion of "Washington's indecision about limits on foreign investment in the United States, especially investment by Arab countries and Iran").

[271] *See* International Investment and Trade in Services Survey Act, 22 U.S.C. §§ 3101–3108 (1976).

[272] *See, e.g.*, PILLSBURY WINTHROP SHAW PITMAN, *Outline of Legal Aspects of Mergers and Acquisitions in the United States* 81 (2003), http://www.pillsburylaw.com/siteFiles/Publications/MandA_reprint_814.pdf ("[CFIUS] is an interagency body established by Executive Order in 1975 in response to concerns at the time about Arab investment in the United States.").

[273] Edward Cowan, *Saudi is Lobbying in U.S. Against Israel*, N.Y. TIMES, Apr. 19, 1975, at 3. The irony is that Saudi Aramco, presently Saudi Arabia's largest producer of oil, started out as a U.S. company. Later, in the 1970s, the kingdom came to acquire the entire company, thus regaining control over its natural resources.

[274] *Id.*

U.S. companies,[275] "We don't have in mind any idea of control of your natural resources."[276]

Gulf state investors met with government officials to learn which industries were closed to foreign investment. Saudi officials in particular used informal consultations before making major investments, suggesting the anxiety both sides felt about U.S. popular reaction to Saudi investment. It is unclear if the congressional reaction diminished Saudi investment.[277]

C. Japanese Investment

Negative reactions to Japanese investment in the 1980s likewise drew on old and inaccurate images of Japan. Looking at the totality of the evidence, racism probably played an even more prominent role than it did in the reaction to Middle Eastern investment in the 1970s. With Japan, it was not simply a small number of Senators who expressed concern, but a diverse array of members of Congress.

In opposing Japanese investment, members of Congress hewed closely the Orientalist discourse explicated by Said. According to Representative Pete Stark, the Japanese were:

> A people (some have used the word clan) who have lived by themselves on a set of islands for nearly 2,000 years of recorded time do not readily buy from outsiders. There is no GATT, there is no law, there is no treaty, there is no negotiation that is going to change that.[278]

This recalls the Orientalist technique of portraying Asians as timeless, eternal, and unchanging—a pre-rational and pre-modern foil to the West. Similarly, Senator Pete Wilson called Japan a "drug addict," hooked on "predatory trade practices," and incapable of reforming itself.[279] This too draws on Orientalist tropes, and perhaps even confuses Japan with China, which had an opium epidemic in the early nineteenth century.[280]

More problematic is the latent "legal orientalism" lurking in these statements. Teemu Ruskola has defined "legal orientalism" as a set of discursive

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[275] Standard Oil signed its first oil concession agreement with the Saudi government in 1933. The Saudi government took a 25% share in 1973, and through incremental payments, purchased the entire entity by 1980. *See* Saudi Aramco, *History: Milestones*, http://www.saudiaramco.com/en/home/about/history/1980s.html.

[276] Cowan, *supra* note 273.

[277] One Saudi official did, however, note that Saudi would decrease its investment in the United States, but did not specify the reason. *See* Douglas W. Cray, *People and Business: Saudis to Limit U.S. Investing*, N.Y. TIMES, Apr. 12, 1975, at 40.

[278] 131 CONG. REC. E1431 (daily ed. Apr. 4, 1985).

[279] 135 CONG. REC. S6399 (daily ed. June 8, 1989).

[280] Peter C. Perdue, *The First Opium War: The Anglo-Chinese War of 1839-1842*, MIT Visualizing Cultures, http://ocw.mit.edu/ans7870/21f/21f.027/opium_wars_01/ow1_essay01.html.

practices that Western commentators use to determine "what is and is not law, and who are and are not its proper subjects" in various Asian jurisdictions.[281] Ruskola's critique focuses mainly on Western characterizations of Chinese "lawlessness." But his critique applies with equal force to U.S. conceptions of Japan. Stark's depiction of a timeless Japan—isolated from the rest of the world, impervious to change, with a blatant disregard for international law—misrepresents Japanese notions of legality and the importance of international law in Japan.

The Fujitsu-Fairchild transaction also reflects this differential treatment. When Schlumberger bought Fairchild in 1979, no one objected that a French company was purchasing a U.S. icon.[282] But when a Japanese company bid on the same company, the U.S. government balked. In either case, the investor was foreign. But the U.S. government opposed Asian ownership. Why? The officially stated reason was "national security."[283] It is true that Fairchild had a small number of contracts with the U.S. military.[284] But had those contracts been for sensitive technologies, the Defense Department could have easily denied those contracts to the Fujitsu-owned entity.[285] Moreover, it is unlikely that Japan, a close political and military ally, would forbid its companies from selling semiconductors to the United States.[286] Indeed, given the broader context of the U.S.–Japan military alliance, the fate of a failing semiconductor company would probably not jeopardize U.S. national security.[287] A secondary reason was probably economic nationalism. Japanese companies were outperforming their U.S. rivals, leading some to believe they would decimate the U.S. semiconductor industry. Why, then, "offer up" a U.S. company to a Japanese competitor? This has some explanatory purchase, but still seems inadequate to explain the government's strong negative reaction.

Because the differential treatment of European investment forms a core part of this Article's thesis, we reflect upon it for a moment. Congress has, to be sure, vocally opposed European investments over the past forty years. To

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[281] TEEMU RUSKOLA, LEGAL ORIENTALISM 5 (2013). *See also* Timothy Webster, *The Legal Precedents of American Orientalism*, 62 AM. J COMP. L. 1003 (2014) (reviewing TEEMU RUSKOLA, LEGAL ORIENTALISM).

[282] The Washington Post dispassionately reported that "Fairchild . . . has announced it has agreed to be taken over by Schlumberger, which has offered $363 million in cash, or $66 dollars a share, for all of Fairchild's outstanding shares. The bid was accepted at a meeting of the Fairchild board on Saturday." *Fairchild, Schlumberger Plan Merger*, WASH. POST, May 22, 1979, at E4.

