BALANCING OPEN INVESTMENT WITH NATIONAL SECURITY: REVIEW OF US AND UAE LAWS WITH DP WORLD AS A CASE STUDY

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Abstract

Global investment is beneficial and necessary to bring economic prosperity worldwide. However, foreign acquisitions of companies can pose a significant challenge for governments because of the need to balance the benefits of foreign investment with national security concerns. In the post-September 11 world, security policies are becoming increasingly relevant to corporate transactions. The goal of this article is to identify the laws in both the US and UAE as they affect inbound foreign investment and relate to national security, with DP World as a case study.

I Introduction

The creation of the World Trade Organisation ('WTO') based on market-economy principles, the increase in bilateral trade and investment treaties and advances in the field of technology have provided a favorable framework for foreign direct investment (FDI).[1] Mergers and acquisitions

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1 The term 'foreign direct investment' refers to the purchase of real assets abroad for the purpose of acquiring a lasting interest in an enterprise and exerting a degree of influence on that enterprise's operations. There are several different kinds of foreign direct investment. First, greenfield investments are investments in a physical structure in an area where no corporate facilities previously existed. It normally entails complete ownership and therefore full control over management. Second, strategic partnerships are formal alliances (joint venture, licensing agreement, distributorship, or agency contract) between two commercial enterprises, usually formalized by one or more business contracts, where they mutually participate in certain activities (advertising, branding, product development, etc.). Third, a merger is a business event wherein two or more companies decide to pool their assets to form a single new company. In the course of this transaction, one of the previously existing companies ceases to exist. An acquisition does not necessarily constitute a merger if the preexisting companies continue to exist. Both of these business transactions can result in a foreign entity gaining a portion of a domestic entity. See Debra Johnson

serve as a driving force behind the growth of FDI. The potential economic benefits of FDI have fueled a worldwide movement toward liberalisation of restrictions on foreign investment, because it is assumed that FDI is a powerful engine for reducing poverty and achieving economic development.

International investment implicates much more than the flow of cash and goods; considerable political issues are often at stake. Commerce may affect national security. Sovereign Wealth Funds ('SWFs'), government investment vehicles funded by foreign exchange assets and managed separately from official reserves, have made a number of high profile acquisitions.[2] For example, Abu Dhabi's SWF, the Abu Dhabi Investment Authority acquired $7.5 billion in convertible securities of Citigroup and Abu Dhabi's Mubadala Development SWF acquired $700 million of stock in Advanced Micro Devices.[3] In addition, Borse Dubai acquired 20% of NASDAQ and Dubai World purchased $424 million in MGM stock.[4]

State-owned enterprises ('SOEs'), which are separate legal entities established to engage in commercial activities, have made transactions that have raised issues of national security.[5] For example, Dubai Ports

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and Colin Turner, *International Business: Themes and Issues in the Modern Global Economy* (Routledge, 1st ed, 2003) 121-123; Adis Maria Vila, 'The Role of States in Attracting Foreign Direct Investment: A Case Study of Florida, South Carolina, Indiana, and Pennsylvania' (2010) 16(2) *Law and Business Review of the Americas* 259, 261.

2 See Rumu Sarkar, 'Sovereign Wealth Funds as a Development Tool for ASEAN Nations: From Social Wealth to Social Responsibility' (2010) 41(3) *Georgetown Journal of International Law* 621, 622. (Typically, SWFs have six main characteristics: SWFs are state-owned or state-controlled; managed separately from official foreign exchange reserves; have high foreign currency exposure; have no explicit liabilities; have high risk tolerance; and have long-term investment horizons).

3 See Diana I Gregg and Aaron Lorenzo, 'Treasury Unveils Accord on Set of Principles for Wealth Funds with Singapore, Abu Dhabi' *International Trade Reporter (BNA)* 25, 27 March 2008, 440. See also Diana I Gregg, 'Working Group Set Up Ready Voluntary Code for Sovereign Wealth Funds' 25 *International Trade Reporter (BNA)* 25, 27 March 2008, 678.

4 See 'The New Rothschilds', *The Economist*, 27 September 2007, 23; Tamara Audi, 'Abu Dhabi Arm Acquires Half of Kor Hotel', *Wall Street Journal*, 23 September 2008, B2. (Mubadala Development Co, the investment arm of the Abu Dhabi government, has purchased a 50% stake in Los Angeles-based Kor Hotel Group, the latest sign of the growing interest among Persian Gulf states in the US hospitality industry. Dubai World also owns half of MGM Mirage's.)

5 SWFs and SOEs can be distinguished at least at the margins. Most SWFs are investment vehicles. In other words, their object is to invest in more or less liquid markets for securities. In contrast, most SOEs are operating enterprises. To the extent that both invest in the securities of other enterprises abroad, SWFs and SOEs ought to have functionally identical objectives: to maximize the welfare of the entity or its owners. These objectives are also comparable to those of similarly constituted private actors. See Edward F Greene and Brian A Yeager, 'Sovereign Wealth Funds - A Measured Assessment' (2008) 3(3) *Capital Markets Law Journal* 247, 263.

World ('DP World'), which is owned by the Dubai government, purchased P&O Steam Navigation.[6] In doing so it took ownership of P&O Ports North America, a subsidiary of P&O that operated terminals at six United States ('US') ports. These foreign investments were a cause for alarm in the US.

National security concerns, related to foreign control of domestic industries, represent an important counterweight to investment liberalisation. Moreover, national security represents a possible barrier for the completion of investment transactions. Some countries have enacted laws that deal with national security as it relates to foreign investment.[7] However, the laws of the US as they relate to foreign investment and national security assume greater importance. The US remains the world's largest net capital importer, attracting more than half of the total Organization of Economic Co-operation and Development ('OECD') inflows.[8] Changes in the content or application of US laws governing foreign investment could, therefore, not only lead to modeling by other countries but also force significant changes in the flow of FDI worldwide.

The United Arab Emirates ('UAE') has a large reciprocal investment relationship with the US and different investment controls. The UAE has one of the most open economies in the Middle East. Foreign investment in the UAE was approximately $10 billion, accounting for nearly 34 per cent of total foreign capital in the Arab world.[9] The UAE is also home to the world's biggest SWF. Assets of the Abu Dhabi Investment Authority are estimated to be worth around US $500 billion.[10] The investments made by the Abu Dhabi Investment Authority are diversified over a broad spectrum of industries in foreign, direct, public and private investments.

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6 See Peter T Leach, 'Acquisition of P&O Puts Dubai Ports World in the Top Echelon of Global Terminal Operators', *Journal of Commerce*, 5 December 2005, 32. (DP World is one of the world's largest port operators. DP World bought CSX World Terminals, a US port operator, in January 2005. It has branched out around the Persian Gulf, and, more recently, in Romania, India, and South Korea. Dubai's DP World handles 7.62 million twenty-foot equivalent units annually.)

7 For a discussion of government authority to block FDI on national security grounds in Canada, China, France, Germany, India, Japan, the Netherlands, and Russia, see Yvonne C L Lee, 'The Governance of Contemporary Sovereign Wealth Funds' (2010) 6(1) *Hastings Business Law Journal* 197, 211-223.

8 Between 2000 and 2006, annual foreign direct investment in the US averaged $144 billion, which is 16 per cent of the world's total during that period. This number puts the US back at the top of the United Nations Conference for Trade and Development's ('UNCTAD') list of FDI recipients. See UNCTAD, *World Investment Report 2010* < http://www.unctad.org/en/docs/wir2010_en.pdf >.

9 See John H Donboli and Farnaz Kashefi, 'Doing Business in the Middle East: A Primer for US Companies' (2005) 38(2) *Cornell International Law Journal* 413, 438-441.

