

THE UNITED STATES FOREIGN INVESTMENT POLICY: CONFLICT OF PRINCIPLES IN CFIUS REFORM

Edna Aparecida da Silva*

ABSTRACT

The text deals with the relation between foreign investment and security in the domestic debate in the United States. Arguments based on the notion of “economic security” suggest the adoption of protectionist measures that would represent a rupture in terms of the principles and the liberal bias that distinguish the foreign investment policy in the U.S. since the post-war. These concerns led to the approval of the Foreign Investment and National Security Act (FINSIA) in 2007 that reformed the Committee on Foreign Investment in the United States, responsible for monitoring and investigating mergers and acquisitions of U.S. companies by foreign investors, based on the implications for national security. It is observed the defense of the traditional policy of open doors by the Executive and the Treasury Department, because of the systemic implications and the sensitivity of the U.S. to economic interdependence. However, the debate has generated effects on the behavior of other actors in the international system, such as “investment protectionism” in OECD countries, and as with the relation between trade and investment that guided the United States strategies in the GATT/WTO negotiations, the axis “investment and security” will possibly affect multilateral negotiations. Therefore, this article analyzes the concept of economic security, identifies positions on domestic policy on the reform of CFIUS since its creation in 1970 until the reform of 2007, and discusses their significance from the standpoint of international politics.

RESUMO

O texto trata da relação entre investimento estrangeiro e segurança no debate doméstico nos Estados Unidos. Argumentos fundados na noção de *economic security* sugerem a adoção de medidas de natureza protecionista que representariam uma ruptura em termos de princípios e da concepção liberal que particularizam a política de investimento estrangeiro norte-americana desde o pós-Guerra. Estas preocupações levaram à aprovação do Foreign Investment and National Security Act (FINSIA), em 2007, que reformou o Comitê sobre Investimentos Estrangeiros nos Estados Unidos, responsável pelo monitoramento e investigação de fusões e aquisições de empresas americanas por investidores estrangeiros, com base em suas implicações para a segurança nacional. Observa-se, por parte do Executivo e do Departamento do Tesouro, a defesa da tradicional política de *open doors*, em razão das implicações sistêmicas e da sensibilidade dos Estados Unidos à interdependência econômica. Contudo, o debate tem gerado efeitos na conduta dos demais atores do sistema internacional, como o “protecionismo de investimentos” nos países da Organização para a Cooperação e Desenvolvimento Econômico (OCDE), e, como ocorreu com a relação entre comércio e investimento, que orientou as estratégias dos Estados Unidos nas negociações comerciais do Acordo Geral de Tarifas e Comércio (General Agreement on Tariffs and Trade – GATT) / Organização Mundial do Comércio (OMC), o eixo “investimento e segurança” possivelmente terá impactos nas negociações multilaterais. Nesse sentido, o artigo analisa o conceito de segurança econômica, identifica as posições na política doméstica sobre as reformas do Comitê de Investimento Estrangeiro dos Estados Unidos (Committee on Foreign Investment in the United States – CFIUS), desde sua criação em 1970 até a reforma de 2007, e discute o seu significado do ponto de vista da política internacional.

* Researcher at the National Institute for Studies on the United States (INEU). E-mail address: <ednasilva@ineu.org.br>.

1 INTRODUCTION

Until mid-1980s, direct foreign investment was not an issue in the American domestic political debate (GRAHAM, 1991). Recently, mergers and acquisitions of American companies have drawn attention to the regulatory regime of national security analysis, increasing reactions to foreign investments in the United States, especially regarding sovereign funds and State-owned companies' investments in the energy and defense industry sectors (TASSEL and CHUNG, 2007, p. 7; GAO, 2009).¹

According to the liberal conception of international economic order, conceived at the end of World War II, the United States foreign investment policy, is based on principles of national treatment, the right of establishment and non-discrimination. However, the increasing flow of foreign investments and its implications in terms of competitiveness have become central in the debate scenario about the relative decline of the USA economy, especially from the 1980's on; since then, this issue has become the instrument for political and regulatory proposals, challenging the liberal principles of open investment policy. The ongoing status of the political debate and the regulatory changes in the United States, as well as in other countries, outlines a new horizon to the international policy on foreign investment: the adoption of protectionism hue policies, clearly not in agreement with the regulatory-liberal model, established according to legitimate objectives of public policies, protection of national security or requirement of benefits for the domestic economies. The so-called protectionism of investments has been justified by the relationship between investment and national security, in the wake of failures regarding multilateral regulation of investments, therefore, out of reach of the World Trade Organization (WTO) disciplines.

Concerns with the security dimension of foreign investment in the USA emerged in the 1970s as a reaction to Arab investments and to foreign acquisitions in the banking sector, becoming stronger in the 1980s with the direct foreign investment, particularly Japanese investments. Currently, the attention is drawn to sovereign funds and direct investments controlled by or with the participation of governments, whose operations call attention to the public opinion and the Congress, due to its possible implications for American national

1. Even investments below 10%, considered as passive investments that do not establish control or ownership, are target of Congressmen initiatives, since this kind of investment is not within the scope of security investigations (The Wall Street Journal, 2008, p. A12). Under Law 110-49, created by The Foreign Investment and National Security Act (Finsa) in 2007, such investments shall be submitted to security analysis when establishing control.

security.² It is possible to state that the United States revisit the same uneasiness of Latin American countries and Europe during the 1960s regarding American multinational companies: fears about the effects of foreign influences in the national economy and their implications in economic, political and mainly, in the American case, security terms.³

It was in this context that, in 2006, the approval for acquisition of Peninsular and Oriental Steam Navigation Company (P&O), a British enterprise operating port terminals in the US, by Dubai Ports World (DPW) unleashed an intense reaction from the American Congress.⁴ According to the public opinion, the quickness of the approval indicated the need of reforming the analysis processes of acquisitions with national security implications, clearly perceived as inconsistent with the set of security policies adopted by the Government after the September 11 terrorist attacks. This episode proved a potential conflict with the goals presented at President George W. Bush's National Security Strategy: preservation of the national security and maintenance of free capital flows, especially direct foreign investment.⁵

Thus, the obscure Committee on Foreign Investment in the United States – CFIUS and the policy of foreign investment inflows has become focus of the Congress and the Senate's attention. In this discussion, the notions of economic security and national security have appeared as vectors of the proposals for regulatory reform, allowing the concerns about sovereignty, economic independence and security to gain strength in the American political set.

In the course of such discussion, the American Congress approved H.R. 556, The Foreign Investment and National Security Act (FINSA), in February 2007 that, with unanimous approval by the Senate and President George W. Bush's enactment, turned into law in July 26, 2007 (P. L. 110-49). This Act amended section 721 of the 1950 Defense of Production Act (DPA), authorizing the President to analyze mergers, acquisitions and takeovers that might result in

2. Among such transactions, there are the acquisition of IBM computer division by the Chinese Lenovo in 2004 and its non-performed operations, as well as the purpose of Unocal acquisition, an American company of the energy sector, by a branch controlled by the Chinese government, China National Offshore Oil Company (CNOOC) in 2005, and the case of 3Com in 2008, a company of equipment and network solutions acquired by Bain Capital Partners, an investment company in which the Chinese Huawei Technologies (manufacturer of telecommunications products) holds minority stakes. In 1990, the George Bush administration canceled the sale of Mamco Manufacturing of Seattle, an American manufacturer of airplane components for the Chinese government, which was the only case the law that allows the President to block foreign investments, based on national security arguments, was used (Rosenthal, 1990).

3. Besides the tone of debates, many authors observe that the foreign presence in the United States cannot be compared to the presence and influence of American multinational corporations in other countries.

4. The same scenario happened in 2005 when China National Offshore Oil Corporation Ltd., (CNOOC), an State-owned company tried to purchase Unocal, an American oil company also disputed by Chevron. In this case, political pressures led to withdrawal of proposal to acquire CNOOC.

5. Cf. The National Strategy Security of the United States of America, March 2006, pages 26-27. Information available at: <<http://www.whitehouse.gov/nsc/nss/2006/nss2006.pdf>>.

ownership or control by foreigners of American companies and blocking those that present implications for national security. In general, FINSA has encoded CFIUS structure, role, processes and responsibilities and it established the role of the Executive's departments, agencies and investments bureaus.⁶

The reference of the relation between investment and security in the FINSA text emphasized the strictness of analysis processes for mergers and acquisitions proposals and, by establishing new criteria, made the impression that the United States would have modified its open-investment policy. As an expression of the liberal internationalist model of international capital flows regulation which established international standards for dealing with foreign investment and policies recommended by international economic organizations (IKENBERRY, 2004, 1999; JACKSON, 2000), this policy is part of guidelines set by international economic organizations, such as WTO and The Organization for Economic Cooperation and Development (OECD), especially part of the Code of Liberalization of Capital Flows and Current Invisible Operations and the multilateral and regional trade agreements, such as The General Agreement on Tariffs and Trade (GATT) and The North-American Free Trade Agreement (NAFTA). It means that liberal values and principles of the international economic order would be challenged at the scope of the American domestic policy.

Both the political debate and the changes effectively introduced in the American domestic regulation have affected international economic relations, encouraging other countries to adopt similar policies. It is worth recalling that the requirement of reciprocity is one of the components of the US international economic policy and, at the same time, one of the principles of the public international law, expressed in the institute of rebuttal, conferring legitimacy to treatment retribution among players.⁷

According to OECD, over the past five years the analysis of national security regarding foreign investment inflows in national economies has been one of the policy-makers' focus. There is a debate on the possibility of the European Union adopting such mechanisms,⁸ although some countries, like the United Kingdom, France and Germany, already have their reviewing systems for acquisitions in "sensitive sectors". The same situation has occurred in other countries. China approved legislation that will block investments that might affect the

6. In November 2008, after the discussion of several purposes in public hearings, the Department of Treasury, through The Office of Investment Security published the final procedural regulations and guidelines for FINSA compliance (Department of Treasury, 2008).

7. "Rebuttal is the act by which a subject of Public International Law is opposed to other subjects that exercise their rights by harming them. Rebuttal is retaliation to an act that, without being a clear infringement of the International Law, might put a State in a disadvantage situation. Rebuttal, as answer to an act, is inspired in the principle of reciprocity, establishing a relation between the offender's act and the offended person's loss" (Lafer, 1979, p. 38).

8. "Europe needs to screen investment" (Financial Times, August 11, 2009).