[283] Sanger, *supra* note 104.

[284] *Id.*

[285] *Id.*

[286] KENNETH FLAMM, MISMANAGED TRADE?: STRATEGIC POLICY & THE SEMICONDUCTOR INDUSTRY 373 (1996).

[287] The United States currently deploys 54,000 U.S. troops in Japan, and has actively participated in Japan's national security since the end of World War II. Hannah Beech, *The Tense Relationship between Japan and the U.S. Military*, TIME, June 8, 2016.

take one roughly contemporaneous example to the Fujitsu controversy, Congress resisted the hostile takeover of Goodyear Tires by British investor James Goldsmith. In articulating their opposition, members of Congress did not view the takeover as part of a larger British conspiracy to re-colonize the United States, even though the United States was formerly a British colony. Nor did they critique the transaction based on English "national character." Instead, the discussion focused on objections to the particular investor.[288] Even when exchanges became heated,[289] members of Congress focused on the merits of the investment, and not the investor's nationality.

With Japan and other Asian investments, by contrast, Congress asked a different set of questions. The Japanese were depicted as hostile, alien, and intent to destroy the United States. Members of Congress talked about "the Japanese," but rarely about the company, Fujitsu. They did not view Fujitsu's proposed acquisition as the consequence of independent analysis of its long-term interests or strategy. Instead, Fujitsu was an appendage of the Japanese state, submerged into the "vast, faceless, nameless yellow horde," as John Dower has written.[290] Congress thus drew upon the "yellow peril" discourse of the late nineteenth and early twentieth centuries, portraying Asians as collectively-minded and incapable of acting on their own initiative. It also resorted to the Orientalist technique of appealing to abstraction and stereotype, as opposed to direct evidence of what this company hoped to achieve.

Adverse actions followed. Under pressure from the Reagan Administration, Fujitsu withdrew its bid for Fairchild.[291] Administration officials did not shy away from expressing anti-Japanese sentiments, including the reaction of Deputy United States Trade Representative Mike Smith, described

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[288] When English investor James Goldsmith sought a hostile takeover of Goodyear tires in 1986, Congress focused on U.S. securities laws, the long-term interests of Goodyear's shareholders and employees, and the implications for the U.S. economy. Even when congressional testimony turned acrimonious, as it did, the focus was on "corporate raiders," not on the perils of English capitalism. *See* Stuart Warner, *25 Years Ago: Driving back the raider at the gates of Goodyear Tire and Rubber Co.*, CLEVELAND.COM, Nov. 27, 2011; Robert D. Hershey Jr., *Goodyear and Sir James Square Off*, N.Y. TIMES, Nov. 19, 1986, at D1. Likewise, when the French company Thomson-CSF bid for a U.S.-based missile manufacturer, members of Congress opposed the transaction by seizing on national security concerns, partial ownership of the company by the French government, and allegations that the company's alleged violation of U.S. export laws by selling lasers to Iraq. *See French Firm Drops Its Bid for LTV Missile Unit*, ASSOC. PRESS, July 7, 1992.

[289] For example, Congressman John Seiberling, whose grandfather founded Goodyear, denounced the takeover by Englishman James Goldsmith. In congressional testimony, Seiberling called the proposed acquisition an "assault . . . by the financial community," and demanded of Goldsmith "Who the hell are you?" Mark Potts, *Goldsmith Trades Barbs with Critics at Hearing*, WASH. POST, Nov. 19, 1986. Goldsmith's English nationality, however, was never taken up as an issue to halt the investment. *Id.*

[290] John W. Dower, *Yellow, Red, and Black Men*, *in* THE IMPACT OF RACE ON U.S. FOREIGN POLICY: A READER 194, 198 (Michael L. Kreen ed., 1999).

[291] Sanger, *supra* note 104.

above.[292] Commerce Secretary Malcolm Baldrige called the acquisition "really bad policy."[293] He also recalled unspecified national security concerns that Fairchild executives had tried to debunk.[294]

The Fujitsu incident also altered the legal framework for foreign investment in the United States. Both Senator Exon and Congressman Florio, who sponsored the Exon-Florio amendment, cited the Fujitsu transaction as the primary reason to empower the President to block inbound investments.[295] Congressman Florio specifically linked the Fujitsu takeover with the need to protect "national security."[296] But as noted above,[297] the shibboleth of national security cannot be accepted at face value. Instead, residual concerns about a powerful Japan seemed to persuade most government officials to oppose the Fujitsu transaction, and Japanese investment more broadly.

D. Chinese Investment

Investment from China generated considerable controversy in the 2000s and 2010s. Since CNOOC's unsuccessful bid for Unocal in 2005, Chinese investors, private and state-owned, have encountered hostility from both Congress and the Cabinet. In articulating their suspicions, U.S. government actors largely eschew the racist caricatures of both Middle Eastern investors in the 1970s, and Japanese investors in the 1980s. This development probably reflects greater cultural sensitivity. Instead, they criticize the "government of China," "communist China" or even "Red China."[298] Of course, Orientalist thinking may very well undergird the more anodyne language.

Yet even before the CNOOC incident, Chinese investment prompted concern about "national security." In 1990, George H.W. Bush used his enhanced presidential powers under the Exon-Florio amendment to block a Chinese investment. He cited "credible evidence" that the Chinese state-owned company "*might* take action that *threatens* to impair the national security of the United States."[299] But he did not specify what that evidence was. In a letter to Congress, President Bush wrote that the U.S. manufacturer sold most of its goods to "a single manufacturer for production of civilian aircraft. Some of its machinery is subject to U.S. export controls. It has *no contracts*

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[292] *See supra* notes 112–13, and accompanying text.

[293] Kilborn, *supra* note 172 (quoting an official from the Japanese Embassy who called Secretary Baldrige's views "illogical").