10 See, Zhao Feng, 'How Should Sovereign Wealth Funds be Regulated?'(2009) 3(2) *Brooklyn Journal of Corporate Finance and Commercial Law* 483, 487.

Amid some international pressure for transparency,Abu Dhabi sent a letter to the US Treasury Secretary in early 2008 including the set of principles that guides Abu Dhabi Investment Authority's investments.[11] Although not viewed as a guarantee or official commitment, the letter was a major development for SWFs. At the turn of the global financial crisis in 2007, Abu Dhabi Investment Authority was one of the first sovereign investors that assisted a major US financial institution in raising capital.

The goal of this article is to identify the laws in both the US and UAE as they affect inbound foreign investment and relate to national security. In particular, the article considers the Exon-Florio Amendment, its legislative conception, executive interpretation and application. The article also discusses the concerns of post-September 11 and potential reforms for the US review of foreign investment. In addition, the article analyses the issues surrounding the DP World transaction and its implications for the protection of US national security. The consequences of the DP World transaction could lead to potentially sweeping implications for FDI in the US. In this article, my assertion is that the US now stands at a crossroad. In the past, the US adopted initiatives designed to foster investment. However the terrorist attacks of September 11, 2001 created a context for invocation of national security exceptions that were hostile to trade and investment. I argue that politicization is becoming important in reviews of whether a proposed merger, acquisition or takeover threatens US national security. This necessitates the establishment of a new equilibrium between open investment and national security.

II US Laws Affecting Foreign Investment

Foreign investors face a number of laws with respect to ownership of US interests. While some regulations restrict the type of companies or interests that may be acquired, others are merely reporting requirements that permit the US government to monitor foreign investment activity. In many cases, these laws have been the direct result of nationalistic reactions to world events or economic conditions. To illustrate, this section will examine first the *Exon-Florio Amendment*, setting forth the existing procedural and administrative requirements and then explaining the several modifications that Congress enacted. It will then address industry sector regulation of foreign investments in the US,

11 See Chip Cummins, 'Abu Dhabi Fund Puts Politics Aside' *Wall Street Journal*, 18 March 2008, A3. The letter lays out the emirate's investment philosophy and embraces a promise that it won't use its wealth for political advantage. The letter states that the emirate wants to ensure that financial markets remain open, that investors that play by the rules are not discriminated against, and that the regulatory process remains transparent and predictable.

such as the *Hart-Scott-Rodino Antitrust Improvements Act* of 1976, the *International Investment and Trade in Services Survey Act* of 1976 and the *Agricultural Foreign Investment Disclosure Act* of 1978.

A *The Exon-Florio Amendment: Structure and Procedures*

The *Exon-Florio Amendment* represented a US Congressional response to the growth of foreign acquisitions of high-technology goods and services perceived as essential for defense-related production.[12] The attempted, but eventually failed acquisition of Fairchild Semiconductor Corporation by the Japanese company Fujitsu generated concern in the US that existing statutory mechanisms could not adequately protect sensitive industries from economic competitors. No legal authority existed for preventing the transaction between Fairchild Semiconductor Corporation and Fujitsu.

Prior to the passing of *Exon-Florio*, the US President had the authority to investigate, regulate, and prevent foreign acquisitions of US companies under the *International Economic Emergency Powers Act* (*'IEEPA'*).[13] However, *IEEPA* requires the declaration of a national emergency, a Presidential finding of an 'unusual and extraordinary threat' to national security. Invoking executive powers under *IEEPA* was perceived to be a politically dangerous choice, as it was virtually the equivalent of a declaration of hostilities against the government of the acquiring company.[14]

In 1988 the US Congress enacted the *Exon-Florio Amendment*, named after the sponsors of the Amendment, which granted the US President the authority to review and act upon foreign takeovers, mergers and acquisitions which threaten national security.[15] *Exon-Florio* does not cover 'greenfield investments' - the use of capital to begin a new company or create a subsidiary within the US. Investigation is limited

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12 The Exon-Florio Amendment was enacted as part of the 1988 *Omnibus Trade and Competitiveness Act* and signed by President Reagan. See Jose E Alvarez, 'Political Protectionism and United States International Investments Obligations in Conflict: The Hazards of Exon-Florio' (1989) 30 *Virginia Journal of International Law* 1, 56.

13 See *International Emergency Economic Powers Act*, 50 USC §1701-1707 (1977).

14 See *Acquisitions by Foreign Companies: Hearing before the Senate Committee on Commerce, Science, and Transportation*, 100th Congress, 1st Session, 15 (1987).

15 *Exon-Florio* amends Title VII of the *Defense Production Act* of 1950 by adding section 721: *Omnibus Trade and Competitiveness Act* of 1988, 100 Pub L No 418, § 5021, 102 Stat 1107, 1425-26 (1988) (amending Title VII of the *Defense Production Act* of 1950, 50 USC app §§ 2158-2169 (1982), by adding section 721, 50 USC app § 2170 (1988). The *Exon-Florio Amendment* takes its name from its co-sponsors, Senator James Exon (D-Nebraska) and former Representative James Florio (D-New Jersey). In 1991, President George Bush signed legislation permanently re-authorising the *Exon-Florio Amendment*. See *Defense Production Act Extension and Amendments of 1991*, Pub L No 102-99, 105 Stat 487 (1991) (codified at 50 USC app 2170).

to mergers, acquisitions and takeovers of existing domestic firms.[16] The term 'national security' was left intentionally undefined so as to afford the US President with broad discretion.[17] As such, the term 'national security' can be interpreted broadly without limitations.

The US President delegated the review process to the 'Committee on Foreign Investment in the United States' ('CFIUS').[18] The review process consists of four steps: (1) a voluntary filing with CFIUS by one or more parties to the transaction; (2) a 30-day Committee review of the transaction; (3) a potential additional 45-day Committee investigation; and (4) within 15 days of receiving the report, the President has to make a decision to permit, deny the acquisition or seek divesture after an *ex post facto* review.

For transactions that raise issues, parties may engage in pre-filing consultations and negotiations with the CFIUS or member agencies before making their official notification.[19] Although these discussions are not part of the formal CFIUS process, they often influence the outcome. Parties may sometimes modify their transaction before filing to expedite clearance. In other cases, parties may abandon transactions after it becomes clear that CFIUS would not approve them or would not do so on terms acceptable to the parties.

16 Ibid, art (e).

17 There were several proposals to define 'national security', but all were rejected. For example, proposals included a positive list of goods and services considered essential to national security or a negative list of those goods and services not considered significant to national security. See Louis Begley and John B Reynolds III, 'Key Terms Still Hazy Under Exon-Florio' (1992) *National Law Journal* 17. See also *Treasury Regulations*, Fed Reg 1991, 56, 775.

18 The CFIUS was established in 1975 by Executive Order 11858. The following agencies are represented on CFIUS: the Departments of the Treasury, Justice, Homeland Security, Commerce, Defense, State, Energy, and the Offices of the US Trade Representative and of the Science and Technology Policy. The Committee is chaired by the Secretary of the Treasury and is comprised of the Secretaries of Commerce, Defense, Homeland Security and State, along with the Attorney General and six White House officials. The six White House officials in the CFIUS are the Director of the Office of Science and Technology Policy, the Assistant to the President for National Security Affairs, the Assistant to the President for Economic Policy, the Director of the Office of Management and Budget, the US. Trade Representative, and the Chairman of the Council of Economic Advisers. See Committee on Foreign Investment in the US, Composition of CFIUS (2011) < http://www.treasury.gov/resource-center/international/foreign-investment/Pages/cfius-members.aspx >.

19 See *Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons of 2008* CFR § 800.401(f) (2008). See also Josh Cavinato, 'Turbulence in the Airline Industry: Rethinking America's Foreign Ownership Restrictions' (2008) 81(2) *Southern California Law Review* 311, 334.