“national economic security”. Japan expanded the covered sectors and Russia established sectors of strategic importance for security and defense. In 2009, Canada and Germany introduced security review mechanisms in all sectors, and India is discussing the CFIUS review model. It is possible to note flexibility in the framework of national policies of foreign investment regulation, regarded as less welcoming by some (SAUVANT, 2009a) and as protectionist by others.

This article deals on the debate about reforms of the regulation policy regarding foreign investment inflows in the US, identifying critical aspects of the new regulation established by FINSA, in 2007. It aims at demonstrating that the focus on national security, according to the National Strategy Security, has been functional for maintaining traditional guidelines of the Executive, CFIUS and Department of Treasury regarding the policy of foreign investment attraction, to the detriment of the Congress and Department of Trade claims for the inclusion of the economic security criterion and a more protectionist perspective. The concern about systemic implications of domestic choices that narrow possibilities of changes according to domestic pressure and of effects on structural problems in the American economy, such as public deficit, competitiveness and unemployment is highlighted. However, the new criteria of FINSA have made analysis more complex, not as predictable as the organizations of international investors would desire. It has simultaneously granted to the Congress greater interaction with the CFIUS’s analysis processes, as well as the direct foreign investment policy. By observing the new regulations approved by the Congress, such as 2007 CFIUS and the Defense Production Act Reauthorization of September 2009,⁹ it is possible to verify that foreign investment securitization¹⁰ in the American domestic policy allowed creating consensus on the need of the Executive and federal agencies working in terms of defending strategic sectors, dissonant to liberal conceptions, and of a competitiveness policy that mobilizes elements of industrial policy.

The text is divided into four sections, in addition to this introduction. Section 2 presents the debate on the relation between economy and security, setting the concepts of national security and economic security. Section 3 analyzes the US foreign investment policy. The fourth section covers the history of CFIUS and its reforms,

9. The Defense Production Act Reauthorization, approved in September 2009, allows the President and Federal agencies to foster the American economy in sectors that are critical to the national defense. Among other possibilities, “the guarantee of private loans for supporting the productive capacity, creating, maintaining, expanding, protecting or restoring production and supply, as well as services essential to the national defense; loans to private businesses whose activities reduce the current or forecasted insufficiency of industrial resources, items of critical technology or materials essential do the national defense; and actions to create, maintain, protect, enhance or restore the domestic capacities for national defense” stand out.

10. Securitization is a very common term used by economists: it refers to securities and debenture bonds. In this aspect, it means to convert bonds into purpose loans or securities to be subsequently issued. In this article, securitization refers to a process of incorporation of topics that got a place in the national security agenda (Buzan, 1997).

highlighting the new procedures and criteria for reviews of foreign investments security established from FINSA and, lastly, the meaning of the debate and the regulatory changes according to the international policy view is discussed.

2 ECONOMY AND SECURITY

From the 1970s, issues like economic embargo, raw-materials supply, energy issues and industrial competitiveness gained space in the field of security concerns, especially with the oil crisis and the emergence of economic powers in the world economy, such as Japan and Germany. The problems of the American economy, such as loss of industrial competitiveness, unemployment, commercial deficit, concerns about the balance of payments stability have strengthened the propositions of policies based on the concepts of “national security” and “economic security”, which feed the debate on the development of policies and foreign investment regulation in the United States.

Economic issues gained the status of national security issues, in the course of the discussion about the US position in the international system (MATHEWS, 1989, p. 162). The perception that the country, due to the increase of interdependence in the fields of trade, production, and financial exchanges would be more sensitive to other countries’ economic policies was crucial to the incorporation of economic issues in the domestic political debate.

Fears about the foreign presence and control in basic sectors of the economies have historically raised reactions of economic nationalism and protection demands of commercial nature (MODEL, 1967). Restrictions to foreign investments reflect the country’s insecurity, indicating its intention to protect local industry in relation to foreign competitors, as well as to preserve control over its economy (TOLCHIN and TOLCHIN, 1988, p. 226). This happens because direct foreign investments, beyond the economic contributions to the host country according to the liberal perspective, also involve fear and distrust of national economies being dominated by foreigners, which explains its capability of creating political mobilization – in American case, especially regarding electoral interests.

The perception in the domestic debate is that, due to vulnerability, direct foreign investment is a security issue. In this sense, far from measuring the effectiveness of threats, according to Buzan, Waever and Wilde (1998, p. 24), it is possible to observe that:

Security is thus a self-referential practice, because it is in this practice that the issue becomes a security issue – not necessarily because a real existential threat exists, but because the issue is presented as such a threat.

This perception of threat is linked to the place of economic issues in the security agenda and it may be explained by a set of changes that happened in the 1990s, with the end of Cold War and the restructuring processes of the world economy, especially the financial liberalization and vertical integration of multinational corporations. More specifically, changes in the security agenda of post-Cold War, concerns of the neo-realistic agenda on the implications, in terms of power, of an occasional loss of competitiveness and the increase of capital flows dependency and the debate over the globalization of the American defense industry and high-technology sector (SORENSEN, 1990; MORAN, 1990/1991 and 1993; KAPSTEIN, 1989/1990; FRIEDBERG, 1991).

In the 1990s, with the end of Cold War, the security agenda has expanded its scope, including other issues than external military threats. The literature has discussed the meaning of such changes, as well as the securitization and politicization of topics such as economic, human, food and environmental security, amongst others, highlighting the multidimensional nature of security issues (BALDWIN, 1997, p. 23; VILLA, 1999; BUZAN; WAEVER; WILDE, 1998; MATHEWS, 1989). The securitization refers to the *status* of security that certain issues acquire, whilst not *stricto sensu* related to defense or security.

The focus of the neo-realistic agenda about the security dimension of structural weaknesses in the American economy has played an important role. In this perspective, the relative decline of its economic power could represent a reduction of military capabilities, a core aspect of its power position in the interstate system (MORAN, 1993). The military power, one of the pillars of the American hegemony, stands in the economic resources mobilization that involves industrial capacity, access to energy and technology (POSEN, 2003, p. 10; KIRSHNER, 1998).

Another aspect refers to the globalization of the American defense industry. Kapstein explains that the planning of the military security in The United States has been based on the concept of an economically independent defense industry. However, the increasing dependency of foreign vendors that supply components used in military equipment has affected defense contracts, especially in the case of vendors with competitive advantages in some sectors, due to globalization trends verified in civil sectors, such as automobiles and computers. The dependency of external sources of energy supply and defense equipment reinforced fears about the national security (KAPSTEIN, 1989/1990, p. 85- 90).

Reich (1986) notes that since the 1950s, through government purchases and research consortia financing, the American government has been a booster of the defense industry, as well as the aerospace sector, creating the market and stimulating new sectors, mainly the high-tech ones. In that sense, the defense industry has been a dynamic element of competitiveness for the American industrial base.

To a significant extent this government-created market has been open only to US firms. Although the “Buy American” provisions of the government procurement laws were relaxed somewhat in 1979, government contracts involving national security are still awarded solely to domestic firms (REICH, 1986, p. 865).

Such comments reveal one of the reasons why investors chose direct investment. It means that policies for the control of technology transfer stimulate mergers and acquisitions, whereby foreign investors aim to be granted with access to sectors of technological innovation and “critical infrastructure”, such as information systems, software, energy, amongst others, treated by the American legislation as sensitive sectors and protected by a dense network of agencies.¹¹

The recognition of the extent of economic issues on security and its place in the national security agenda has a long tradition and it does not represent any novelty. The acknowledgment that the productive capacity represents one of the bases for the military power is shared by different schools of thought, liberal or mercantilist ones (KIRSHNER, 1998). Nevertheless, it is necessary to distinguish the dimension of security of the economy from the meaning of the notion of economic security that has been mobilized in the domestic political discussion in the US about investment regulation.

According to literature, the concept of economic security has several meanings and it is regarded as little precise (VILLA, 1999). For Cable, this concept:

1. Refers to aspects of commerce and investment that affect the defense capacity of a country, such as freedom to acquire arms and technology, trust in suppliers of military equipment or threat by opponents that improve their technological capacity;
2. Defines economic security in terms of instruments for economic policy that are used for aggression or defense, such as trade and economic boycotts, restrictions to energy supply;
3. The idea that a relative military capability, or power projection might be weakened by a low economic performance and require a response for economic policy;
4. An extension of the concept encompassing fears of economic, ecological and social instability (CABLE, 1995, p. 306-307).

11. In addition to CFIUS, there is a dense network of laws and regulations on foreign investments, among which are worth highlighting: control programs of the United States foreign trade, such as the regulation of the Trade Department, the Export-Administration Regulation (EAR), that limits the exports of dual-use items, products (software) and military and commercial technologies; the International Traffic in Arms Regulation (ITAR) of the State Department, that controls exports and transfers of defense goods, software of technical information created for military or intelligence purposes; the Office of Foreign Assets Control of the Department of Treasury, responsible for programs of trade sanctions, which also forbids imports and exports operations with countries or entities due to security reasons or American national policies; regulations and security controls of the U.S. Securities and Exchange Commission (SEC) and reviews of the U.S. Federal Trade Commission (FTC) and the Justice Department, that evaluate the effects on competition according to antitrust laws. Besides those, there are sectorial requirements, such as the ones applicable for the telecommunication sector and for financial institutions.

Cable explains that his analysis is focused on the concept of economic security or on a geo-economic perspective, not because it is the most important one, but because in The United States such concept was “moved to the centre of the debate, perhaps crowding out more legitimate issues more directly linked with traditional notions of security” (CABLE, 1995, p. 308). The concept of economic security that informs the political debate and the initiatives of domestic reforms of investments in US is established in the field of the strategic-military perspective, as indicated in Cable’s first and third definitions, pointing out to the need of an “strategy of economic policy”, as observed in the notions of technology and critical infrastructure in CFIUS analysis criteria of security.

This concept, part of the speech of different players, such as academics, policymakers and government agencies, reveals positions favorable to changes in US policies as a reaction to the increment of economic interdependency.

The relation established between “national security” and “economic security” generates conflicting demands regarding foreign investments regulation and the role of government and its agencies. On the one hand, demands for more inflow control and restrictions. On the other hand, concerns about avoiding the adoption of measures that might reduce or hamper capital flows, considered important to financial balance in American economy. In this scenario, the notion of economic security suggests the adoption of protectionist measures, pointing in the direction of rupture in terms of values and a liberal conception of the State’s role.