[294] *Id.*

[295] *See* 134 CONG. REC. S4833 (daily ed. Apr. 27, 1988) (statement of Sen. Exon); 134 CONG. REC. H2278 (daily ed. Apr. 21, 1988) (statement of Rep. Florio).

[296] *Id.*

[297] *See supra* notes 202–06, and accompanying text.

[298] *See supra* notes 117–20, and accompanying text.

[299] *See* Order Pursuant to Section 721 of the Defense Production Act of 1950, 55 Fed. Reg. 3935 (Feb. 1, 1990) (emphasis added). The statement itself constitutes a fairly weak assessment of the security threat.

with the United States Government involving *classified* information."[300] In other words, MAMCO did not produce sensitive military technology. The fact that certain products were subject to export controls should not have sunk the deal, as these controls would have prohibited their exportation to China. At the time, MAMCO did not actually export anything.[301] Many commentators doubted the national security implications of the investment.[302] A more likely explanation would pair a longstanding fear of China with a persistent antagonism towards government investment in the United States.

More recently, when CNOOC launched its bid for Unocal, a congressional chorus homed in on the national security implications of the deal.[303] Two members of Congress decried "China's aggressive tactics to lock up energy supplies around the world that are largely dedicated for their own use."[304] James Woolsey testified to the House Armed Services Committee that CNOOC is "an organ, effectively, of the world's largest communist dictatorship," and that its proposed acquisition was part of China's "national strategy of domination of the energy markets and strategic domination of the western Pacific."[305]

Several questions arise from this testimony. First, it is unlikely that Unocal's sale would appreciably disrupt oil supplies. Unocal had proven reserves of 1.754 billion barrels of oil,[306] out of a world total of 1.292 trillion barrels (about 0.0013%).[307] Nor was it a major player in the United States (ranking tenth).[308] Oil is a commodity bought and sold on world markets. It is unlikely that changing ownership of such a small percentage of the world oil supply could disrupt global markets or U.S. access to oil. Oil as a "national security" threat thus appears unlikely.

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[300] 138 CONG. REC. 761, 05 (1990) (statement of President George H.W. Bush).

[301] *See* Harriet King, *China Ends Silence on Deal U.S. Rescinded*, N.Y. TIMES, Feb. 20, 1990, at D1 (quoting officials from the Chinese government and the CEO of MAMCO).

[302] Officials in both the Chinese government and the U.S. manufacturer expressed doubts that MAMCO's products could threaten U.S. national security. *See id.*; Art Pine & James Gerstenzang, *China Must Sell U.S. Aircraft Parts Maker, Bush Says*, L.A. TIMES, Feb. 3, 1990, at D1 (noting "mixed reviews" among international lawyers). Possible reasons also include (a) denying CATIC (the Chinese aeronautic agency) a position in Seattle to conduct its operations; (b) concern after CATIC allegedly disassembled a GE jet engine and stole advanced technology several years before; (c) punishing China for failing to change the repressive atmosphere after the Tiananmen massacre in 1989; (d) securing a political deal with the Senate on a bill to allow Chinese students in the US to extend their visas. *See* Brown, *supra* note 226.

[303] *See* Paul Blustein, *Many Oil Experts Unconcerned over China Unocal Bid*, WASH. POST, July 1, 2005, at D1.

[304] Two Texan congressmen wrote this in a June 27, 2005 letter to President George W. Bush. *Id.*

[305] *See* EDWARD S. STEINFELD, PLAYING OUR GAME: WHY CHINA'S RISE DOESN'T THREATEN THE WEST 178 (2011).

[306] *See ChevronTexaco to Purchase Unocal for $16.4 Billion*, BLOOMBERG NEWS, Apr. 4, 2005.

[307] *See Global Reserves, Oil Production Show Small Increases for 2005*, OIL & GAS RESERVES, Dec. 19, 2005, at 73.

[308] *PIW's Top 50: How the Firms Stack Up*, PETROLEUM INTELLIGENCE WEEKLY, Dec. 12, 2005, at 16.

Instead, one could imagine that the transaction might threaten a broader set of U.S. interests. As described above, Unocal had worked with a host of unsavory governments around the world. The United States, whether or not it helped Unocal do business in these areas, may not have wanted this information ending up in the hands of the Chinese government. The issue may fit more neatly into a national interest rubric. Yet as James Feinerman and others have written,[309] CNOOC was a pretty small transaction, the blockage of which represented a "protectionist, xenophobic or maybe even racist reaction."[310]

More recently, the U.S. government claimed that Ralls and Huawei's attempted acquisitions would impair national security. In *Ralls*, the D.C. Circuit found that President Obama failed to give Ralls the opportunity to view or respond to unclassified information, and thus violated its due process rights.[311] Why did the President force Ralls to divest? We do not know. But some suggest presidential suspicion that Ralls might spy on drones, which the Navy was developing nearby.[312] Such concerns suggest that Ralls, a privately held company established in Delaware by two Chinese nationals, would spy on behalf of the Chinese government.

As with Japan and Fujitsu, it is wise to separate private companies from home governments. The conflation of corporation and country is more plausible with a state-owned or state-controlled entity. But even these enterprises do not act so differently from most commercial actors.[313] Ralls, on the other hand, is a privately-held corporation producing wind turbines. If the wind turbines were located too close to a U.S. Naval Base, when exactly did that