The CFIUS formal process begins with a voluntary filing seeking review of a proposed or completed transaction by one or more of the parties to an acquisition of a US company, or certain US assets by a foreign company.[20] Additionally, the *Exon-Florio* regulations empower members of CFIUS to file notice with the Chair of the Committee and trigger a CFIUS review.[21] The filing must contain a detailed description of the transaction, including timelines and assets to be acquired.[22] CFIUS also requires detailed background concerning the parties. The initial filing and CFIUS's review process are confidential.

A CFIUS filing is not mandatory for any transaction. Nevertheless, foreign direct investment by a firm controlled directly or indirectly by a foreign government is subject to mandatory review under *Exon-Florio*.[23] The standard for review is substantially lower in the case of mandatory investigations. The CFIUS is required to consider whether the acquisition 'could affect national security' rather than apply the 'threatens to impair national security' level of scrutiny. The lower standard of review, coupled with the mandatory nature of the inquiry, presents the CFIUS with the opportunity to exercise leverage over the acquiring entity or its government.

The 30-day initial review period begins to run once the CFIUS staff gives notice that they are satisfied that the filing contains all of the required information.[24] Although only one party to the transaction need file notice to trigger a review, the CFIUS may delay the beginning of the review period until the required information about other parties is received.[25] Thus, the CFIUS in practice may request a joint filing. During the 30-day initial review, the CFIUS may contact the parties for further information or to discuss steps that would mitigate any national security concerns that the transaction raises.

At the end of the 30-day initial review period, the CFIUS is required either to clear the transaction based on its initial review or begin an additional 45-day investigation.[26] However, the CFIUS may informally request that the parties withdraw the filing before the end of the 30-day initial review

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20 See *Exon-Florio Amendment*, above n 15, art (A). See also 50 USC app § 2170(a).

21 See Exon-Florio Amendment, above n 15 art (A).

22 The implementing regulations spell out in detail the required contents for a filing. See *Exon-Florio Amendment Implementing Regulation of 2004* CFR §§ 800.401-404 (2004).

23 See Exon-Florio Amendment, above n 15, art (B). See also 50 USC app § 2170(b) (1977).

24 See *Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons*, above n 18, §800.502(b).

25 Ibid §800.403(b).

26 See *Exon-Florio Amendment*, above n 15, article (B); The International Economic Emergency Powers Act, 50 USC § 2170(b).

period if the CFIUS needs more time or information to fully review the transaction, or the parties have not agreed to mitigating conditions as requested by agencies.[27] If the parties re-file for the same transaction, the 30-day review begins anew from the date of the new filing.[28] Additionally, if the parties make a material change to their filing at anytime during the process, the clock will begin to run anew from the day the parties file the change with CFIUS.[29]

The 45-day investigation is mandatory in cases where a foreign company purchasing a US entity is government-owned and the acquisition could affect the national security of the US. However, in practice all presidential administrations since 1992 have considered the 45-day investigation as a 'discretionary' option, even in cases where a foreign company is government-owned.[30] If the national security concerns raised by a transaction are resolved during the 30-day review, an investigation is not necessary. Therefore, questions arise about what *Exon-Florio* requires and its intent, and whether the 45–day investigations are mandatory or discretionary.

If CFIUS proceeds with a full investigation of the acquisition, it must conclude its additional review within 45 days.[31] At the conclusion of the investigation, the CFIUS will submit a recommendation to the President. Normally the CFIUS makes a unanimous recommendation, but if the members are divided they will forward their differing views to the President.[32] The President has 15 days from the date of referral to clear, prohibit or suspend the acquisition.[33] When the process reaches the presidential decision stage, the President must make a mandatory report to Congress.

The statutory language of the *Exon-Florio Amendment* provides the timeframe for investigations and recommendations. In total, a CFIUS review may last between 30-90 days. However, delays are inherent in the review process. Parties may engage in pre-filing consultations with the CFIUS, make a material change to their filingor file again for the same transaction. Also, the CFIUS itself can ask the parties for further information or to withdraw. All these issues can result in extensions and

27 See *Regulations Pertaining to Mergers*, above n 19, §800.507(a).

28 Ibid §800.507(d).

29 Ibid §800.403(i).

30 Jonathan C Stagg, 'Scrutinizing Foreign Investment: How Much Congressional Involvement Is Too Much?' (2007) 93(1) *Iowa Law Review* 325, 337.

31 See *Regulations Pertaining to Mergers*, *Acquisitions, and Takeovers by Foreign Persons*, above n 19, § 800.506(a).

32 Ibid § 800.506(b)(2) & (c).

33 See *Exon-Florio Amendment*, above n 15, art (d)(2).

delays in the various stages of the CFIUS review process of a proposed transaction. Parties should engage with the CFIUS early in the process to expedite the process and avoid any delays.

One of *Exon-Florio's* unusual features is that it has no statute of limitations. Notification by companies of potential foreign acquisitions to CFIUS is largely voluntary. However, the CFIUS has indefinite discretion to review any transaction that did not go through a review. This can happen even after a transaction has closed. Thus, any potential acquirer faces a strong incentive to submit a notification in any transaction that might have national security implications or risk facing significant scrutiny well into the future.

B *The 1993 Statutory Amendments*

In 1993, the US Congress amended *Exon-Florio* by enacting the *Byrd Amendment*,[34] which is named after its sponsor Senator Robert Byrd (D-West Virginia) and was motivated by Congressional dissatisfaction with the track record of the review process. Specifically, the *Byrd Amendment* was motivated by the debate over French-owned Thomson-CSF's proposed acquisition of LTV Corporation's missile division. Following an investigation and congressional and public scrutiny, the US President was prepared to block the transaction. Concern centered on the French government's control over Thomson-CSF's parent company as well as the potential transfer of sensitive LTV technologies. The acquisition was eventually approved, but only after restructuring.[35]

The *Byrd Amendment* made three changes to the original *Exon-Florio Amendment*. First, whereas the original statute focused on the plans for acquired assets rather than investor nationality, the *Byrd Amendment* required a separate review process focused on national origin.[36] The *Byrd Amendment* requires an investigation where an entity controlled by or acting on behalf of a foreign government seeks to engage in any merger, acquisition or takeover which could result in control that could affect the national security of the United States.[37] The term

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34 See *Byrd Amendment* of the *National Defense Authorization Act* for Fiscal Year 1993, Pub L No 102-484, § 837, 106 Stat 2315, 2463-65 (1992) (amending 50 USC app § 2170 (1988)).

35 Instead of sole ownership, Thomson restructured the deal to include joint acquisition with US-based Loral Corporation. See John C Rosengren, 'Changes in Exon-Florio Affect Foreign Buyouts' (1992) *The National Law Journal* 28.

36 See *Byrd Amendment*, above n 34.

37 The threshold requirement of 'could affect the national security' is considerably lower than the 'threatens to impair the national security' standard utilized when the transaction involves a foreign entity. As a result, the mere possibility of harm will require an investigation. See *Regulations Pertaining to Mergers, Acquisitions, and*

'foreign government' includes any government or body exercising governmental functions. The *Byrd Amendment* applies to supra-national entities, such as the European Union.[38] Second, the *Byrd Amendment* included a determination of 'potential effects' of any transaction on US international technological leadership in areas affecting its national security. Examination of 'potential effects' introduced a new approach for interpreting national security threats.[39] Finally, the *Byrd Amendment* requires an immediate report to Congress whether or not action is taken following an investigation, as well as a quadrennial report detailing any credible evidence of either industrial espionage or a coordinated attempt by either foreign countries or companies to outdo American control over leading sectors of technology.