Despite the intense mobilization of the Congress, the reactions to the September 11 attacks regarding the US safety, summed to multiple pressures for a more restrictive attitude regarding the regulation of the domestic foreign investment policy, the viewpoint of the Executive and the CFIUS perspective of action have kept consistent with the liberal internationalist tradition that particularize the foreign investment policy since the post-war period. Since the establishment of CFIUS, the position of the Executive and the Department of Treasury have been in defense of the open doors policy and the maintenance of the neutrality of the Federal range, in clear opposition to the attempts of the Congress to set monitoring policies and stricter regulation regarding foreign-owned companies.

How the history of CFIUS shows, subject of the next section, even if the United States seek to preserve the open doors policy in the preambles of legislative acts and speeches, the set of criteria approved in the 2007 reform indicates that regulations have incorporated new concepts that express changes in the sense of a protectionism policy. It is possible to observe that

In the US there is a strong disharmony between the prevailing economic speech (that consecrates principles of free trade and non-interference by the government) and the reality of a tradition full of development policies, which by the same reason

has this scarce public visibility. Despite that, it is constantly reproduced in the operation of different branches of the government apparatus, at Federal and state levels, as well as in the framework of relations that they keep with the most diverse of society. This is one side of its strong institutionalized nature that justifies them in pieces of legislation (VELASCO and CRUZ, 2009, p. 50).

The analysis of legislative changes, in the fine print of security regulations approved by the American Congress, identifies a set of provisions that translate elements of a competitiveness policy and of the industrial base, legitimized by its relation with the national security. The securitization of the foreign investment, mobilizing security issues, has made viable the maintenance of some coherence with liberal principles of local and international policies of the American State, and, at the same time, the development of policies in compliance with demands of protectionism hue, covered by the exception nature conferred by security arguments. It is what one sees, as it will be shown in the next section, in the case of CFIUS and in the text of the Defense Production Act Reauthorization approved in September 2009 that authorized Barack Obama's administration to create a fund to stimulate the American defense industry capacity, recognizing its connection with the world competitiveness and the need to protect sensitive sectors.¹²

In the context of reactions to the industrial policy topic, the relation between economy and security has allowed the development of a consensus on the protection of the defense industry and strategic sectors.

Such issues have served as bases for the relation established between investment and national security and nourished the debate on the domestic investment regulation reform, conducting the reforms of CFIUS in 1988, with the Exon-Florio amendment, and with FINSA in 2007.

3 THE UNITED STATES FOREIGN INVESTMENT POLICY

Foreign investment in the USA, since its independence until World War I, has played an important role in development (WILKINS, 2004; CHANG, 2004). Since then, as Chang describes, even if considered as necessary, it has been coping with fears of the American economy domination and its effects.

In order to ensure that the foreign investment would lead to the loss of national control in key-sectors of the economy, a huge amount of federal and state legislation was edited in the US since its independency to mid-1920s, when the country became the World's main economy. Such legislations focus especially on the finance, transportation and natural resources extraction (agriculture, mining, logging) sectors, which were the main recipients of foreign investments during this period (CHANG, 2004, p. 11).

12. S.167: Defense Production Act Reauthorization of 2009. Available at: <<http://www.govtrack.us/congress/billtext.xpd?bill=s111-1677>>.

Since the 19th century, restrictions to foreign investments were justified by concerns of national security as a measure of exception, consistent with liberal traditions. Some sectors, such as nuclear energy and domestic sea transportation were blocked for foreign investment. Others, such as broadcasting, telecommunication and local air transport only had limitations. Some were governed by the principle of reciprocity, such as land leasing for mining and gas pipelines (WILKINS, 2004).

With the end of World War II, when the country emerged in the indisputable condition of economic power, the US adopted its open doors policy for foreign investments. Since then, the country's domestic and international policy is guided by principles of non-discrimination, national treatment and right to access. This policy can be found in declarations, regulations, policies, international treaties and agreements.

For instance, a presidential declaration of 1977 observed that the USA policy regarding international investment was not meant to promote or to discourage flows of investment or activities. A presidential declaration of 1983 noted that the direct investment was welcome in the United States once it would be a response to market forces. Most recently, the former President George W. Bush issued a political declaration of support to open regimes of investment in 2007, stating that the government of the USA unequivocally supports international investments in the country (GAO, 2009, p. 8-9).

The report refers to Jimmy Carter's statements in 1977, acknowledging that market forces allow the best allocation of economic resources and Ronald Reagan's in 1983, restating the neutral position of the Federal government regarding capital flows. The investment policy that has been defended by the American Executive power is summarized in George W. Bush's words:

A free and open international investment regime is vital for a stable and growing economy, both here at home and throughout the world. The threat of global terrorism and other national security challenges have caused the United States and other countries to focus more intently on the national security dimensions of foreign investment. While my Administration will continue to take every necessary step to protect national security, my Administration recognizes that our prosperity and security are founded on our country's openness.

As both the world's largest investor and the world's largest recipient of investment, the United States has a key stake in promoting an open investment regime. The United States unequivocally supports international investment in this country and is equally committed to securing fair, equitable, and nondiscriminatory treatment for US investors abroad. Both inflow and outflow investments benefit our country by stimulating growth, creating jobs, enhancing productivity, and fostering competitiveness that allows our companies and their workers to prosper at home and in international markets (BUSH, 2008).

In this sense, the adoption of security measures for investments would not compromise the design of the American liberal policy of capital flows opening. This second formulation seems to be the most adequate for understanding the interpretation that has been built on the current route of CFIUS changes.

Congress' efforts to regulate foreign property of domestic assets date back to the World War I. In that moment, the German domain over the chemical industry stimulated the Congress to approve the Trading with Enemy Act in 1917, which authorized the President to regulate transactions involving foreign countries' interests. Afterwards it was replaced by the International Emergency Economic Powers Acts, which restricted Presidential authority on foreign assets and a formal declaration of national emergency (WEIMER, 2009).

According to Weimer (2009), between the World War I and the 1980s, the American Congress widened protections against foreign investments through a direct legislation on specific sectors, such as transportation, communication, banking, natural resources, energy and defense. However, it did not ban investment, only established limitations and imposed conditions. According to GAO's report, such legislation covers three categories: those limiting direct foreign investment in certain sectors, others restricting activities of acquired firms or their branches and those that do not clearly limit investments but only requiring transparency regarding ownership.

This reveals a significant trait of CFIUS and its processes of security analysis appear. Through CFIUS, the President is allowed to block an operation or to order its disinvestment.

Over the 1970s and the 1980s, a new scenario was set in the American domestic politics. The growth of foreign investments from developed economies, with growth rates higher than the American ones and with technological competitiveness, as well the oil crisis combined with the regulatory pressure on US based multinationals in host countries questioned the need of a review in the domestic policy.¹³

In the academic field, the 1980s were marked by discussions of theses about the hegemonic decline (discussion of Gilpin and Kennedy's theses) and, in the political level, by mobilization of the Congress and public opinion on the discussion about policies more adequate to the US new economy framework. This period, briefly mentioned herein, marked the emergence of the industrial policy issue in the United States, which in face of a strong opposing mobilization, as explained by Velasco and Cruz (2009), would be extinct by the end of the decade,

13. An example widely mentioned in the US is about the regulatory initiatives in Canada, through the Foreign Investment Review Agency (FIRA), created in 1973 in order to require net benefits to the local economy, emphasizing the security extent of the economy control. Such initiatives would directly affect the United States interests, the greatest investor in the Canadian economy. CFIUS was developed in the context of this discussion.

reappearing in the discussion of the 1990s as “competitiveness policy”.¹⁴ According to Eisinger (1990), in Walter Mondale in 1984 and Dukakis’ campaigns in 1988, the arguments in favor of the industrial policy have become public issues. In 1987, the attempt of acquisition of Fairchild Semiconductor Corporation by the Japanese Fujitsu Ltda. helped the Congress to approve the amendment of the Defense Production Act in 1988, which is called Exon-Florio, formalizing the authority of CFIUS in the processes of the foreign investment analysis with national security implications.

And then the United States international economic policy was changed. The trade policy, through the 1984 Trade and Tariff Act, established requirements of reciprocity and opening of markets in the sectors of services, investments and intellectual property. It was clearly an offensive policy of trade liberalization with the aim to reduce barriers and change countries’ policies in order to conforming them to their goals. In the case of investments, the purpose was to cut barriers, enhance the principle of national treatment and the right of establishment. Such proposals were supported in Chapter 11 of NAFTA and unsuccessfully integrated the text of OECD’s Multilateral Agreement on Investment in 1998 (VELASCO and CRUZ, 2009, p. 50-52).

And then the issue of reforming the regulation policy for direct foreign investment is back.

If the United States performance in the international level was about increasing liberalization and the requirement of reciprocity, a disharmony would be verified regarding the domestic discussion on direct foreign investment regulation. In this sense, Reich states that:

in the issue of foreign direct investment, largely unnoticed, that the US continued to adopt a pattern of behavior consistent, in important aspects, with a definition of a hegemon....While the US has therefore pursued domestic closure in trade, the same is not true of investment. In that sense, the US ‘underwrites the rules of system’ by sustaining on a unilateral basis and paying any of the costs associated with unreciprocated behavior. US Foreign Direct Investment (FDIUS) policy may therefore be last bastion of behavior consistent with a hegemonic status. (...) More pointedly, the U.S. has sustained a system of largely unimpeded, generally non-discriminatory access for foreign firms to the world’s largest single recipient access for foreign direct investment in the face of consistent ‘free rider’ (protectionist, discriminatory) behavior by the states whose major firms constitute some of its largest investors, whether that behavior is the product of public or private sectors barriers. Many of these costs have been incurred by virtue of the insistence of the United States government that it retain only the most minimal limitations of the free flow of foreign direct investments, both into and out of the United States (REICH, 1996, p. 28-29).

14. In this context, arguments against demands of industrial policies are explored by Eisinger (1990) and Velasco and Cruz (2009).

As seen in Reich's analysis, the United States preserve their direct foreign investment policy, even if their position in the global scenario has changed. In other economic issues, such as the trade policy, there were changes in policies with reciprocity requirement from their partners.

The American economy, in view of the deepening of economic interdependency, faces problems that will not be solved in the medium term, thus generating significant concerns (GRAHAM and KRUGMAN, 1995). Among those, there are deficit in the balance of payments, dependency of foreign investment flows, along with trade deficit and loss of the competitive position, both regarding the local market and exports in sectors that had been previously guided by the USA, such as electronics, industrial tools, automobiles, steel, computers, semiconductor chips, printers, technology and industrial design. The dependence on energy and strategic resources from other regions, such as oil and natural resources, which is a central aspect of discussion, still makes the maintenance of multilateral commitments and the preservation of the international economy opening a focal point of the American international policy.