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309 *See Seven Questions: China and Unocal*, FOREIGN. POL'Y (July 1, 2005), http://foreignpolicy.com/2005/07/01/seven-questions-china-and-unocal/. Other analyses that posited race or xenophobia include (1) Christopher Herman, *Cnooc-Nexen Deal Is Just the Beginning of the Great American Oil Gas Grab*, FORBES (July 23, 2012), http://www.forbes.com/sites/christopherhelman/2012/07/23/why-cnoocs-19-5-billion-offer-for-nexen-is-a-done-deal/#1c1a97ea4e5b (noting the "xenophobic American politicians who blocked [CNOOC's] 2005 takeover of Unocal"); (2) Op-ed: *Let Chinese Buy Unocal; It Won't Hurt Our Oil Supply*, INDIANAPOLIS STAR, July 12, 2005 ("In fact, the Unocal controversy seems like scaremongering of the worst kind with racist 'yellow peril' overtones. Would there be such an uproar if the buyers were Russian or French or Saudi Arabian?"); and (3) Sheila McNulty, *Rants and racism fill the blog sites*, FIN. TIMES (July 6, 2005), http://www.ft.com/cms/s/0/3366413c-edbb-11d9-9ff5-00000e2511c8.html?ft_site=falcon&desktop=true#axzz4PYGBck4P ("A series of blog webpages set up by individuals to publish the typical blogging mix of fact, opinion and raw prejudice, plus any responses, have turned to the issue for a debate.").

310 *See Seven Questions: China and Unocal*, *supra* note 309.

311 *See* Ralls Corp. v. Comm. on Foreign Inv. in U.S., 758 F.3d 296 (D.C. Cir. 2014). "[D]ue process requires, at the least, that an affected party be informed of the official action, be given access to the unclassified evidence on which the official actor relied, and be afforded an opportunity to rebut that evidence." *Id.* at 319.

312 Helene Cooper, *Obama Orders Chinese Company to End Investment at Sites Near Drone Base*, N.Y. TIMES, Sept. 28, 2012, at A16; Julie Pace, *Obama blocks Chinese purchase of U.S. wind farms*, WASH. POST (Sept. 28, 2012), https://www.washingtonpost.com/business/economy/obama-blocks-chinese-purchase-of-us-wind-farms/2012/09/28/e1cd8246-09bd-11e2-a10c-fa5a255a9258_story.html.

313 *See* Milhaupt & Zheng, *supra* note 135.

become a problem? The Chinese investors purchased the wind-farm from a Greek company, who bought it without causing a major contretemps.[314] As far as we know, the U.S. government did not oppose the sale of the same wind-farm to the Greek company. Yet it strongly opposed the transfer to a privately held Asian company. We do not know the exact reason, and the government is under no obligation to tell the general public, or the company itself.

In the lawsuit, Ralls did not bring a racial discrimination claim, so the D.C. Circuit did not rule on this issue. The court did, however, note "other foreign-owned windfarms using foreign-made wind turbines operate *without governmental interference* near the same restricted airspace as the Butter Creek projects. We can thus infer . . . mere proximity of [the windfarms] to the restricted air space is not the only factor that precipitated the CFIUS Order."[315]

The court, rightly, does not engage in speculation. But we might wonder what other factors might have led the Obama Administration to make its decision. Competition in the renewable energy sector? Fear of Asian investment? Some combination thereof? In the absence of a public explanation, suspicions arise on both sides of the Pacific.

E. Dubai Ports World

The evidence of discrimination against Dubai Ports World recalls prior discussions of "Arab" investment: derogatory statements based on ethnicity, and differential treatment of Arabs and non-Arabs. We have reviewed the colorful language members of Congress used to describe a longstanding U.S. ally in the Middle East: the devil, a bazaar for terrorist nations, and so on. Even the more genteel locutions of Barney Frank rehashed quintessential stereotypes about Arabs:[316] people from that "part of the world" cannot be trusted to run U.S. ports.[317]

Congressman Frank and his fellow members of Congress said nothing about DPW's track record in running ports around the world, or the strategic implications for either DPW, or the British company they sought to buy. Instead, Congress resorted to stereotyped fallacies about "Arabs." It also treated DPW differently from European counterparts. The company that DPW sought to purchase—P&O—was British. No one objected when a European owner operated U.S. ports. But when the foreign owner was Arab,

[314] Ralls purchased the wind farm project from Greek company TernaUS. *See Ralls*, 758 F.3d 301, at n.5.

[315] *Id.* at 325 (emphasis added).

[316] Stereotypes are rigid and exaggerated beliefs about an entire category of people, and each individual within the group. They often form the basis for discriminatory attitudes and actions. *See* ALI RATTANSI, RACISM: A VERY SHORT INTRODUCTION 126–30 (2012).

[317] *See supra* note 142.

"national security" suddenly emerged as a critical issue. Indeed, most U.S. ports are operated or owned by foreign entities, part of a global trend towards consolidation in the shipping industry.[318] In the case at hand, P&O operated 24 terminals, out of the 829 available, in six U.S. ports. No publicly available evidence indicates DPW suffered security lapses at other ports. The differential treatment did not elude President George W. Bush, who asked "[w]hy all of a sudden a Middle Eastern company is held to a different standard than a British one."[319]

Finally, two adverse actions resulted from Congress's campaign. First, Congress passed a law to prohibit DPW from purchasing P&O.[320] This may be the only time in U.S. history—certainly, recent U.S. history—where Congress forbid a foreign investment by naming the two entities involved.[321] The link between congressional action and discriminatory behavior could not be clearer. Second, one year later, Congress passed another law—the Foreign Investment and National Security Act. This law stemmed from the potential threat that foreign investment posed to U.S. national security.