C *The Exon-Florio Amendment in Practice*

The US President delegated responsibilities to the CFIUS as the secretive inter-agency body responsible for administering the *Exon-Florio* process.[40] The CFIUS receives notice of foreign acquisitions of US companies, determines whether the transactions could adversely affect national security, investigates the transactions in question and submits a report and recommendation to the President following the conclusion of an investigation. The review process primarily relies on voluntary filing by foreign entities prior to completion of the transaction. The incentive underlying voluntary submission is the extension of a safe harbour: where the CFIUS has issued a determination that a transaction does not pose a threat to national security, there is little or no risk that the President will order divestiture at a later date.[41]

Failure to notify the CFIUS neither precludes investigation nor protects against Presidential directives ordering suspension of a completed transaction. Rather, the Treasury Department has interpreted *Exon-Florio* broadly, noting that any merger, acquisition or takeover by a foreign entity is subject to review and that nothing in the statute narrows the

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Takeovers by Foreign Persons 59 Federal Register 27, 178 (1994).

38 Ibid.

39 See, eg, Mark E Rosen, 'Restrictions on Foreign Direct Investment in US Defense and High Technology Firms: Who's Minding the Store?' (1993) 4 *United States Air Force Academy Journal of Legal Studies* 75, 83.

40 See above n 18. See also *Executive Order No. 12661* 3 CFR 618 (1989).

41 There are disincentives for filing a report under CFIUS. These include the revelation of material to government agencies with varying degrees of respect for confidentiality, exposure of transactions to Congressional or Executive criticism, leaks, lobbying by company competitors, and Committee indecision. See Nelson G Dong, *Due Diligence, Export Controls and the Exon-Florio Rules in the American M&A Transaction* (Practicing Law Institute, Washington DC, 2000) 689-690.

availability of any Presidential remedies.[42] In the absence of voluntary notice, CFIUS members may report any investment offers potentially affecting national security. However, in practice CFIUS members have never used the authority of reporting.[43] Action by the President pursuant to the *Exon-Florio Amendment* is not subject to judicial review.

Due to the confidential nature of CFIUS reviews, exact figures regarding the activities of CFIUS are impossible to obtain, but it has been reported that CFIUS reviewed about 1,600 potential acquisitions from 1988 to 2006, of which it investigated 25 and sent 12 recommendations to the President.[44] Seven investment offers were voluntarily withdrawn following formal review. The US President resolved not to intervene in nine of the 10 remaining cases. In one case, President George Bush issued a directive ordering the China National Aero-Technology Import and Export Corporation ('CATIC') to divest all interests it held in MAMCO Manufacturing, Inc, a Seattle-based company engaged in the manufacture of metal components designed for US commercial aircraft.[45] Determination of a threat to national security was based on CATIC's ownership by China's Ministry of Aerospace Technology, a close affiliate of the People's Liberation Army. CATIC's acquisition risked providing China with unique access to US aerospace companies and products restricted under export controls.

The CFIUS' first investigation under President Bush was ASM Lithography's ('ASML') proposed acquisition of the Silicon Valley Group, Inc ('SVG'). The primary concern preventing approval of the ASML-SVG deal was the potential transfer of advanced optics technologies to European companies that might re-export such technologies to China and other countries. Intervention by members of Congress, as well as the Department of Defense, led to withdrawal and re-application under President Bush. Deadlocked by the end of the formal 45-day review, the CFIUS worked to achieve consensus and issue a formal recommendation.[46] In the end, approval was conditioned on a substantial restructuring of the deal that included ASML's promise to sell SVG's Tinsley Laboratories, maintain extensive research, development and production capabilities in the United States and adhere to stringent conditions governing both personnel decisions and the process for technology transfers.

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42 See *Treasury Regulations of 1991*, 56 CFR 58,775.

43 See Ann M Calvaresi-Barr, *Defense Trade: Enhancements to the Implementation of Exon-Florio could Strengthen the Law's Effectiveness* (Diane Publishing, 2006) 9.

44 Ibid 14.

45 See W Robert Shearer, 'The Exon-Florio Amendment: Protectionist Legislation Susceptible to Abuse' (1993) 30 *Houston Law Review* 1729, 1756–1757.

46 See Frank J Gaffney, 'Defense Fire-Sale Redux' *Washington Times*, 3 April 2001, A15.

The CFIUS enhances the national security when it identifies specific problems which could threaten US security and helps resolve these problems, while still allowing US business to receive the capital they need. Viewed from this perspective, the CFIUS has been successful. However, in light of the CATIC-MAMCO and ASML-SVG transactions, the approach of both Bush Administrations to the application of *Exon-Florio* can be characterized as conservative because they exercised their options under *Exon-Florio* on one occasion only. The Clinton Administration exercised similar caution in the consideration of reports under the CFIUS' review. In other words, US government examinations under the *Exon-Florio Amendment* have been dormant for many years since its inception in 1988 and have made only a cursory review of transactions.

D *Industry Sector Regulations*

In addition to *Exon-Florio*, there are other US regulations which restrict the free flow of foreign investment.[47] An example is the *Hart-Scott-Rodino Antitrust Improvements Act of 1976*. The *Hart-Scott-Rodino Act* was enacted to foreclose numerous loopholes in the US merger policies that were created speedily and surreptitiously, consummating suspect mergers and then protracted ensuing litigation.[48] The *Hard-Scott-Rodino Act* requires parties to mergers and acquisitions of a certain size to observe a waiting period before completing a transaction and to submit certain information to the Federal Trade Commission and the Antitrust Division of the US Department of Justice.[49] Through these requirements, enforcement agencies are given ample opportunity to review any proposed transactions prior to completion and provide information needed to conduct a review.

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47 For eg, the *Communications Act* which contains several prohibitions on the foreign operation, ownership, or control of wireless communications facilities in the US: see *Communications Act of 1934*, 47 USC §§ 151-613 (1988 & Supp 1991). The *Mining Law of 1987* limits the right to explore for minerals and to purchase lands containing such deposits to citizens of the US: see *Mining Law of 1987*, 30 USC § 22 (1988). The *Mineral Lands Leasing Act of 1920* restricts foreign procurement of leases to explore and extract deposits of coal, oil, oil shale, gas, and various non-fuel minerals on US government lands, with certain exceptions: see *Mineral Lands Leasing Act of 1920*, 30 USC §§ 181-287 (1988).

48 See Kathryn Fugina, 'Merger Control Review in the United States and the European Union: Working towards Conflict Resolution' (2006) 26(2) *Northwestern Journal of International Law & Business* 471, 475. (Early governmental intervention in a problematic merger may prevent a number of problems that might occur should a consummated merger later be enjoined by a court. After a merger, two entities may commingle their assets or intertwine their management teams, which can create logistical problems for a court attempting to undo the merger).

49 See *Hart-Scott-Rodino Antitrust Improvement Act of 1976* (2006), 15 USC § 18a (2006).

The *Hard-Scott-Rodino Act* sets two thresholds that determine whether a transaction is reportable under the Act. Firstly, a transaction valued in excess of US $56.7 million must be reported to the enforcement agencies before completion.[50] Secondly, a person must have annual net sales or total assets of US $113.4 million or more and the other has annual net sales or total assets of US $11.3 million or more.[51] These jurisdictional thresholds are adjusted - either upward or downward - annually to account for the gross national product ('GNP').[52] Thus, the *Hard-Scott-Rodino Act* thresholds relate to the size of transactions and parties.