According to Kang (1994), this topic has gained an electoral meaning and the regulation policy of foreign investment inflow is no longer an obscure issue, becoming subject of debate and propositions linked to concerns about economic policies:

growing conviction among U.S. politicians that economic security is a crucial element of national security and their perception that economic competitiveness is increasingly becoming a relevant electoral issue have driven the U.S. policy toward direct investments inflow from liberal encouragement to discretionary restrictions in some sensitive sectors of the domestic economy (KANG, 1994).

In this scenario, the United States are facing controversial directive policies. Since its establishment in 1975, according to terms used in the literature, the debate and proposals for CFIUS reform reveal a long-term conflict between the perspective of the conservative free traders that oppose the restriction to the American economy access and the nationalistic or interventionist ones, favorable to stricter controls on foreign investment inflows. Both positions, developed over decades of debate, represent deep forces in the US policy and are supported by republicans and democrats.

From the realistic perspective, it would be necessary to protect competencies in high-technology industrial sectors, which are essential to the defense industry and competitiveness. From the "American nationalistic" point of view, in several political scenarios, the direct foreign investment represents a threat not only to property and economy participation standards but also to the national security due to the foreign control of sectors like defense and high-technology industry. In these terms, they propose that the notion of "economic security" should be

added to the set of criteria used in the analysis of security implications, observing its impacts on competitiveness, essential commerce and jobs.¹⁵

From a liberal perspective, only issues of *strictu sensu* national security would justify limitations or blockages to operations, as established by the national legislation. This position, favorable to free capital flow, prevailed in George W. Bush's administration, who opposed to proposals of restrictions to investment flows that would reduce growth and market efficiency.¹⁶ This view emphasizes the benefits of unrestricted access of foreign investments, such as the incentive to competitiveness, in addition to macroeconomic aspects, effects on jobs, saving accounts and balance of payments. According to Souza (1994), this is the position that has been traditionally adopted by the Executive.

The domestic debate on foreign investments in the American economy confronts two interpretations that are different in terms of diagnosis. For liberals of several hues, the foreign investment is beneficial to the economy, although they recognize the need of monitoring operations of enterprises linked to products that are vital to the defense sector. Since taxation and reduction of public spending are not considered as politically viable alternatives and also not accepted by Americans, the choice for maintaining the balance of current accounts with external capital flow is kept (GRAHAM, 1991). Under this comprehension, as explained by Reich, the problem of the United States is not the foreign investment, but, instead, the issues of macroeconomic standards, such as low saving accounts, for which investment flows are a solution. That is, this interpretation removes the discussion focus on national competitiveness in favor of the issue of companies' profitability (REICH, 1996, p. 30-31; GRAHAM, 1991).

Another one is the approach of critics, according to which the industry competitiveness in high technology sectors and those linked to the industrial defense basis should be protected. Among these, there are the realists that underline the relation between investment and exports, the extent of national security and the industry competitiveness. Another essential aspect is the relation between multinationals and the States of origin:

companies are or at least should be related to their national base of origin; they are not interpreted as nationality-regardless, even though they are involuntarily just national agents (e.g., Gilpin 1975; Wellons, 1986). To the critics of American politics, part of the problem is that multinational companies originated from the main economic

15. According to Kang (1997), in the discussion of Exon-Florio amendment clauses of 1988, the White House opposed to the use of the term essential commerce, due to its ambiguity and the fact that it confronted the objective of reducing investment measures regarding commerce, as provided in the Trade Related Investment Measures (TRIMs) established in the Uruguay Round of GATT.

16. According to George W. Bush, "International investment in the United States promotes economic growth, productivity, competitiveness, and job creation. It is the policy of the United States to support unequivocally such investments, consistent with the protection of the national security" (Bush, 2008, p. 101).

trilateral competitors of the United States, widely-known Japan and Germany, seem to be more closely associated to considerations on the economy of their country of origin than to North-American multinational companies, even with results of contrasting ideologies, parameters of different sets of government standards or alternative calculations of self-interest. Regardless the cause, this essential difference seems to have significant implications to the composition of each country's economy and its structure of manufacturing basis. (REICH, 1996, p. 31).

Such interpretations summarize the general lines of divergences and tensions between the Congress and the Executive regarding the balance between the foreign investment attraction and requirements of national security that explicit the conflicts about their institutional role (SOUZA, 1994, p. 171). If, on the one hand, there is criticism to the foreign presence and its impact in terms of competitiveness and security; on the other hand, there are interests from the Executive and the Department of Treasury in terms of the meaning of capital flows for the macroeconomic balance. Not to mention the local pressures on the Congress from groups exposed to greater competition and from the interests of international investors and companies. Indeed, this is one of the critical aspects, since American companies that intend to operate with foreign investors face the transactions costs due to regulatory requirements, whether by Federal agencies and legislation or by the CFIUS analysis process. Therefore, as long as the Congress and the Department of Commerce reverberate pressures of interests groups, macroeconomic management issues prevail in the Executive and in the Department of Treasury's positions.

The United States economic policy has been a result of the relative influence of both positions, more than the adoption of a pragmatic guideline to the solution of the issues at stake, especially regarding the policy of direct foreign investment inflow (GASTER, 1992, p. 92).¹⁷ According to Mastanduno (1998, p. 825-854), by the end of the 1980s, government agencies responsible for economy and security issues were openly conflicting with priorities for the US foreign policy. In the same direction, according to Vernon and Spar (1989, p. 110), the American government did not developed a coherent policy for dealing with problems created by multinational companies' operations, despite the intensity of debates over the past decades.

It is in this scenario that the sense of discussion about the foreign investment policy reform and the creation of CFIUS is defined, which is the subject of next section.

17. What does explain political and legislative results and the little change in regulation, despite such increasing demand? According to Souza (1994), the institutional conflict may enlighten governance problems and bring comprehension to such issue. In the author's point of view, the perspective of institutional cooperation does not capture the political dynamics, suggesting focus on institutional conflicts. The author identifies coherence in the Executive position regarding direct foreign investment, despite political differences and party ideologies.

4 THE COURSE OF CFIUS

Until the 1970s, the concerns about investments outflow and the effects on foreign policy, balance of payments and employment prevailed in the domestic political debate (BLOCK, 1989, p. 226-234). This is so because of incentives offered by the United States government in order to encourage investments of American private capitals abroad, linked with the post-War foreign policy, resulting in the expansion of American multinational corporations. This moment was a breakthrough regarding the change of US position in the international economy, that, besides being the country of origin of multinational companies, it also assumed the host condition.

In the 1960s and 1970s, the international debate on relations among multinational companies and countries of origin and destination would mobilize academics, governments, the legislative power and international organizations. Niehuss (1979) observes that developed countries addressed issues like national security, employment security, collective negotiation, work relations, transfer pricing, allocation of costs and profits, policy of capital movement and balance of payments. In that moment, multinational companies were target of intense efforts for the creation of an international regime due to several regulatory initiatives of States that hosted American multinational companies, both in Europe and in emerging countries. It means that the American domestic policy would react in the same direction of the rest of the States, evaluating implications of the foreign presence and the benefits for host economies.

In 1973, due to Arab, Japanese and Western Europe investments flows, as well as the acceleration of international acquisitions in the banking sector, the Congress demanded an evaluation of the open doors policy (NIEHUSS, 1975). The proposals of congressmen, such as Dent-Gaydos Bill, Roe Bill, Günter Bill and Metzemaum Bill, would suggest restrictions to inflows, limitation to percentages of participation, monitoring and the creation of a review agency, in a debate clearly influenced by other countries' initiatives, such as Canada and Mexico.

In the Cold War context, Americans were worried about impeding transfers of information and military technology to foreigners. For this purpose, they created networks of regulatory statutes in addition to CFIUS, established in 1975.

As a response to such demands, President Gerald Ford created CFIUS in 1975, through the Executive Order 11858 (BAILEY, HARTE and SUGDEN, 1994, p. 107). The committee was formed aiming to monitor and assess the impacts of foreign investments in the USA, as well as to coordinate the implementation of investment policies. The Department of Treasury and Ford's administration stressed that a possible amendment would cause losses to American interests, defending the preservation of the Federal government's neutrality policy (NIEHUSS, 1975, p. 70).

In this sense, several difficulties for an eventual change in the regulation policy of investment inflow were pointed out. Among these, the United States leadership in the development and support of the liberal international economic regime was highlighted since the World War II. As observed by Krasner (1977, p. 56), the American policy can be summarized in two basic characteristics: “first, is the minimization or elimination of barriers to the movements of goods, services, technologies, and capital across international boundaries. The second is the control of such movements by private, as opposed to state-owned, corporations.” (KRASNER, 1977, p. 56). The other is the existence of international commitments, such as bilateral treaties and the possibility of retaliation of countries hosting American enterprises (BAILEY, HARTE and SUGDEN, 1994, p. 114). Such arguments have strongly reverberated in the discussion about FINSA in 2007, with emphasis upon international effects regarding changes in the domestic regulation policy.

These arguments drew Congressmen’s reactions, leading to the resubmission of other draft laws, now focusing on the protection of American companies. The 1976 Foreign Investment Survey Act determined surveys on direct and portfolio investment inflow and outflow. The 1978 Agricultural Foreign Investment Disclosure Act required the notice of agricultural land purchases in the lumber and forestry sectors.

Despite the involvement of the Department of Commerce regarding direct foreign investment issues, the CFIUS presidency was assigned to the Department of Treasury and the committee was formed by the Secretaries of State, Defense and Commerce, the Presidency’s advisor for economy issues and the executive director of the White House Council of International Economic Policy (CIEP). CFIUS was established as an informal and flexible mechanism, without specific guidelines, whose tasks would be supervision and monitoring of foreign investments and preparing recommendations to the President who would decide if proposals to acquiring American firms would involve implications on national security or not. The Office of Foreign Investment in the United States (OFIUS) would assist CFIUS in the task of monitoring and analyzing investment inflow impacts, which would include studies on concentration and distribution by sector, impact on national security, energy, natural resources, agriculture, environment, real estate investments, employment, balance of payment and trade.