F. Russian Investment

A word about Russia is also in order. Would the United States act any differently if the investor were Russian instead of Chinese or Japanese? In the absence of sizeable Russian investment in the United States, it is difficult to say. Even before the United States imposed sanctions in 2014, Russia invested less than either India or Venezuela.[322] Still, given the long history of animosity between the United States and Russia (and its predecessor, the Soviet Union), surely the United States would treat Russian investment with the same suspicion that it has directed towards Asian investment. Yet, that turns out not to be the case. As Obama's first Commerce Secretary, Democrat Gary Locke, stated:

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[318] Paul Blustein & Eric Rich, *Security Programs, Unions Would Stay at Ports*, WASH. POST (Feb. 22, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/02/21/AR2006022101924_pf.html; Adam Davidson, *Most U.S. Port Terminals Are Foreign-Run*, NPR (Feb. 26, 2006), http://www.npr.org/templates/story/story.php?storyId=5234177. Since most major shipping companies are foreign, many U.S. ports would be operated by foreign-owned companies. *See Drewry's Annual Review of Global Container Terminals Operators*, THE MAR. EXECUTIVE (Aug. 27, 2013), http://www.maritime-executive.com/pressrelease/Drewrys-Annual-Review-of-Global-Container-Terminals-Operators-2013-08-27. The top ten came from Singapore, Hong Kong, Netherlands, UAE, China, Netherlands, China, Korea, Taiwan, and Germany. *Id.*

[319] Etter, *supra* note 155.

[320] *See* CONG. REC. 152, 3036 (daily ed. Mar. 8, 2006).

[321] I found no other instances where Congress directly blocked an investment by passing a law. In the CNOOC case, Congress passed legislation that would require a 120-day review period. That lengthy period, in turn, killed the deal.

[322] *See* Organization for International Investment, *Foreign Direct Investment in the U.S.: 2016 Report*, http://ofii.org/sites/default/files/Foreign%20Direct%20 Investment%20in%20the%20United %20States%202016%20Report.pdf.

> I am proud to be able to say that the United States is more receptive to foreign investment than any other country in the world. *No proposed Russian investment in the United States has been rejected,* and, in fact, Russian companies have made very significant investments in areas such as steel, mining and retail *petroleum*. These investments benefit the United States, as well as Russia.[323]

Locke also mentioned cooperative arrangements between "Boeing, Motorola, and Microsoft, and their Russian partners."[324] Locke's predecessor under the George W. Bush administration, Commerce Secretary Carlos Gutierrez, made similar overtures to Russian companies in the U.S. gas sector.[325] Even in sensitive sectors such as oil, aviation, and advanced technology, the United States has expressed willingness to work with Russian companies, despite almost a century of antagonism.

Of course, one cannot rule out the possibility that the United States would oppose a particular Russian investment. If that were the case, political actors would likely point to the long history of mistrust between Russia and the United States, Russia's destabilizing invasions of Crimea and Georgia, its support for the Syrian regime, or the clash of values of our two political systems. They would probably not talk about Russian ethnicity, clannishness, or lack of sophistication, as they did for Middle Eastern, Japanese and Chinese investors.

V. PROTECTING ASIAN INVESTMENT

In prior parts, this Article has outlined a series of discriminatory actions involving Asian investment. We have seen the harm this causes: both in terms of forgone foreign investment, and to the image of the United States as both racially tolerant and open to foreign investment. This final Part asks what, if anything, can be done about it.[326] Anti-Asian sentiment has circulated in public, political, and legal discourses for almost two centuries. It is unlikely that any one form of redress will extirpate such deeply held suspicions.

I offer two possible ways to mitigate some of the harm discussed above. Part IV.A offers ways to improve the CFIUS review process, in particular to make that opaque body more transparent and less subject to political or racial bias. Part IV.B takes a page from international investment law and urges the

[323] Secretary of Commerce Gary Locke, Remarks at U.S.–Russia Business Summit (July 2, 2009) (Westlaw) (emphasis added). Ambassador William Burns also noted "no Russian investment in the United States has ever been turned down in the CFIUS process." *See* Ambassador Burns, Addresses American Chamber of Commerce, U.S. FED NEWS, Apr. 23, 2008.

[324] *Id.*

[325] *RF* [*Russian Federation*] *accession to WTO allow it to take powerful position – Gutierrez*, ITAR-TASS WORLD SERV., June 25, 2008.

[326] I thank Cassandra Robertson for helping me think through the issues in this Part.

adoption of *pre-entry national treatment*, which will ensure that foreign investors receive treatment equal to that enjoyed by domestic ones.

A. CFIUS: Improving Transparency

For the past several decades, CFIUS has largely served its mandate of permissively screening foreign investment. When active, formally and otherwise, foreign investment has frequently hailed from Asia. CFIUS was not simply created to monitor "Middle Eastern" investment. CFIUS was also a reaction to Japanese investment in the 1980s. Even if the concern was only economic nationalism (and that seems dubious), the *language* used to describe the Japanese threat drew on Orientalism. In 1990, President Bush divested CITIC, the Chinese aviation state-owned enterprise, again on CFIUS' guidance. In the late 2000s and early 2010s, CFIUS blocked several Chinese technology investments. It also recommended divestiture in *Ralls*. One could probably not establish a housing or employment discrimination claim based on such scant evidence.[327] Yet the paucity of reliable information on CFIUS feeds the perception that the United States disfavors Asian investors. A more transparent CFIUS process, reporting more fully to the investor and public, could help address this gap.

Under the 2007 FINSA, CFIUS annually reports to Congress.[328] The expurgated version of that report is publicly available, but offers incomplete information about investment activity, such as the number of investigations conducted by CFIUS, the investor's home country, industry, and other statistics.[329] It does not, however, link the number of investigations to a particular country. Thus, one cannot discern whether CFIUS investigates Chinese companies at a higher rate than European companies.

The annual report does produce at least one statistical incongruity. From 2011 to 2013, Chinese companies filed 54 notices, more than any other country.[330] Considering the small amount of Chinese investment in the United States during that period—just 0.3% (three-tenths of one percent) of all

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[327] A recent empirical study of CFIUS decisions concludes there is no basis of discrimination. Yet, they study only cover five years of data, and does not cover the first three decades of the body's existence. *See* Paul Connell & Tian Huang, *Note: An Empirical Analysis of CFIUS: Examining Foreign Investment Regulations*, 39 YALE J. INT'L L. 131 (2014).