If the thresholds of the *Hard-Scott-Rodino Act* are met, then parties must submit a Notification and Report Form. As part of the notification, parties must submit information about their businesses and the proposed transaction.[53] Filings are confidential and it is generally not possible to find out if a filing has been made. Notification is complete when the acquiring company pays a filing fee, which varies from US $45,000 to $280,000, depending upon the size of the transaction.[54] Furthermore, a waiting period must be observed prior to closing a transaction. The waiting period is 15 days for cash tender offers and 30 days for all other transactions.[55] Before the expiration of the waiting period, enforcement agencies may initiate a more extensive investigation by issuing to each party a Request for Additional Information and Documentary Materials, also known as a Second Request.[56] A Second Request extends the waiting period for 30 days from the date of compliance with the request.[57]

The *Hart-Scott-Rodino Act* is a procedural and investigatory mechanism which enables concerned agencies to analyse merger proposals for any potential anti-competitive effects and determine whether seeking injunctive relief is justified. However, possible lengthy time delays and disclosure requirements may effectively prevent a deal from being proposed or closed. The CFIUS review process has some structural similarities to the *Hart-Scott-Rodino* process; however filings are largely voluntary, where no filing fee is required and no mandatory waiting period is imposed.

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50 See *Revised Jurisdictional Thresholds for Section 7A of the Clayton Act*, 71 Fed Reg §§ 2943-44 (Jan 18, 2006).

51 See *Hart-Scott-Rodino Antitrust Improvement Act of 1976* (2006), 15 USC § 18(a)(2)(B).

52 Ibid § 18a(a)(2).

53 Ibid § 18(d)(1).

54 Ibid § 18a (b).

55 Ibid § 18a(b)(1)(B).

56 Ibid § 18a(e)(1)(A).

57 Ibid § 18a(e)(2).

In the early 1970s, Congress became concerned about the increasing amount of foreign investment in US land, particularly farmland.[58] In response to increasing pressure generated primarily by the farm lobby, US Congress passed the *International Investment Survey Act 1976* ('IISA') and two years later followed up by passing the *Agricultural Foreign Investment Disclosure Act of 1978* ('AFIDA').[59] IISA, now known as the *International Investment and Trade in Services Survey Act* (following a name change by Congress in 1984) is a disclosure law addressing foreign investment in US real estate.[60] As the name indicates, it is merely a reporting law that contains no restrictions on foreign investments and is not intended to restrain or deter such investments.

The primary requirement of IISA is that a report must be filed with the Bureau of Economic Analysis of the US Department of Commerce if any foreign person, entity or affiliate acquires a direct or indirect financial or voting interest of 10 per cent or more in a US business enterprise which includes ownership of real estate.[61] IISA defines those persons and entities subject to its provisions in a broad manner to require disclosure by as large number of foreign investors as possible.[62] The initial report must be filed within 45 days of the date on which the investment occurs. Thereafter, the foreign investor may be subject to a continuing combination of quarterly and annual reports.[63] Failure to comply with the reporting and disclosure requirements of IISA results in monetary and non-monetary penalties.[64] IISA provides the US government with

58 See Richard E Andersen and W Donald Knight, Jr, 'Disclosure of Real Estate Investments under the International Investment Survey Act of 1976 (Re-entitled the IISA)' in Richard E Anderson and W Donald Knight, Jr (eds), *Structuring Foreign Investments in US Real Estate* (Kluwer Law International, 2010) 5-7; Polly J Price, 'Alien Land Restrictions in the American Common Law: Exploring the Relative Autonomy Paradigm' (1999) 43 *American Journal of Legal History* 152, 165-171.

59 See Anderson and Knight, above n 58, 5.

60 See *International Investment Survey Act of 1976*, 22 USC §§ 3101-3108 (1988), amended by the *Trade and Tariff Act of 1984*, Pub L No 98-573, § 306(b)(1), 98 Stat 2948, 3009 (1984).

61 Ibid § 3104(b)(2). Exemptions from the initial reporting requirements of IISA are available in limited circumstances. A foreigner needs not to file an initial report if the total cost of the acquisition is $1 million or less, and the acquisition does not involve the purchase of 200 or more acres of US real property.

62 IISA defines 'person' as any individual, branch, partnership, associated group, association, estate, trust, corporation, or other organization, and any government including a foreign government, and any agency, corporation, financial institution, or other entity or instrumentality thereof, including a government-sponsored agency. Ibid § 3102(3).

63 IISA reporting forms require disclosure of the identity of the foreign and domestic parties involved in the transfer and their management and financial structures. Reports are not available for public inspection. Ibid § 3104(b)(2).

64 IISA provides for a fine of up to US$10,000, injunctive relief, and imprisonment for up to one year for failure to comply with the Act's reporting requirements. Ibid § 3105.

information useful in monitoring foreign investment in real estate and the effects of that investment. Thus, IISA reports may be used only for analytical or statistical purposes.

Like IISA, AFIDA is not designed to create restrictions for foreign investors who wish to purchase US property. AFIDA's intent is simply to gather information on foreign ownership of domestic agricultural land to determine whether such ownership is an issue of concern. AFIDA requires foreign persons to file a report with the Department of Agriculture if they directly or indirectly hold a significant interest or substantial control of entities that own or lease agricultural land in the US.[65] Foreign persons not only include a foreign citizen or a corporation organised with a principal place of business in a foreign country, but also a US company in which a foreign entity holds an interest of only 10 percent or more.[66] Agricultural land is defined as any land that presently or within the past five years has been used for farming, ranching, forestry or timber production.[67] In comparison with the confidential nature of reports under the IISA, AFIDA reports are available for public examination.[68] Non-compliance with the reporting requirements under the AFIDA is subject to penalty which may be as severe as 25 per cent of the acquisition value.[69]

The US enacted IISA and AFIDA, among other laws that set forth wide-ranging reporting and disclosure requirements for foreign investment transactions. While not imposing restrictions on foreign investment, these investment reporting requirements should be considered part of the US investment control regime. The requirements afford the US a measure of protection through monitoring inward foreign investment. Furthermore, mandatory submission of reports may to some extent burden foreign investment or even deter potential investment.

III The Additional Concerns After The September 11 Attacks

The attacks on September 11, 2001 signaled a new era. Prior to September 11, the CFIUS had been criticized for failure to assume a more proactive role in the identification of acquisitions with national security implications. The rhetoric in the US is that globalisation and the desire for economic growth contributed to the US complacency about policing its transportation networks and land and sea borders,

65 *Agricultural Foreign Investment Disclosure Act of 1978*, 7 USC §§3501-3508, 7 CFR § 781.2(k)(1)-(3) (1992).
66 Ibid § 781.2(g)(1)-(4).
67 Ibid § 781.2(b).
68 Ibid § 781.3(a).
69 Ibid. §781.4.

transforming critical infrastructure into attractive targets for terrorist agents.[70] The events of September 11 required a response to secure trade because trade infrastructures, such as commercial shipping, were built for speed and profit, not for security. People and packages now move faster, easier and at a lower price than ever before. Whether by land, sea or air, cargo containers can be used in human, drugs and weapons smuggling. If terrorists were to ship and explode a chemical, biological or nuclear device via container cargo, governments would have no prior information to prevent it. The international trading system favors businesses. However, terrorists can easily exploit the vulnerabilities of global trade and transportation infrastructure.

In post-September 11 world trade, the US has adopted several security measures. For instance, the US Department of Homeland Security has issued approximately 150 'no load' orders prohibiting shippers from loading ocean-going cargo bound for the US due to inadequate manifest information under a new rule requiring 24-hour advance cargo notification before loading.[71] Additionally, the US developed the Container Security Initiative ('CSI'), which requires the US Customs and Border Protection to pre-screen sea-cargo containers bound for the US at certain large ports, such as the Port of Dubai.[72] The US is adopting a 'one face at the border' initiative, which includes hiring new officers that will have the combined duties of immigration, customs inspectors and agricultural inspectors.

The changing security environment could prompt the CFIUS to be more focused on the relationship between the domestic company being acquired and national security concerns in order to determine whether a proposed merger, acquisition, or takeover threatens national security. As such, the security environment could lead to substantial re-interpretation of the criteria upon which the *Exon-Florio* review process is based and dramatically change the ways in which the *Exon-Florio Amendment* is applied and the scope of its application. The Department of Defense will be more involved with the CFIUS when evaluating the national security implications of a proposed investment.