Jimmy Carter and Ronald Reagan’s administrations kept the same conduct regarding CFIUS: defense of neutrality and the non-discriminatory treatment. Some measures, such as the 1981 fiscal reform – which reduces tax on corporations’ profits, providing increase on profit rate of foreign investment in the United States – and participation of foreign institutions as primary dealers of American public debt bonds, unleashed politicization of domestic regulation and pressures on the Congress, which progressed in the 1980s, as shown in many draft laws that were presented (SOUZA, 1994). However, the Executive’s posi-

tion was kept with the support of the Department of Treasury and Department of State that opposed changes in the investment policy.¹⁸

In the Congress perspective, CFIUS was not a sufficient response to its demands due to submission of Executive control, of continued approval of foreign acquisitions in sensitive sectors and by remaining immune to its influence (BAILEY, HARTE and SUGDEN, 1994). Foreign investment flows reached higher levels in the 1980s and, in spite of Japanese investments had been surpassed by the British, and it was the Japanese presence in high technology industries and in international financing that placed Japan in the focus of concerns on economic security. According to Kang (1997), candidates, particularly Democrats, exploited in the election's debate the complaints against Japanese competitive practices.

At that time, the proposal to acquire Fairchild Semiconductor Corporation by Fujitsu, Japanese electronics enterprise, favored the approval of Exon-Florio amendment in 1987. This operation was considered as an exemplary case of concerns under focus because it was an acquisition in the defense industry involving national security and the essential commerce, since one of Fairchild's branch office supplied high speed circuits for the United States defense and intelligence community. In view of the volume of pressure, the Japanese firms gave up on the operation.

Among the several propositions for legislative change in 1987, two were determinant for the debate's course: paragraph 907 of House Bill 3 and section 907 of Senate Bill 1420, which, with special emphases, equally incorporated the notion of economic security. House Bill 3 proposed that authority should be given to the Department of Commerce to supervise mergers, acquisitions, takeovers, joint ventures, and license contracts, and to evaluate the implication for national security, essential commerce, and economic welfare. The notions of "essential commerce" and "economic welfare" required that the impact of foreign control on domestic industries, such as unemployment, reduction in collection, loss of investment or capabilities were considered in the evaluation processes. They also required the provision of detailed information on all operations of the Department of Commerce. This proposal, even if it did not deny foreign investment beneficial effect for the American economy, highlighted their long term effects on the economic and political independence. The Senate version also attributed supervision responsibility to the Department of Commerce, but it excluded license contracts and joint-ventures.

Thus, the Exon-Florio amendment was established as a new section of the Defense Production Act of 1950, defeating those who advocated its inclusion as a section of the Commerce Code, limiting it to the national security context (BYRNE, 2006, p. 858-869).

18. Initiatives by the Congress and the content of draft laws related to CFIUS are described in details by Bailey, Harte and Sugden (1994, p. 106-148).

These proposals generated negative reactions in public hearings. The Executive declared opposition to incorporating economic security concept as review criteria, advocating maintenance of the opening policy toward direct foreign investment, and warning about the fact that “the Exon-Florio economic security element would not only harm the USA economy, discouraging direct foreign investment in the country, but could lead other countries to close their doors to the United States direct foreign investment (DFI)” (BYRNE, 2006, p. 860). Representation entities of industrial interests, such as Business Roundtable and the Chamber of Commerce, reiterated the same concerns of the Executive. Other members of the Congress argued that the amendment should refer strictly to national security issues. One of the White House objections was related to using the term essential commerce, which would compromise its objective of negotiating an agreement to reduce investment measures related to trade (Agreement on Trade Related Investment Measures – TRIMs) then under discussion in the GATT Uruguay Round. The option would be the sentence “harm to national security” in the text proposal and its application would be evaluated on a case by case basis.

In spite of pressure, the approval of Exon-Florio amendment to the Omnibus Trade and Competitiveness Act of 1988 resulted from an agreement between the House of Representatives and the Senate with the Executive, just as declared in a Conference report in 1988. Thus, it was defined that the amendment did not created barriers to foreign investment, its action was restricted to operations involving national security and it would not authorize investigation on investment that did not involve foreign control. Concerning the national security concept, it would be interpreted in a broad sense, without determining specific sectors (DAVIDOW and STEVES, 1990, p. 50). This lack of a definition for the notion of security was kept in FINSA, in spite of the requirement of greater accuracy that marked the context of its designing.

The amendment authorized the President to investigate the effects of foreign acquisitions on national security and, based on evidences, to uphold or prohibit those acquisitions. Exon-Florio provisions regarded mergers, acquisitions and takeovers by or with foreign persons, people or corporations, resulting in control.¹⁹ The Congress, in 1992, added a statute requiring CFIUS to undertake mandatory investigations when an operation were under control or involved a foreign government. Thus, the procedures for CFIUS review process were set, as well as its composition that were on force until the approval of the Foreign Investment and National Security Act (FINSA) in 2007.

CFIUS continued to be chaired by the Department of Treasury, comprising 12 members, the Secretaries of State, Treasury, Home Security, and Commerce, the United States Trade Representative (USTR), the chairman of the Council of

19. Control means power of decision on assets disposal, of contract performance, of operations and location of facilities. At last, defining the organization's objective.

Economic Advisers, the Attorney General, the directors of the Office of Management and Budget and the Office of Science and Technology Policy, Presidency advisors for national security and economic policy.

Committee's investigation process initiates through a voluntary notification from the parties involved in transaction or by a member agency's recommendation. In practice, CFIUS does not open investigations; it only stimulates those involved in sensitive transactions to present voluntary notifications. The committee, in view of a notification, defines in 30 days if the operation will be subject of investigation; if positive, it should comply with the deadline of 45 days to present its recommendation to the President, who, in his turn, issues his decision within 15 days. Operations submitted to this procedure are exempt of later review or legal appeal.

A major aspect of CFIUS procedures are the risk mitigation agreements.

Each member agency negotiates the inclusion of changes or adjustment in proposals individually with the parties, through agreements, such as the performance requirements, in order to make transaction undertaking feasible. If there are difficulties in remodeling the transaction, the investor can withdraw the proposal at any time and resubmit it later.²⁰

Georgiev (2008) calls attention to CFIUS activity, which received 1.500 notifications between 1988 and 2005, opened investigations on 25, of which 13 were withdrawn by firms, and 12 were sent to the White House that blocked only one. Investigations encompass less than 2% of the notifications. These data are indicative of CFIUS's functionality in consultation processes and institutional work prior to submissions. Inclusively, they show the committee's nature that seems to work as modeling instrument of operations for compliance of regulatory requirements more than a restricting mechanism.

The continuity of investments and CFIUS were under Congress surveillance throughout the 1990s. Many acquisition proposals were object of political pressures and public opinion mobilization, in some cases openly stimulated by the domestic competitors of the foreign investors, which led to withdrawal of proposals in order to prevent a negative recommendation from CFIUS.²¹

20. This mechanism is one of the factors that explain the low rate of reviews that are target of investigation by the CFIUS. Proposals are modeled in a complex consultation and restructuring process that allowed increased volume of operations without conflict with security provision or antitrust laws. It is an indication of the relationship between the American State and international businesses' interests.

21. One example was the case of the UV Corporation acquisition proposal, an American steel corporation working in the aerospace sector, by Thomson-CF, a French state owned corporation, in partnership with the Carlyle Group, competing with Martin Marietta, an American aerospace corporation. In spite of its voluntary notification to CFIUS, it did not reach a risks mitigation agreement with the Department of Defense related to missiles division. Its competitor argued that Thomson had sold weapons to Iraq and, thus, America's enemies could have access to technology. Another case was the China National Offshore Petroleum Company's attempt to acquire Unocal, an American oil enterprise that had reserves in other regions, competing with American Chevron. Members of the Congress put pressure over the Department of Treasury, and the debate in public hearings touched the problem of foreign oil dependence and geopolitical concerns related to China. This context of pressures to block the operation by CFIUS let the Chinese government to withdraw its proposal (Petrusic, 2006, p. 1373-1393; Georgiev, 2008, p.125-134; Byrne, 2006, p. 870-879).

In 2006, with the Dubai Ports World's case, demands for CFIUS reform were renewed. This acquisition would have granted control over 11 terminals in six US ports and, according to agencies, committee's approval resulted from mitigation agreements' success. President George W. Bush and the administration argued that the Arab Emirates were allies and cooperate in the war against terrorism, and one of the first to adhere to the Container Security Initiative.²² However, the House of Representatives and the Senate denounced the operation. The House's Appropriations Committee voted, by 62 to 2, the blocking of transaction, pressing for the transfer of part of ports to American buyers, and it proposed changes in Exon-Florio amendment to Congress in order to strengthen CFIUS review processes.

Although the operation had been cancelled due pressures, the Congress restarted hearings to discuss national security issues and the need of reforming procedures that, according to some analyses, would represent a strategy of the Executive to respond to pressures without changing its rejection stand on imposing restriction on foreign investments inflows. The committee's work, for others, allows balancing national security requirements and the open doors, preventing protectionist outbursts that could affect foreign investment inflows in the United States.

In summary, the basic points that emerged in the debate about CFIUS reform in 2006 were: a proposal to change committee's chairing from the Department of Treasury to the Department of Commerce, Defense or Home Security, and criticisms on the definition and narrow interpretation of national security concept and on the lack of transparency in reviewing processes.

A conflicting issue that goes back to its establishment is its chairing by the Department of Treasury. This happens because, for critics, its analysis would be led by economic concerns in detriment of national security issues. Proposals attempting to change CFIUS chairing to the Department of Commerce, relating "national security" to "economic security" had the opposition from the Department of Treasury.²³ In addition to criticism related to Exon-Florio implementation by the Department of Treasury, this was one of the outstanding points in the Government Accountability Office report of 2005.

As its advocates point out, maintenance of CFIUS chaired by the Treasury would represent a signal of the United States intention in keeping its traditional opening policy, while the transfer to the Department of Commerce could be

22. By means of such agreement, countries allow inspection in embarked cargo with destination to the United States at these country's ports.