[328] Recent studies have noted the paucity of information revealed by CFIUS. *See, e.g.*, David Zaring, *CFIUS as a Congressional Notification Service*, 83 SO. CAL. L. REV. 81 (2009). Zaring analyzes the "few publicly available mitigation agreements imposed by the Committee on foreign acquirers," and finds that "some CFIUS agreements look more alike than others." *Id.* at 89.

[329] *See* Committee on Foreign Investment in the United States, *Annual Report to Congress for Calendar Year 2013* (Public/Unclassified Version), Feb. 2015, http://www.treasury.gov/resource-center/international/foreign-investment/Documents/2014%20CFIUS%20Annual%20Report%20for%20Public%20Release.pdf.

[330] *Id.* at 17.

FDI—this number assumes additional significance.[331] U.K. companies filed 49 notices, but accounted for 18% of inbound investment, sixty times more than China.[332] In other words, Chinese companies approach the U.S. market with caution, likely due to the heightened scrutiny CFIUS and Congress have directed at Chinese investment.

The opacity of CFIUS procedure has come under criticism. How can we pry open the "black box?"[333] Many improvements are imaginable, but we narrow our inquiry to three.[334] First, the CFIUS review process is rigorous. Guidance is available, either in the form of Treasury guidelines or the legal counsel of a fancy Washington law firm.[335] Without such guidance, the investor may fail to "articulate, early on, a clear and consistent rationale for the transaction."[336] As one former CFIUS staff member put it, the "rules are intentionally ambiguous to afford regulators maximum discretion."[337] In part, that discretion helps protect CFIUS's classified intelligence assessment. But it also provides some cover when the Committee disapproves of a transaction but fails to articulate the reason why.

Second, foreign investors may need more information than the government provides. In *Ralls*, the D.C. Circuit found that the Obama Administration failed to provide material information to Ralls, thereby violating its due process rights.[338] In prosecutorial terms, CFIUS failed to hand over material evidence to Ralls, arguably preventing the company from understanding the

[331] *See* U.S. Dep't of Commerce, Bureau of Economic Analysis, *Foreign Direct Investment Position in the United States on a Historical-Cost Basis, 2013*, https://www.bea.gov/international/di1fdibal.htm.

[332] *Id.*

[333] *See, e.g.*, Jose W. Fernandez, *Lessons from the Trenches*, INT'L FIN. L. REV., July/Aug. 2014, at 44; Todd Millen & Michael Sussman, *Regulatory: A Brief Guide to CFIUS*, INSIDE COUNSEL, May 31, 2002, http://www.insidecounsel.com/2012/05/31/regulatory-a-brief-guide-to-cfius.

[334] There is no shortage of commentary on how to reform CFIUS. *See, e.g.*, Jonathan Wakely & Lindsay Windsor, *Ralls on Remand: U.S. Investment Policy and the Scope of CFIUS' Authority* , 48 INT'L LAW. 105, 121 (2014) (suggesting stricter limits on CFIUS' authority to enter mitigation agreements); Derek Scissors, *A Better Committee on Foreign Investment in the United States*, Heritage Foundation Issue Brief #3844, HERITAGE.ORG (Jan. 28, 2013), *http://www.heritage.org/research/reports/2013/01/enhancing-the-committee-on-foreign-investment-in-the-united-states-cfius*; Yiheng Feng, Note, *"We Wouldn't Transfer Title to the Devil": Consequences of the Congressional Politicization of Foreign Direct Investment on National Security Grounds*, 42 N.Y.U. J. INT'L L. & POL. 253 300–03 (2009) (arguing CFIUS should have better mitigation procedures); Jason Cox, *Regulation of Foreign Direct Investment after the Dubai Ports Controversy: Has the U.S. Government Finally Figured Out how to Balance Foreign Threats to National Security Without Alienating Foreign Companies?*, 34 J. CORP. L. 293, 311–14 (2008) (recommending, *inter alia*, the creation of a new committee to review all FDI, and the repeal of mandatory investigations for government-controlled investments).

[335] *See* Notice, Dep't of Treasury, Office of investment Security; *Guidance Concerning the National Security Review by the Committee on Foreign Investment in the United States*, 73 Fed. Reg. 74568 (Dec. 8, 2008).

[336] Fernandez, *supra* note 333, at 45.

[337] *Id.* at 44.

[338] *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 758 F.3d 296 (D.C. Cir. 2014).

national security implications of its acquisition. Since CFIUS is both prosecutor (compiling evidence) and judge (making decisions based on that evidence), its failure to share evidence casts doubt on its ability to act independently. It is critical, then, to ensure that the foreign investor has a meaningful opportunity to see, analyze and rebut the evidence that CFIUS has gathered.[339]

Third, once CFIUS renders its decision, investors have no way to challenge it. Indeed, the Exon-Florio amendments specifically preclude judicial review of the President's decision.[340] *Ralls* revealed that courts can review CFIUS *procedure* to ensure certain constitutional rights of due process. The introduction of an appeals mechanism, either within CFIUS itself or in an outside body, such as federal courts, would ensure that CFIUS decisions have a firm factual basis, and do not result from political or racial ructions of the day. Federal judicial review of agency actions is common in many areas of the law, and courts are well equipped to handle sensitive or confidential information.[341]

B. Congress: Acts and Omissions

Congress also has a role to play. First, its members should understand the importance of foreign investment in the United States generally and in their respective districts specifically. Scarcely a week goes by without news of another Chinese investment in the United States, and not just in the major markets such as New York or California.[342] If Congress understood the extent to which foreign investment benefited their constituencies—through jobs, research and development, economic activity and secondary effects (services catering to the employees)—they may find it harder to oppose foreign investment.[343]

In this respect, a recent report by the National Committee on U.S.–China

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[339] Jeremy Zucker & Hrishikesh Hari, *Gone With the Wind: The Ralls Transaction and Implications for Foreign Investment in the United States*, 9 GLOBAL TRADE & CUSTOMS J. 182, 190 (2014).