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70 See Eric J Lobsinger, 'Post-9/11 Security in a Post-WWII World: The Question of Compatibility of Maritime Security Efforts with Trade Rules and International Law' (2007) 32(1) *Tulane Maritime Law Journal* 61, 86.

71 Under the *Trade Act of 2002*, the 24-hour rule requires that sea carriers and non-vessel-operating common carriers provide complete cargo manifests 24 hours prior to loading the cargo in a foreign port through an approved electronic data interchange system. See Christopher S Rugaber, 'DHS Official Defends 24-Hour Rule, Cites 150 Orders Barring Cargo Unloading' *International Trade Reporter (BNA)* 20, 13, 27 March 2003.

72 In 2004, the Port of Dubai became the first port in an Arab country to participate in the CSI. See, eg, Comment, 'First Middle Eastern Port, Dubai, Joins CSI' *International Trade Reporter (BNA)* 21, 2094, 23 December 2004.

The war against terrorism could lead the CFIUS to apply greater scrutiny to new FDI on the basis of *Exon-Florio's* national security factors. Some of the national security factors enumerated for consideration under *Exon-Florio* are control of domestic industries and commercial activity by foreign citizens, as this affects the capability and capacity of the US to meet the requirements of national security, control over defense-related industries necessary to maintain the military's global-reach capabilities and preservation of technological leadership.[73] More importantly, the permissive nature of the *Exon-Florio Amendment* allows for consideration of additional threats to national security not listed in the Amendment.[74]

According to the *Exon-Florio Amendment*, the Presidential authority to prohibit or suspend a transaction is to a certain degree proscribed by a requisite determination that no other law is available that adequately protects the interest in question.[75] There are federal laws that proscribe foreign ownership in transportation sectors such as airplanes, commercial ships, buses, and trains. An example of these deferral laws would be the *Anti-Terrorism and Effective Death Penalty Act*.[76] However, enforcement of foreign-ownership restrictions were relaxed towards the end of the 1990s. This could lead to questions regarding the adequacy of these laws. Therefore, the *Exon-Florio Amendment* could be revitalized to cover critical infrastructure considered vulnerable to terrorist attacks. For example, the President could employ *Exon-Florio* where he determines that the *Anti-Terrorism Act* is not sufficient to protect security.

The creation of the Office of Homeland Security could lead the Treasury Department to invite the Director of the Office of Homeland Security to serve on the CFIUS as an official member. A precedent for inclusion of non-member agency officials has been established when the national security consideration at issue involves agency expertise.[77] Inclusion of Homeland Security officials would create a source of pressure for increased scrutiny of transactions affecting US national security.

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73 The *Exon-Florio Amendment* provides explicit restrictions on FDI involving countries that support international terrorism or contribute to the proliferation of weapons of mass destruction and accompanying missile systems that support delivery. See *Exon-Florio Amendment*, above n 15, art (f)(3) and (4).

74 The language of the enacted legislation uses the term 'may ... consider among other factors rather than more restrictive language such as, for example, 'shall consider the following. Ibid art (f).

75 Ibid art (e)(2).

76 *The Anti-Terrorism and Effective Death Penalty Act of 1996*, Pub L No 104-132, 110 Stat 1214 (1996).

77 The Department of Energy generally participates in the review process although it is not an official member of the CFIUS.

IV The Dubai Ports Controversy

A company executing a corporate transaction should be mindful of US international trade and security policies, which could bear on the transaction as well as on the company engaging in the transaction. Under US international trade and security laws, a transaction could require one or several government approvals. If the transaction entails a non-US company's acquisition of control over US operations, Exon-Florio clearance is necessary, as noted earlier.

DP World, which is owned by the government of Dubai, purchased Peninsular and Oriental Steam Navigation Co (P&O), a British firm, in a US$ 6.8 billion deal that closed on 13 February 2006.[78] P&O's US subsidiary, P&O Ports North America, runs commercial operations at six of the largest US ports: New York, Newark, Baltimore, New Orleans, Miami and Philadelphia, as well as others. The takeover was planned for 2nd March 2006.[79] However, in the wake of lawsuits being filed and in response to a barrage of criticism by US lawmakers, DP World agreed to delay taking control of P&O Ports North America so that the CFIUS could conduct a full 45-day investigation. DP World still took legal ownership of the US port operations on 2 March as scheduled but did not take operational control.

The CFIUS' review of the DP World transaction was not rushed through. CFIUS began reviewing the application from DP World to purchase British-owned P&O in early December 2005.[80] In January 2006, the CFIUS approved the transaction after the initial 30-day review. Therefore, the CFIUS decided to forego the 45-day investigation, despite a Congressional mandate to complete both the 30-day initial review and the 45-day investigation when the purchaser is owned or controlled by a foreign government. The reason the CFIUS decided to forgo the 45-day investigation could have been that DP World had reached an agreement with the CFIUS to take specific security measures to mitigate any security concerns raised by the purchase.

Any number of adverse developments may have followed the DP World transaction. Ports have long been considered among the most vulnerable targets for a terrorist attack in the US. Some members of Congress asserted that the transaction would undermine US security interests. Therefore,

78 See Rossella Brevetti, 'Customs Had No Hesitation on Dubai Port Deal, Ahern Says' *International Trade Daily (BNA)* 2 March 2006.

79 Ibid.

80 See Greg Hitt, 'Bush and Congress Clash over Dubai Ports Deal' *Wall Street Journal* 22 February 2006, A1.

several steps were taken, such as administration and congressional investigations, hearings, efforts to block or affect by Congressional offices the Executive approach to the transaction, lawsuits, and negative publicity.[81] The repercussions of these steps and efforts were potentially adverse, as DP World might have been characterized not simply as a lawbreaker but also as a threat to US security.

The DP World experience demonstrates that developments of this kind can complicate and delay consummation of a transaction. In addition to cost and inconvenience, such developments can result in extensive legal liability for one or more parties to the transaction or for the company that results from the transaction.

A *The Stance of US Congress on the DP World Transaction*

The DP World deal resulted in a firestorm of criticism by US lawmakers. No fewer than 11 bills and resolutions were introduced in the US Congress in the wake of DP World's acquisition of P&O's US terminals.[82] In an effort to block the sale of a port operations company to DP World, then Senator Hillary Clinton (D-New York) and Senator Robert Menendez (D-New Jersey) introduced legislation to prohibit companies that are owned or controlled by foreign governments from acquiring port operations in the United States. Several members of Congress, such as Senator Charles Schumer (D-New York) and Representative Pete King (R-New York), proposed emergency legislation to suspend the DP World transaction.[83] In addition, Senator Susan Collins (R-Maine) and Representative Jane Harman (D-California) introduced a resolution of disapproval calling on the Administration to reconsider the sale.[84] Their position was that the US should not turn the Border Patrol or the Customs Service and ports over to a foreign government. Those members of Congress argued that outsourcing the operations of the US's largest ports to the UAE, a country with a dubious record on terrorism, would be a dangerous precedent.

Senator Frank Lautenberg of New Jersey proposed legislation giving individual ports the ability to terminate leases with port operators if the ownership has been transferred to an entity they feel poses a security

81 See Christopher S Rugaber, 'Clinton, Menendez to Introduce Bill to Block Sale of Port Operator to UAE' *International Trade Daily* (BNA) 21 February 2006.

82 See Christopher S Rugaber, 'Nancy Ognanovich, and Brett Ferguson, Port Transaction to Undergo Further Review As Senators Keep Pushing Bill to Block Deal' *International Trade Daily* (BNA) 28 February 2006.