23. According to Bailey, the bill proposed by Mel Levine (D – California) and Frank Would (R – Virginia) proposed: expand the definition of 'national security' to include wider economic issues. New factors are required – such as the concentration of foreign direct investment in the industry in question, the effect on 'critical' technologies, and whether the target-firm had received US government funds – to be considered by the administration before approving acquisitions. They also sought to transfer control of CFIUS to the Commerce Department, arguing the Treasury had a conflict of interests in its dual functions of encouraging foreign acquisitions of Treasury bills and screening acquisitions that might affect national security (Financial Times, May 14, 1991 and May 31, 1991, apud Bailey, Harte and Sugden, 1994).

interpreted as a flexion in the sense of protectionist nature guidance. The notion of “national security”, although broadly defined, would have been solely interpreted in its relation with defense issues. In spite of proposals to create exhaustive risk factors lists, the definition of what would be a menace to national security consisted of remains in the realm of Executive’s competence. Byrne (2006) explains that the relative “vagueness” in the notion of national security is a major point for flexibility of regulation, as it allows negotiating mitigation agreements and maintenance of balance between risks contention and preservation of open investment policy. System stability, for the author, limits politicization of topics and more effective treatment of actual security risks implicated in operations.

Another criticism made by the Congress pointed the lack of transparency of procedures and criteria for review. Based on confidentiality clauses of the Exon-Florio, the information submitted by the parties to CFIUS as proprietary information and testimonies are exempt from submission to the Freedom of Information Act.²⁴ As the review process accesses corporate information, these data are confidential and only recommendations and results are publicised or disclosed to Congress.

From a political point of view this debate is polarized, as it occurs since 1970s. On the one hand, arguments favorable to a more restrictive approach, based on concerns about national sovereignty and industrial competitiveness, that advocate a more restrictive Federal regulation, supervision and control transparency over mergers and acquisition transactions carried out by foreign capital in the American economy, greater institutionalization of these mechanisms and a more active role of the Congress. This is the position of the public opinion and of domestic interest groups who, concerned with increasing competitiveness firebrand and the loss of sovereignty over American assets, provided electoral relevance to the topic. Concerns for the business sectors are on capital goods price increase and domestic competition. In this sense, authors such as Tolchin (1996) advocate the need to redefine the role of public administration to deal with issues affecting the United States international competitiveness.

On the other hand, there is the position according to which most of foreign investment would not involve security issues, except the defense industry or some segments of sensitive technologies sectors, such as information. This reading confers much emphasis to the role of foreign investment in the United States economy, both from the point of view of macroeconomic balance and employment (GRAHAM, 1991). According to Byrne (2006), for whom the CFIUS mechanism already allows a proper balance between national security and openness to foreign investment, adoption of the “economic security” concept as a criterion for

24. The Freedom of Information Act (FOIA) ensures the right of access of any citizen to Federal agencies information and records.

CFIUS review would remove the focus from national security and would set it on economic protectionism. This would be a sign that the traditional policy of openness was changing, without increase in queries related to national security issues, which, from his point of view, would be sufficiently addressed in the review process carried out by the Committee.

Despite the pressures and the mobilization of members of the Congress, between 2006 and 2007, the Congress and the Senate approved and President George W. Bush enacted, in July 2007, the Foreign Investment and National Security Act, FINSA, which became the Law 110-49. This approval resulted from the compromise between the House and the Senate, to the extent that included some Congressional demands without changing the liberal regulatory perspective. FINSA defines the procedures of the analysis processes of foreign investments operations and it targets, clearly set out in its preamble, the reconciliation of national security demands with the promotion of foreign investment in view of their importance for job creation. That is, it becomes clear the perspective of mitigating concerns that were placed in the discussion of national security requirements required limitations on foreign investment inflow in American economy.

Even though the FINSA and regulations by the Treasury, published in December 2008, in their general lines, have preserved the traditional regulatory perspective, they have ambiguous elements that preserve the conflicting institutional dynamics that gave rise to them. The incentive to voluntary notifications and pre-filing consultations is noticed in the procedural perspective. These provisions enable companies to submit their proposals to previous evaluation, so operations are modeled to suit all regulatory requirements, minimizing objections or polemics. From the substantive point of view, the concept of covered, control, critical infrastructure, critical technologies transactions and those controlled by Governments was defined.

Among the established changes three aspects stand out.

Firstly, a greater communication of CFIUS with Congress is set out. The Committee shall submit substantive reports with information on findings of 30 days reviews that have resulted in 45 days investigations, and all 45 days investigations that did not present recommendations to the President, in addition to the description of transactions and identifying the factors that guided the decisions. Still, it shall produce annual reports or notes about a particular transaction, when requested by the Congress. However, the Congress will not have control or interference in the investigation processes remaining under the Executive's command.²⁵

25. Since then, CFIUS produced two reports for the Congress; the first in December 2008 related to 2006-2008 period, and another in November 2009. Available at: <<http://www.treas.gov/offices/international-affairs/cfius/docs/CFIUS-Annual-Rpt-2008.pdf>>.

Secondly, the expansion of the guiding criteria of the investigation process. New criteria were incorporated, such as the assessment of potential effects on critical infrastructure like energy assets, sales of goods or military technologies to countries that pose military threat; on potential effects of critical technologies for national defense (without considering domestic or foreign condition), among others, such as the dispersion of military technologies or long-term projections of U.S. energy requirements. However, the types of transactions that may have security objections were not objectively defined. Following the legal text, critical infrastructure refers to “systems and assets, physical or virtual, which are vital for the United States, so that destruction or weakening of such systems and assets may have a debilitating impact on national security” (GEORGIEV, 2008, p. 133), while critical technologies relate to “technologies, critical components or critical technological items essential to national defense”.

Thirdly, a change in the regulatory framework that defined a role for intelligence agencies is set out. The Director of National Intelligence will have the responsibility to draw up an analysis of threats involved in foreign investments.²⁶

This reform, publicly welcomed by organizations representing international investors, such as Business Roundtable, Financial Services Forum, Organization for International Investment and by the United States Chamber of Commerce, clearly indicates the perception of sensitivity to imperatives of economic interdependence and the limits to its ability to establish dissonant regulatory guidelines. Businesses groups mobilized in defense of FINSA, considering that those changes would safeguard national security without restricting or discouraging investments. A common ground in those manifestations consisted in highlighting foreign investments contribution to the United States economy, such as their potential for jobs generation and preservation of foreign investment opportunities for American investors. From this point of view, a more restrictive policy would have consequences in investment ambience related to American international investors in host countries.

Criticisms that fostered the 2007 reform date back to 1990 when the Exon-Florio was approved and due to CFIUS performance. The Dubai Ports World case, the security policy and George W. Bush administration after the September 11 and the strong appeal of the topic with the public opinion seem to have favored Congressional demands for reform and expansion of its role in safety investigations. However, while the relation between “investment and trade” approaches the Congress and the Department of Commerce in formulating foreign investment policy, the relation “investment and security” has justified its conservation under the Executive’s authority and limited movements toward a regulation with more restrictive profile. This enables continuity of a stand historically taken by the

26. Those points are dealt by Georgiev (op. cit. p. 132-133).

Executive, of maintaining a liberal regulation for capital flows, especially for direct foreign investments, and as alternative to deal with structural problems of the American economy, such as financing current accounts deficits without resorting to other options, less palatable to American taste, such as reduction of Federal expenditures, tax increase or policies affecting international investors' interests.

It is observed that changes in foreign investment regulation resulting from the relationship between security and investment gained density in political discussions and were approved by the Congress in the wake of security concerns after the terrorist attacks of September 11, 2001. What is intended to demonstrate is that this context favored the approval by the Congress of a regulation that incorporated positions which until then had been object of intense resistance – such as the notions of “critical infrastructure” and “sensitive technologies”, which in FINSA define priority sectors of the American economy for which protection mechanisms should be established – as well as a policy of competitiveness under the national security arguments. These proposals aiming at a proactive role of the Federal Government and its agencies related to defending American nation's industrial competitiveness have been generated in the context of 1980 and 1990 discussions about the relative decline of the American economy.

5 CFIUS BETWEEN DOMESTIC AND INTERNATIONAL POLICY

The expansion of the definition scope of national security with the adoption of criteria derived from the notion of economic security in the CFIUS review procedures indicates a rupture with the principles that traditionally guided foreign investment inflow policy. This is what, in some measure, occurs already in the case of the defense industry, whose mitigation agreements established between investors and members of the CFIUS agencies include performance requirements, as a condition to minimize security impacts and to allow the approval of operations, even if those requirements are clearly banned by the WTO agreements. As it was the case with Sematech, a research consortium in the semiconductor sector, which did not allow the participation of foreign investors, harming the principle of non-discrimination.²⁷

When the debate on domestic policy and the reform of the CFIUS is analyzed, in addition to identifying effective changes, the intention is to highlight their political meaning and the systemic effects of domestic policy. The emergence of “investment protectionism” would represent a policy of restriction of the international flow of capital and the adoption of domestic policies driven by an autonomist, protectionist, or neo-mercantilist perspective, which would have impacts for multilateral negotiations, since they directly touch on the fundamental principles of international economic organizations.

27. “In principle, Sematech's membership structure represents a choice in the part of the member firms rather than a federal policy of exclusion. In practice, however, the exclusion has surely also reflected the preferences of the US Department of Defense, which funds the consortium” (Graham and Krugman, 1995, p. 125).

In order to contain these effects, the OECD has launched, in 2006, the initiative Freedom of Investment, National Security and Strategic Industries (FOI), an intergovernmental dialogue on the need to maintain the commitments of the member countries to a liberal international investment policy based on the principles of transparency, liberalization and non-discrimination. Reacting to what it called “investment protectionism”, OECD recommends that national security regulations, while legitimate, should be used by member States only as exception measures.²⁸ In the same sense, the Santiago Principles are quoted, set out in October 2008 by the International Monetary Fund (IMF) with the purpose to preserve the open policies for international investment, avoiding the adoption of restrictive regulations for sovereign wealth funds, and creating guidelines for funds’ performance.

The “investment protectionism”, which is identified on policies adopted by the central countries, reacts to investment flows from emerging economies such as China, Russia, India and Brazil, mainly in oil, energy, software and telecommunications sectors, called “critical infrastructure”.²⁹ The rhetoric of resource protectionism and the reactions to globalization in central countries, anchored in national security arguments, can be understood in part by reactions to threats from global terrorism after September 11, 2001 and, to some extent, by the growth in acquisitions by private and State companies from emerging economies, which were stressed as a result of commodity and energy prices hike, a trend which should deepen due to the financial crisis unleashed from 2008 (UNCTAD, 2005; MALAWER, 2006, p. 34-35). In this same regard, Sauvants analyses that:

for some countries, like the United States, this reevaluation is based in national security concerns (largely undefined) that arose in the aftermath of the terrorist attacks of September 11, 2001. But there also seems to be a reaction to the “new kids on the block”, namely multinational enterprises from emerging markets, especially when these are state-owned and seek to enter the US market through mergers and acquisitions. Thus, strengthening the active screening mechanism of the Committee on Foreign Investment in U.S. (SAUVANT, 2009b).³⁰

28. Since then, the OECD has analysed and recommended policies to maintain a favorable regulatory environment and non-discriminatory access to foreign investors. These recommendations are indicated in the Guidelines for Recipient Country Investment Policies relating to National Security published in July 23, 2009. Available at: <<http://www.oecd.org/dataoecd/11/35/43384486.pdf>>.