[340] The Exon-Florio Amendments foreclose judicial review of decisions made by the President. *See* 50 U.S.C. § 2170(e) (1988).

[341] Of course, courts could not do this without congressional authorization. Even if the judiciary has such authority, it must determine whether its review would "implicate political, military, economic or other choices 'not essentially legal [in] nature.'" Hondros v. U.S. Civil Service Comm'n, 720 F.2d 278, 293 (3d Cir. 1983).

[342] For instance, the New York Times reported that a Chinese state-owned enterprise signed a $566-million dollar contract to supply railway cars for Boston's Orange and Red Lines. $60 million will go to setting up a factory in Springfield, one of the poorest cities in the Commonwealth. *See* Jad Mouawad, *A Rail Firm From China Puts a Toe Into the U.S.*, N.Y. TIMES, Sept. 4, 2015, at B1. *See also*, Randy Ludlow, *Kasich spills the beans on Chinese trade trip to Ohio*, COLUMBUS DISPATCH (June 9, 2015), http://www.dispatch.com/content/blogs/the-daily-briefing/2015/06/6-9-15-kasich-cain.html (noting a $330 million investment from a Chinese-owned glass company).

[343] Some of these investments have helped bring manufacturing jobs back to the U.S. *See* Mouawad, *supra* note 342 (subway care construction); Ludlow, *supra* note 342 (glass construction).

Relations and the Rhodium Group is instructive.[344] The report tracks fourteen years of Chinese foreign direct investment into each of the 435 congressional districts. To be sure, China remains a comparatively small investor in the United States—twentieth in the world, holding 0.3% of total FDI in the United States.[345] Yet Chinese investors employ about 80,000 U.S. workers and spend hundreds of millions of dollars in research and development annually.[346] They have invested in a diverse array of sectors, including oil, technology, and renewable energy—the very sectors that Congress and CFIUS warned about in prior years. Yet, as far as we know, no company has shut down, no terrorist attacks have occurred, and no trade secrets have been stolen. This Article may help U.S. politicians realize that Chinese investment, properly screened, can serve the same useful purposes that foreign investment has traditionally played in the United States.

Second, Congress could also consider providing additional investment protections through legislation. Since nations enjoy autonomy to regulate foreign investment on their own terms, the legislature can decide how to treat foreign investors. The national treatment standard demands equal treatment for both the foreign and domestic investor.[347] The foreign investor should not encounter discrimination in market access, applicable laws, access to justice, due process, and so on. In most investment treaties,[348] the national treatment obligation arises *after* the host state formally approves the investment.[349] This *post-entry* model preserves the state's strong gatekeeping function regarding foreign investment. It simply prohibits objectionable foreign investors from entering the market in the first place.

The North American model, also known as *pre-entry* national treatment, accords equal treatment to foreign investors when they acquire the interest,

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[344] National Committee on U.S.–China Relations & Rhodium Group, *New Neighbors: Chinese Investment in the United States by Congressional District*, NCUSCR.ORG (May 2015) [hereinafter *Chinese Investment Report*], https://www.ncuscr.org/sites/default/files/Chinese-FDI-in-US_Full-Report-2015-NCUSCR_0.pdf.

[345] *See* Bureau of Economic Analysis, Foreign Direct Invest in the U.S.: Balance of Payments and Direct Investment Position Data, https://www.bea.gov/international/di1fdibal.htm. As of 2014, the most recent figures available, China has invested approximately $9.47 billion, of a total of $2.90 trillion, in the United States. Even if we include all investment from Hong Kong—where *some* PRC capital originates—the total would be $17.07 billion—less than Korea, Singapore, Hungary or Norway. *Id.*

[346] *Chinese Investment Report*, *supra* note 344, at 7.

[347] United Nations Conference on Trade and Development, *National Treatment*, 1, UNCTAD/ITE/IIT/11 (Vol. IV) (1999).

[348] European states have traditionally only granted post-entry national treatment. M. Sornarajah, THE INTERNATIONAL LAW OF FOREIGN INVESTMENT 336–37 (6th ed. 2006). Developing states usually provide post-entry national treatment in their bilateral investment treaties. Lauge Skovgaard Poulsen, *The Significance of South-South BITS for the International Investment Regime: A Quantitative Analysis*, 30 NW. J. INT'L L. & BUS. 101, 118 (2013) (finding South-South BITs far less likely to provide robust national treatment protections than North-South BITs.

[349] Poulsen, *supra* note 348, at 119.

even if the state has not specifically authorized it.[350] That is, the state cedes regulatory autonomy in many fields, usually spelled out in a treaty appendix or "negative list." The default setting is that foreign investors enjoy the "right of entry" or "right to establish" in the host state.[351] Corporations enjoy enhanced autonomy under pre-entry national treatment. The state has, in effect, approved the investment and agreed not to discriminate against them.

The United States has made pre-entry national treatment a cornerstone of its foreign investment policy for decades. Beginning with its 1983 model Bilateral Investment Treaty ("BIT"), all U.S. BITs require pre-entry national treatment of the partner country.[352] Because pre-entry national treatment is a product of treaty law, and Congress must ratify investment treaties, Congress has the power to extend this protection. The United States could extend pre-entry national treatment to all foreign investors—even in the absence of a bilateral investment treaty. This would bring the United States' own practice far closer to the goal of universalizing pre-entry national treatment. It would also provide a legal guarantee to the long held mantra of openness to foreign investment.

Were the U.S. government to deny a foreign investor national treatment, a remedy could take one of several forms. If CFIUS or Congress interferes with a foreign investment without a legally compelling justification, a court could grant declaratory relief (e.g. the investor's rights were violated), injunctive relief (requiring CFIUS to take action, and perhaps even authorizing the investment), or monetary damages (lost profits or otherwise). Such protections may not prevent another Dubai Ports World or CNOOC situation. They might, however, provide legal remedies to foreign investors and signal to the political branches that their authority to regulate investment has limits.