83 Ibid. On February 21, 2006, President George W. Bush promised to veto such legislation.

84 Ibid.

risk.[85] Several members of Congress, such as Senators Charles Schumer (D-New York) and Tom Coburn (R-Oklahoma) cited several reasons to more closely scrutinize the DP World transaction. Some of this hysteria were likely to have resulted from the fact that the UAE has a troubling history. Money used for the September 11 attacks were transferred to the hijackers through the UAE's banking system.[86] Two of the hijackers were UAE nationals. Moreover, Dubai has been cited as a transfer point in the shipment of nuclear components to Iran, North Korea and Libya.[87]

The CFIUS' approvals that find their way into the public arena tend to be controversial. As such, it is no surprise that the DP World transaction became the subject of controversy. However, the CFIUS decision to approve the DP World transaction was made on the basis of whether or not the approval would be detrimental to security, not whether it would be politically popular.

The DP World transaction was very closely scrutinized to ensure that all national and international security concerns were met. Ports managed by DP World are international ship and port facility security-certified. The CFIUS began reviewing the application from DP World to purchase British-owned P&O in early December 2005. The Department of Homeland Security took a leading role in reviewing the application. After each of the CFIUS members completed their own individual assessments of how the purchase would affect security at their agencies, all of the members agreed that DP World's purchase of P&O could proceed. In situations in which the CFIUS has a concern about security, it seeks to address the issue with the company filing the application. In some cases, the CFIUS might request the divestiture of security-sensitive portions of companies in order for the deal to be approved. However, the CFIUS approved the DP World deal. Therefore, the 45-day investigation was not required, because Executive Branch officials were satisfied that the terms of the transaction address any security issues raised by the deal.

DP World could have argued that it should not have been required to undergo the CFIUS 45-day investigation. According to the *Exon-Florio Amendment*, procedures conclude once a notified transaction receives

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85 See Christopher S Rugaber and Rossella Brevetti, 'Cardin Introduce Bill Barring Foreign-Owned Operations at Seaports' *International Trade Reporter (BNA)* 23, 9 March 2006, 381.

86 See Charles B Bowers, 'Hawala, Money Laundering, and Terrorism Finance: Micro-Lending as an End to Illicit Remittance' (2009) 37(3) *Denver Journal of International Law and Policy* 379, 398.

87 See Michael Dutra, 'Strategic Myopia: The United States, Cruise Missiles, and the Missile Technology Control Regime' (2004) 14(1) *Journal of Transnational Law & Policy* 37, 74.

approval from the CFIUS or the President.[88] In the case of DP World, the CFIUS approved the transaction. The CFIUS cannot re-open the DP World transaction unless it can show that the parties to the transaction deliberately withheld material information or submitted false or misleading material information. In such circumstances, the CFIUS has authority over the transaction even if the transaction previously received approval.[89] However, nothing suggests that DP World omitted material information or submitted false material information that would have merited re-opening investigation of the transaction.

With regard to UAE government control over DP World, DP World could have argued that private interests hold a portion of its shares and that the UAE government does not play an active role in the company's management. The UAE government has little legal power to intervene in the company's operations if necessary and may not have control over the strategic goals and direction of the company. DP World could also have argued that it relies on international capital markets.

During the formal review, the Department of Homeland Security negotiated an 'assurances letter' with DP World that set out specific security measures the company agreed to take to assuage national security concerns.[90] Moreover, DP World signed a security agreement as a result of the CFIUS review. The CFIUS had a tough security agreement with DP World that had detailed requirements and personnel screening. For example, DP World committed to enforcing security standards set out by CSI and the Customs-Trade Partnership against Terrorism. Those standards were voluntary, but would have been mandatory for DP World. Furthermore, DP World agreed to take additional security measures beyond what some other companies have had to agree to in the past.[91] The agreement with DP World included auditing and reporting requirements and contained penalties if the agreement was not complied with.

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88 See Exon-Florio Amendment, above n 15, art (d).

89 Ibid art (e).

90 See Christopher S. Rugaber, 'Port Transaction to Undergo Further Investigation; Senators Seek to Block Deal' *International Trade Reporter (BNA)* 23, 2 March 2006, 328. DP World will guarantee the independence of all terminal operations managed by P&O Ports North America (or POPNA) by establishing the operations as a completely separate business unit. DP World will not exercise control or influence the management of the US operations - either directly or via P&O headquarters in London. Final authority for the US terminals will rest with the CEO of P&O, a British citizen, and the chief security officer for POPNA will remain a US citizen, unless the Coast Guard agrees otherwise.

91 DP World agreed to allow US anti-terror officials to examine company records without a subpoena and to check the background of any of its employees. DP World promised to separate its US port terminal operations from the rest of the company. See Greg Hitt and Neil King, Jr, 'Dubai Firm Bows to Public Outcry' *Wall Street Journal* 10 March 2006, A1.

The backlash against the DP World deal recalls the successful campaign by members of the US Congress in 1998 to prevent China Ocean Shipping Co. ('Cosco') from building a marine terminal at a former naval base in Long Beach, California.[92] Opponents claimed that it would pose a security risk because Cosco at the time was fully owned by the Chinese government.

DP World is a company known worldwide.[93] In many aspects, DP World has a strong reputation and a track record that is solid. DP World could have operated some of the terminals at the US ports but not control the ports themselves. Port security then and now continues to be managed by the Bureau of Customs and Border Protection and the US Coast Guard. Other foreign-owned companies already operate terminals at US ports. The US should have explained why all of a sudden a Middle Eastern company is held to a different standard than other foreign companies. The US must treat all foreign companies fairly.

The UAE government is a friend and ally of the US. It has co-operated with the US on security issues. The UAE was the first Middle Eastern country to join the CSI, whereby US Bureau of Customs and Border Protection officials work alongside their UAE counterparts to pre-screen sea-cargo containers before they are shipped to the US.[94] The Port of Dubai joined the CSI in March 2005, becoming the 35th operational CSI port. As such, DP World works with US authorities to implement the CSI program that secures the supply chain of US companies. Moreover, the UAE hosts more US Navy ships in its ports than any country outside the US.[95] UAE ports where the Navy ships dock are managed by DP World. The US relies on DP World for the security of its military ships in the UAE. Therefore, contrary to what some members of the US Congress claim, the UAE has an even history and record on friendship, co-operation, and security matters.

B *State Lawsuits over the DP World Transaction*

US states such as New York, New Jersey and Maryland, which have ports affected by the UAE-owned company's acquisition of US port operating rights, were concerned about the security implications of the DP World deal. They could have requested additional information from the federal

92 See Bill Mongelluzzo, 'Cargo Expected to Soar if Taiwan, China are Admitted to WTO' Journal of Commerce, 28 March 2000, 16.

93 DP World is one of the world's largest port operators, alongside Hutchison of Hong Kong and PSA, Singapore's State-backed port authority. See Leach, above n 6, 32.

94 See Wendy J Keefer, 'Container Port Security: A Layered Defense Strategy to Protect The Homeland and The International Supply Chain' (2007) 30 *Campbell Law Review* 139, 159-163.

95 See US Department of State, *Background Note: United Arab Emirates* (2010) < http://www.state.gov/r/pa/ei/bgn/5444.htm> at November 20, 2010.

government about the approval process. Moreover, these states explored all legal options that might have been available to them in regards to the DP World transaction.

The State of New Jersey filed a federal lawsuit seeking a preliminary injunction to block the DP World deal pending a national security investigation.[96] The lawsuit also sought all information on the sale and security arrangements attached to the sale.[97] The lawsuit argued that the US government's failure to provide New Jersey's Office of Counter-Terrorism with all of the documents and information relevant to the acquisition by DP World interfered with the residual and inviolable sovereign functions reserved to the State of New Jersey by the Tenth Amendment to the US Constitution. The Federal District Judge in that lawsuit ordered the US government to explain in a hearing why it failed to provide New Jersey officials with information it had about the deal allowing a UAE-owned company to take over some port operations at Newark. The judge warned that he would issue a preliminary injunction pending a full investigation if the court was not satisfied with the government's response.