29. Several proposals for acquisition were withdrawn due to the politicization of foreign investments for security reasons. China Mobile Communications Corp., the wireless carrier, was forced to give up the acquisition of European based company Millicom International Cellular in 2006. Russian Gazprom’s attempt to take control of Centrica in the United Kingdom and invest in gas pipelines in Europe concerned the British and Europeans, particularly after conflicts with Ukraine because of gas cuts. In 2007, the Indian Tata Steel undertook the takeover of Anglo-Dutch Group Corus, formerly British Steel, after dispute with the Companhia Siderurgica Nacional. In 2006, Gazprom, controlled by the Russian State, took control of 50% plus one of the shares of the private energy project Sakhalin II, whose initial partners were Anglo-Dutch Shell and Japan’s Mitsui and Mitsubishi corporations; in the same year Gazprom decided to control 100% of the shares of the energy project that will explore the Stokhamn gas deposit in the Barents Sea, excluding Chevron/Texaco, Conoco Phillips (USA), Hydro (Norway), Statoil (Norway) and Total (France).

30. “For some countries, like the United States, this re-evaluation is grounded in national security concerns (largely undefined) that arose in the aftermath of the terrorist attacks of September 11, 2001. But there also seems to be a bit of a reaction against the “new kids on the block”, namely multinational enterprises from emerging markets, especially when these are state-owned and seek to enter the US market through mergers and acquisitions. Hence the strengthening of the active screening mechanism of the Committee on Foreign Investment in U.S.”

It is observed that the coherence between domestic and international positions of the United States foreign investment policy has been worn out. Since 1970, foreign investment gained wider exposure in the domestic political debate because of concerns with competitiveness, employment and balance of payments, trade deficit issues, putting at risk the positions traditionally held by the Americans in international economic negotiations and multilateral economic institutions.

Here it is worth remembering Ikenberry's arguments (1999; 2004) about the rules and institutions that underpin the American hegemony. For the author, one of the pillars of this hegemony is the rules and liberal institutions such as economic openness, reciprocity and multilateralism, rooted in Western Nations' domestic policies. The United States domestic and international economic policy adopted the same values and principles, which consolidated the balance and stability of hegemonic order (IKENBERRY, 1999; 2004). In fact, this guidance was followed by Americans in international economic organizations, especially in OECD initiatives related to liberalization of capital flows. This position is present in the guidelines and policies of the World Bank and the IMF, in defense of international capital flows liberalization.

Anyway, the United States domestic policy options defined the normative standard of international regulation of foreign investment and, at the same time, it is observed that it was this country's hegemony in the international system that defined the model of domestic policy of foreign investment. In the condition of capital exporter, they advocated the right of establishment and national treatment, principles of neutrality policy in relation to foreign investment inflow, and an active policy of encouraging the outflow, with an emphasis on protection. In this sense, the Federal Government programmed a policy to stimulate American investment abroad and acted to minimize private investors concerns with security. The normative model of regulation of international investment, both in outflow and in inflow policy, had assumed the United States supremacy in military and economic terms.

The defense of national treatment and the creation of mechanisms for the protection of investments carried out by Overseas Private Investments (OPIC), ensured the participation of private capital in the post-war arrangements. Through this mechanism, the Federal Government guided private American investment abroad, particularly in Europe, participating in the economic and political restructuring of the world order designed by United States. This relationship between the expansion of capital and the priorities of American foreign policy was one of the central points of criticism and fears of host countries, both in Europe and in Latin America, regarding multinational corporations, which were perceived, with property, as instrument of American foreign policy.

After the World War II, the United States was the country of origin of international investments and, hence, the neutrality policy of the Federal Government in relation to foreign investment inflow did not have sensitive implications in the American economy. They pressed other countries, the companies' hosts, to adopt policies consonant with the principles of non-discrimination and national treatment, in accordance with their domestic policy.

The context of the domestic political debate and regulatory changes in the United States will surely have significant effects for the treatment of foreign investment in the multilateral context, as in the WTO negotiations (SILVA, 2006). And it makes a question to emerge: in which extent the controversial demands between the governance of the world economy, based on liberal principles and emerging policy of economic competitiveness, could create difficulties for the exercise of American hegemony regarding the foreign investment issue, both in domestic and international economic policies?

The insights identified in the American debate, make it clear that the actors have the exact size of these regulatory and political limits to their domestic policy options. An important fact is that the United States is the country of origin and destination of direct international investment flows. The actors, the Executive and its agencies, are aware that this move would affect other countries' regulatory policy, leading them into adopting the same policies, affecting American State interests and of groups benefited by those policies, such as the transnational corporations. As several authors note, this has been one of the main reasons why the Executive prevents the adoption of a more vigilant or restrictive approach for the domestic regulation of foreign investment and seeks to balance the needs of national security with maintaining open investment policy.

The effects of domestic American debate are visible already. The adoption of similar measures by other countries, despite the Executive and Treasury's initiatives and strategies to avoid restrictive measures, begins to emerge on the international scene. Other developed countries such as Canada, France and Germany, expanded national security issues to economic considerations and the protection of national champions and have established monitoring mechanisms, which should be followed by other countries, such as China and Russia (SAUVANT, 2009b). As Larson and Marchick warn (2006, p. 8, p. 18), Russia observes CFI-US reforms carefully, while India and China are proposing similar measures based on security restrictions to be implemented along the same CFIUS lines, coating with legitimacy that they follow the same course of the United States policies.³¹

31. It is essential to note that Japan is moving in the opposite direction, as evidenced by the reform proposals made by Cabinet Office to the Minister of Economy, Hiroko Ota, seeking to expand foreign investment in Japanese economy, through the revision of the rules that restrict foreign investment based on national security arguments (Nakamoto, 2008, p. 10).

In reaction to FINSA, China adopted an antitrust law, and in 2006 transactions regulation and monitoring were approved, based on national security arguments, the Provision on the Acquisition of Domestic Enterprises by Foreign Investors.³²

The keynote of the ongoing debate between the Executive and the Congress and the position of agencies, committees and public opinion expose a relative fragility and allows observing the United States' perception of their ability to establish the normative parameters of foreign investment in the domestic economy. It should be noted that the assessment of the systemic meaning of domestic regulatory alternatives is a concern of the relevant actors in the debate on the domestic regulatory regime in the United States.

In the political environment of the debate on foreign investment regulation and the apparent restrictions for domestic alternatives indicate two perspectives of future scenarios. In one of them, concerns about economic independence, sovereignty and national security, which they consider expansion of Federal controls on direct foreign investment as necessary gain strength, what would represent a very significant regulatory change in terms of international economic policy and would indicate a more autonomous action capacity of the United States in relation to systemic pressures. On the other hand, protection of liberal norms and reaffirmation of commitment to the maintenance of the free trade and openness to investment policy will remain as it has been the United States international position, which means a lower possibility for change and it would be a clear indication of the weight of the systemic and regulatory factors on its capacity of action in domestic policy.

The emergence of investment protectionism follows parallel to the maintenance of an open policy. This is because the investment is not under WTO disciplines, although aspects of international investment have been regulated in investment agreements related to trade (TRIMs), trade and services (GATS) and intellectual property (Agreement on Trade-Related Aspects of Intellectual Property Rights – TRIPs), and because restrictive regulations are based on national security arguments. This means that they are established in the realm of States' legitimate security and national interest.

The question that feeds the debate is about the possibilities and implications of a change in domestic policy regulations, along with international governance based on liberal principles. In this sense, it is important to think about the United States' capacity of action in international economic policy and on the impacts of their domestic choices in the international system.

32. It is worth noting that in the case of China, transaction approvals considered as affecting national security are carried out by the Ministry of Commerce.

REFERENCES

- BAILEY, D.; HARTE, G.; SUGDEN, R. **Transnationals and governments: recent policies in Japan, France, Germany, the United States and Britain**. New York: Routledge, 1994.
- BALDWIN, D. A. The concept of security. **Review of International Studies**, n. 23, p. 5-26, 1997.
- BLOCK, F. **Los orígenes del desorden económico internacional**. Mexico: Fondo de Cultura Económica, 1989.
- BUSH, G. W. Executive Order 13456 – Further Amendment of Executive Order 11858 concerning foreign investment in the United States. **Weekly Compilation of Presidential Documents**, Washington, v. 44, n. 3, p. 101-104, 28 Jan. 2008.
- BUZAN, B.; WAEVER, O.; WILDE, J. Security: a new framework for analysis. **Lynne Rienner Publishers**, 1997.
- BUZAN, B.; WAEVER, O.; WILDE, J. **Security: a new framework analysis**. London: Lynne Rienner Publishers, 1998.
- BYRNE, M. R. Protecting national security and promoting foreign investment: maintaining the Exon-Florio balance. **Ohio State Law Journal**, v. 67, p. 849-910, 2006.
- CABLE, V. What is international economic security? **International Affairs**, v. 71, n. 2, p. 305-324, 1995.
- CHANG, H. Regulation of foreign investment in historical perspective. **European Journal of Development Research**, n. 16, p. 687-715, 2004.
- DEPARTMENT OF TREASURY. Office of Investment Security, 31 CFR Part 800 Regulations. Pertaining to mergers, acquisitions, and takeovers by foreign persons: final rule. **Federal Register**, v. 73, n. 226, p. 70702-70729, Nov. 2008.
- EISINGER, P. Do the American states do industrial policy? **British Journal of Political Science**, v. 20, n. 4, p. 509-535, Oct. 1990.
- FRIEDBERG, A. L. The changing relationship between economics and national security. **Political Science Quarterly Review**, v. 106, n. 2, p. 265-276, 1991.
- GASTER, R. Protectionism with purpose: guiding foreign investment. **Foreign Policy**, n. 88, p. 92-106, 1992.
- GEORGIEV, G. S. The reformed CFIUS regulatory framework: mediating between continued openness to foreign investment and national security. **Yale Journal on Regulation**, v. 25, n. 1, p. 125-134, 2008.