In the long run, the United States is unlikely to offer pre-entry national treatment to foreign investors in the absence of a treaty. Unless the United States gains national treatment from a partner country, there is no reason why it would offer something for nothing. To be sure, the United States is capable of acting unilaterally, particularly if long-term commercial interests are at stake.[353] Congress has the ability to do this, either by passing a law like the

[350] This standard was part of NAFTA, and has since spread to BITs between Canada and China, for instance. D.M. McRae and A.L.C. de Mestral, *Canada-China Foreign Investment Agreement,* 49 CANADIAN YB. INT'L L. 202, 224–25 (2009). China has also agreed to pre-entry national treatment with the United States. *See* He Weiwen, *A High Standard Bilateral Investment* Treaty, CHINA US FOCUS (July 24, 2014), http://www.chinausfocus.com/finance-economy/a-high-standard-bilateral-investment-treaty.

[351] ANDREW PAUL NEWCOMBE & LLUIS PARADELL, LAW & PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 158 (2009).

[352] 1983 Draft Bilateral Investment Treaty of the United States, Art. II(b), *quoted in* Kenneth J. Vandevelde, *The Bilateral Investment Treaty Program of the United States*, 21 CORNELL INT'L L.J. 201, n.119 (1998).

[353] Antitrust and corruption are two areas where the United States has insisted its domestic law may have extraterritorial application. *See F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 165 (2004) ("No one denies that America's antitrust laws, when applied to foreign conduct, can interfere with

FCPA, or by serially ratifying BITs with pre-entry national treatment provisions. However, Congress does not appear quite as attached to pre-entry national treatment as it has been to other principles of commercial law.

VI. CONCLUSION

One frequently hears that the United States is the "most hospitable country" towards forward direct investment. This Article does not dislodge the broad thrust of that claim. Instead, it shows how U.S. law of foreign investment grew out of several responses to Asian investment, and that this response was not based solely on objective or political criteria like economic nationalism or national security. The evidence, pieced together from the 1970s to the 2000s, punctuates this notion of U.S. openness.

We know U.S. treatment of Asian investment has not always been equal to that of Western investment. As a recent Chinese article summarized:

> Although the U.S. is one of the world's most open markets, its security review process for foreign investment is particularly stringent. For Chinese companies especially, the U.S.'s national security review seems to wear "tinted glasses." From the early defeat of CNOOC's bid for Unocal and Huawei's thwarted attempts to invest in the U.S., to the recent failure by Sany to invest in wind farms, Chinese investors face especially interesting security barriers in U.S. mergers and acquisitions.[354]

At the present moment, many Chinese investors suspect that the United States opposes Chinese investment. Indeed, Daniel Chow surmises that China's interest in BITs stems in large part from its frustration with U.S. barriers to Chinese investment.[355] How can we make sense of the United States' current unease with Chinese investment, and the past four decades of opposition to Asian investment? Three factors help make sense of this history.

First, national security—whose implication is highly implausible in most instances—plays a role. With advances in cybersecurity, one cannot know *ex ante* the extent to which an acquisition may disrupt U.S. national

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a foreign nation's ability to regulate its own commercial affairs."). *See* Andrew Brady Spalding, *Four Unchartered Corners of Anti-Corruption Law: In Search of Remedies to the Sanctioning Effect*, 2012 WIS. L. REV. 661, 662 (reciting the frequent complaint that U.S. anticorruption law handicaps U.S. businesses).

[354] *Zhongguo Qiye Ruhe Fangfan Meiguo Touzi Anquan Shencha Fengxian* [*How Can Chinese Companies Guard Against the Risk of U.S. Investment Security Review*], 21 SHIJI JINGJI BAODAO [21ST CENTURY ECON. TIMES] (Sept. 7, 2015), http://finance.sina.com.cn/roll/20150907/084423172831.shtml.

[355] *See, e.g.*, Daniel C.K. Chow, *Why China Wants a Bilateral Investment Treaty with the United States*, B.U. INT'L L.J. 421, 442 (2015). This sentiment also surfaced in the conversations the author had with officials from China's Ministry of Foreign Affairs and Ministry of Commerce in Summer, 2015.

security. Precisely for this reason, CFIUS has a thorough, though opaque, vetting process.

Second, economic concerns reverberate throughout these discussions. As noted, investments from certain Asian jurisdictions—South Korea, Taiwan, and Singapore, for example—attract little of the umbrage reserved for China, Japan, and certain Middle Eastern jurisdictions. This animosity stems from a fear that the United States is slipping, losing its international prestige, or fading into obscurity. This is not true as an empirical matter; the United States continues to enjoy the "pole position" in the global prestige race. But perceptions frequently overshadow the truth. The thought of receiving "reverse investment," and of somehow being subjugated to economic forces originating from Asia, still bothers many people from the United States and some U.S. politicians. A similar anxiety does not attach to investments from Germany, the United Kingdom, or France, the fourth, fifth and sixth largest economies, respectively. This leads to the final point.

Third, race and national origin still matter. Having analyzed an array of statements, actions and decisions rendered by government officials over four decades, this Article still observes special censure for investors from Asia. Westerners, even now, account for the overwhelming majority of inbound foreign investment. Yet Chinese investment—tiny by comparison—still rankles. U.S. politicians often react to Chinese investment, whether in pork manufacturing or computer software, with a suspiciousness in large part disproportionate to the actual threat. The language of opposition to Asian investment has grown less strident from the 1970s and 1980s to the present. But the underlying discomfort with a powerful, economically strong and internationally active Asia persists.

Many predict that the twenty-first century will belong to "Asia," as Asian countries gain wealth, power, military strength, and other capacities. This rise need not come at the expense of the United States, any more than the United States' own rise impoverished Germany, Britain, or France. If people from the United States can avoid reflexive reactions to Asian investment, the United States may actually live up to its reputation for receptivity to foreign capital. That would pose a model for the rest of the world.