GILPIN, R. **U.S. power and the multinational corporation: the political economy of foreign direct investment**. New York: Basic Books, 1975.

GRAHAM, E. M. Foreign direct investment in the United States and U.S. interests. **Science**, new series, v. 254, n. 5039, p. 1740-1745, Dec. 1991.

GRAHAM, E. M.; KRUGMAN, P. R. **Foreign direct investment in the United States**. 3. ed. Washington-DC: Institute for International Economics, 1995.

GOVERNMENT ACCOUNTABILITY OFFICE (GAO). **Sovereign health funds – Report to the Committee on Banking Housing and Urban Affairs**. United States Government Accountability Office – U.S. Senate, May 2009.

IKENBERRY, G. J. Liberal hegemony and the future of American postwar order. *In*: PAUL, T. V.; HALL, J. A. (Ed.). **International order and the future of world politics**. Cambridge: Cambridge University Press, p. 123-145, 1999.

_____. Liberal hegemony or empire? American power in the age of unipolarity. *In*: HELD, D.; KOENIG-ARCHIBUGI, M. **American power in the twenty-first century**. Polity Press: Cambridge, p. 83-113, 2004.

KANG, C. S. E. **The dynamics of U.S. inward foreign direct investment policy: national security, economic competitiveness, and the politics of structural choice**. Yale University, 1994.

_____. U.S. politics and greater regulation of inward foreign direct investment. **International Organization**, v. 51, n. 2, p. 301-333, 1997.

KAPSTEIN, E. B. Losing control: national security and the global economy. **The National Interest**, p. 85-90, 1989-1990.

KRASNER, S. D. US commercial and monetary policy: unraveling the paradox of external strength and internal weakness. **International Organization**, v. 31, n. 4, p. 635-671, 1977.

KIRSHNER, J. Political economy in security studies after Cold War. **Review of International Political Economy**, v. 5, n. 1, p. 64-91, 1998.

LAFER, C. **O convênio do café de 1976: da reciprocidade no direito internacional econômico**. São Paulo: Perspectiva, 1979.

LARSON, A. P.; MARCHICK, D. M. **Foreign investment and national security**. CSR, n. 18, July 2006.

MASTANDUNO, M. Economics and security in statecraft and scholarship. **International Organization**, v. 52, n. 4, p. 825-854, 1998.

MATHEWS, J. T. Redefining security. **Foreign Affairs**, v. 68, p. 162-177, 1989.

MODEL, L. The politics of private foreign investment. **Foreign Affairs**, n. 45, p. 639-650, 1967.

MORAN, T. H. International economics and national security. **Foreign Affairs**, v. 69, n. 5, p. 74-90, 1990/1991.

MORAN, T. H. An economics agenda for neorealists. **International Security**, v. 18, n. 2, p. 211-215, 1993.

NAKAMOTO, M. Tokyo set to relax rules on foreign takeovers. **Financial Times**, London, p. 10, 19 May 2008.

NIEHUSS, J. M. Foreign investment in the United States: a review of government policy. **Virginia Journal of International Law**, v. 16, n. 1, p. 65-102, 1975.

_____. Multinationals revisited. **Michigan Law Review**, v. 77, n. 3, p. 552-559, 1979.

PETRUSIC, M. Oil and national security: CNOOC's failed bid to purchase Unocal. **North Carolina Law Review**, v. 84, n. 4, p. 1373-1393, 2006.

POSEN, B. Command of the commons: the military foundation of U.S. hegemony. **International Security**, v. 28, n. 1, p. 5-46, 2003.

REICH, R. B. Making industrial policy. **Foreign Affairs**, v. 60, n. 4, p. 852-881, 1986.

REICH, S. Manufacturing investment: national variations in the contribution of foreign direct investors to the US manufacturing base in the 1990's. **Review of International Political Economy**, v. 3, n. 1, p. 27-64, 1996.

ROSENTHAL, A. Bush, citing security law, voids sale of aviation concern to China. **New York Times**, New York, p. 1-1, 3 Feb. 1990.

SAUVANT, K. P. FDI protectionism is on the rise. **Policy Research Working Paper**, International Trade Department/World Bank, n. 5052, 2009a. Available at: <<http://econ.worldbank.org>>.

_____. Dangers of FDI protectionism. **Daily Times**, 31 July 2009b. Available at: <<http://www.dailytimes.com.pk>>.

SILVA, E. A. O investimento nas negociações comerciais internacionais: entre estratégias e princípios. **Cena Internacional**, v. 08, n. 2, p. 84-123, 2006.

SORENSEN, T. C. Rethinking national security. **Foreign Affairs**, v. 9, n. 3, p. 1-18, 1990.

SOUZA, P. J. **The regulation of foreign investment in the United States 1973-93 and the making of American foreign economic policy**. Stanford University, 1994.

TASSELL, T.; CHUNG, J. How sovereign funds are muscling in on global markets. **Financial Times**, p. 7, 24 May 2007.

THE WALL STREET JOURNAL. **Politics & economics**: lawmakers want CFIUS rules clarified. New York, n. 14, p. A12, 2008.

TOLCHIN, S. J. The globalist from nowhere: making governance competitive in the international environment. **Public Administration Review**, v. 56, n. 1, p. 1-8, 1996.

TOLCHIN, M.; TOLCHIN, S. **Buying into America**: how foreign money is changing the face of our nation. New York: Times, 1988.

VELASCO, E.; CRUZ, S. C. 1945-1984: ordem (e desordem) econômica internacional e nova estratégia comercial dos Estados Unidos. **Cadernos do Cedec**, n. 82, ago. 2009.

VERNON, R.; SPAR, D. L. The politics of multinational enterprises. *In*: **Beyond globalism**: remaking American foreign economic policy. New York: Free Press, 1989.

VILLA, R. A. **Da crise do realismo à segurança global multidimensional**. São Paulo: Annablume, 1999.

UNITED STATES OF AMERICA. House of Representatives. **H.R. 556**: Foreign investment and national security act of 2007. *In*: CONGRESS ASSEMBLED, 110. 2007. Available at: <<http://www.govtrack.us/congress/billtext.xpd?bill=h110-556>>.

WILKINS, M. **The history of foreign direct investment in the United States, 1914-1945**. Cambridge: Harvard University Press, 2004.

WEIMER, C. M. Foreign direct investment and national security post-FINSA 2007. **Texas Law Review**, v. 87, n. 663, p. 684, 2009.

COMPLEMENTARY BIBLIOGRAPHY

CLARK, H. L.; YANG, L. W. Foreign investment and national security. **The China Business Review**, v. 35, n. 1, p. 51-53, Jan./Feb. 2008.

DAVIDOW, J.; STEVES, P. S. Antitrust merger control and national security review of foreign acquisitions in the United States. **Journal of World Trade**, v. 24, n. 1, p. 39-56, 1990.

DEESE, D. A. Energy: economics, politics, and security. **International Security**, v. 4, n. 3, p. 140-153, 1979-1980.

FINGER, S. M. United States policy toward international institutions. **International Organizations**, v. 30, n. 2, p. 347-360, 1976.

HUDSON, W. E. The feasibility of a comprehensive U.S. industrial policy. **Political Science Quarterly**, v. 100, n. 3, p. 461-478, 1985.

JACKSON, J. J. **The world trading system**: law and policy of international economic relations. 2. ed. Massachusetts: MIT Press, 2000.

KATZENSTEIN, P. J. International Relations and domestic structures: foreign economic policies of advanced industrial states. **International Organization**, v. 30, n. 1, p. 1-45, 1976.

KUPCHAN, C. A. Empire, military power, and economic decline. **International Security**, v. 13, n. 4, p. 36-53, 1989.

KURDLE, R. T.; BOBROW, D. B. U.S. policy toward foreign direct investment. **World Politics**, v. 34, n. 3, p. 353-379, 1982.

LIEBELER, S. W.; LASH III, W. H. Exon-Florio harbinger of economic nationalism? **Regulation**, Cato Institute, p. 44-51, 1993. Available at: <<http://www.cato.org/pubs/regulation/regv16n1/v16n1-6.pdf>>.

LIPSON, C. **Standing guarding**: protecting foreign capital in the nineteenth and twentieth century's. California: University of California Press, 1985.

LITTLE, J. S. Multinational corporations and foreign investment: current trends and issues. **Annals of AAPSS**, 460, Mar. 1982.

MAIER, C. S. The politics of productivity: foundations of American international economic policy after World War II. **International Organization**, v. 31, n. 4, p. 607-633, 1977.

MENDENHALL, J. *et al.* Economic politics and national security: a CFIUS case study. **American Society of International Law**: proceedings of the annual meeting, p. 245-257, 2008. Available at: <<http://www.proquest.com/>>. Accessed: 4 jan. 2010.

METZGER, S. D. Developments in the law and institutions of international economic relations: American foreign trade and investment policy for the 1970's: the Williams Commission Report. **The American Journal of International Law**, v. 66, n. 3, p. 537-559, 1972.

NYE, J. S. Collective economic security. **International Affairs**, v. 50, n. 4, p. 584-598, 1974.

OBAMA, B. **Critical infrastructure protection month**. 2009. Available at: <http://www.whitehouse.gov/sites/default/files/2009cip.prc_.rel_.pdf>.

ROCHA, A. J. R. O sistema político dos EUA: implicações para suas políticas externa e de defesa. **Contexto Internacional**, Rio de Janeiro, v. 28, n. 1, p. 53-100, 2006.

RODMAN, K. **Sanctions beyond borders**: multinational corporations and U.S. economic statecraft. New York: Rowman & Littlefield Publishers, 2001.

ROSE, P. Investment in the shadow of regulation and politics. **Georgetown Journal of International Law**, v. 40, n. 4, p. 1207-1237, 2009.

STRANGE, S. Protectionism and world politics. **International Organization**, v. 39, n. 2, 1985.

TATE, C. The constitutionality of state attempts to regulate foreign investment. **The Yale law Journal**, v. 99, p. 2023-2042, 1989.

ULLMAN, R. H. Redefining security. **International security**, v. 08, n. 1, p. 129-153, 1983.

WALLACE, C. D. Control through legislation: foreign multinational enterprises in industrialized states. *In*: RUBIN, S. J.; WALLACE, D. (Eds.) **Transnational corporations and national law**. New York: Routledge/UNCTAD, v. 19, p. 200-234, 1994.