To obtain the remedy of a preliminary injunction, the State of New Jersey would have had to demonstrate: (i) likelihood of success on the merits; (ii) that denial will result in irreparable harm to the plaintiff; (iii) that granting the injunction will not result in irreparable harm to the defendant; and (iv) that granting the injunction is in the public interest.[98] Failure to prove any one of these elements is ground for denial of a preliminary injunction. According to the facts of the lawsuit, the State of New Jersey failed to establish a likelihood of success on the merits of the claim or to meet its burden with respect to the remaining preliminary injunction factors.

The State of New Jersey's request for a preliminary injunction could have been moot. It might not have had standing to bring the case, although it could have argued that it has a duty to provide security at the Port of Newark and may have challenged the failure of the CFIUS to carry out its statutorily mandated investigation. Moreover, the State

96 See *Corzine v Snow*, District Court of New Jersey, No 06-833 (2006). The lawsuit named a number of defendants, including then US Treasury Secretary John Snow, who was also chairman of the CFIUS. The other members of the CFIUS, including US Trade Representative Rob Portman, were also sued in their official capacity.

97 See *Corzine v. Snow*, District Court of New Jersey, No. 06-833 (2006); The lawsuit sought a writ of mandamus requiring the CFIUS to undertake a full national security review of the transaction. .

98 Richard RW Brooks and Warren F Schwartz, 'Legal Uncertainty, Economic Efficiency, and the Preliminary Injunction Doctrine' (2005) 58 *Stanford Law Review* 381, 389.

of New Jersey might have had difficulties in asserting an injury that is concrete, particularized, actual and imminent which would have merited a preliminary injunction for the DP World deal.

With respect to the State of New Jersey's request for documents, these documents are confidential. The CFIUS statute provides that information or documentary material filed with the CFIUS pursuant to the statute or regulations is exempt from disclosure under the *Freedom of Information Act*.[99] Therefore, the CFIUS and DP World information or documentary material cannot be made public. Releasing any document could have publicized DP World trade secrets or disseminated sensitive information on matters of national security. Because the State of New Jersey had failed to identify any legal entitlement to the documents sought, it would have failed to establish a likelihood of success on the merits on the documents claim.

The legal basis asserted by the State of New Jersey for its document claim is the Tenth Amendment to the US Constitution, which provides that the powers not delegated to the US by the Constitution, nor prohibited by it to the states, are preserved to the states respectively, or to the people.[100] Whatever the Tenth Amendment might mean, it could not have entitled the State of New Jersey to any of the documents or information submitted by the parties to the transaction to the CFIUS nor could have entitled any state to exercise authority over CFIUS activities.

The judge in the lawsuit dismissed the case. The DP World commitment to submit the transaction to the CFIUS for a full 45-day review, coupled with its commitment not to exercise control over P&O's US operations pending the outcome of that review, undermined claims of irreparable

99 The CFIUS statute also exempts all information filed with the President or the CFIUS from disclosure under the *Freedom of Information Act*. See *Freedom of Information Act*, 50 USC app s 2170(c) (West Supplement 1993).

100 Peter A Lauricella, 'The Real Contract with America: The Original Intent of the Tenth Amendment and the Commerce Clause' (1997) 60 *Albany Law Review* 1377, 1390. Federalism preserves what people believe the adoption of the Constitution accomplished: a strong national government governing several enumerated areas, and strong state and local governments governing most other aspects of life, because the states are closer to the people. Based on US Supreme Court jurisprudence, the text of the Tenth Amendment does not directly restrain the power of the federal government. See also Sharon Elizabeth Rush, 'Domestic Relations Law: Federal Jurisdiction and State Sovereignty in Perspective' (1984) 60 *Notre Dame Law Review* 1, 17. Some areas of the law belong affirmatively to the states. Under this theory, the federal government lacks power to take away from the states any matters within the enclave. Federal courts have intimated that domestic relations matters, such as divorce and child custody, are beyond their power because they are reserved to the states by the Tenth Amendment.

injury. Indeed, the 45-day CFIUS investigation, which was already ordered, was the very relief sought by the State of New Jersey in its complaint. As such, the claim for a preliminary injunctive relief was baseless. The State of New Jersey was in exactly the same position it would have been in, had it succeeded in its lawsuit.

In a related development, the Port Authority of New York filed a suit in the Superior Court in Newark alleging that the existing lease arrangement gave it a right to review changes in port management.[101] The lawsuit, which was dismissed, sought to enjoin the sale and terminate the Port Authority's lease with Port Newark Container Terminal, the current operator at the Port of Newark, alleging that the type of transaction engaged in with DP World required prior written approval from the Port Authority and that none was obtained.[102]

The DP World transaction was delayed pending an outcome in a UK court.[103] The UK's High Court approved the US$ 6.8 billion purchase of P&O Steam Navigation Co, a British-based firm, by DP World on March 2, 2006. However, the Court stayed the approval pending the outcome of a request by Eller & Co, a Miami-based port operator, to appeal the decision.[104] The Eller & Co request for an appeal was refused; thus, the DP World-P&O transaction was made final.[105] Eller & Co fought the purchase of P&O by DP World in the courts because the company did not want to become business partners with a company owned by a foreign government. In other words, Eller & Co would have become an 'involuntary partner' with Dubai's government.

Lawsuits brought by US states against the DP World deal were frivolous. The appropriateness of those lawsuits and how they should have been dealt with were in question. Courts should not be in the position where they have to adjudicate a non-justifiable political question.

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101 See Rossella Brevetti, 'Federal District Court Orders Government to Explain UAE Port Deal or Risk Injunction. 23 *International Trade Reporter (BNA)* 23, 2 March 2006, 324.

102 Ibid.

103 See Christopher S Rugaber, 'Senators to Propose Changes to CFIUS; Treasury Seeks to Cooperate' *International Trade Reporter (BNA)* 23, 9 March 2006, 378.

104 Ibid. Eller & Co is a Miami-based port operating company that has a 50-50 partnership with P&O's North American subsidiary, P&O Ports North America (POPNA).

105 Ibid. On March 6, 2006, the UK's Court of Appeal rejected a request by Eller & Co to appeal an earlier decision by the UK's High Court to approve the purchase of P&O Steam Navigation by DP World. P&O's North American subsidiary owns terminal operating rights at the six US ports.

C *The DP World Deal and US Services Commitments under the WTO*

The DP World transaction raised questions about whether US attempts to bar the UAE firm's takeover of P&O were inconsistent with the requirements of the General Agreement on Trade in Services ('GATS') rules. GATS provides a multilateral regulation for international trade in services which encompass a wide range of sectors such as banking, transportation, professional services, and telecommunications.

The GATS applies to services provided by a service supplier of one member, through commercial presence in the territory of any other member.[106] This provision is complemented by the definition of 'commercial presence' which is defined as any type of business including through the constitution, acquisition or maintenance of a juridical person within the territory of a member for the purpose of supplying a service.[107] As the notion of commercial presence adopted by the GATS focuses on enterprise-oriented investments, it aims to cover any juridical person devoted to the supply of a service. Under such coverage, acquisition contracts are usually included.

Investors benefit from GATS to the extent that its disciplines restrict the ability of host governments, such as the US, to adopt measures that are contrary to the provisions of the GATS. GATS provides for the most-favored-nation ('MFN') principle, which is directed at avoiding discrimination between service providers of third countries.[108] The MFN principle applies to any measure affecting trade in services. Measures include rules, procedures and decisions made by governments affecting trade in services.[109] The WTO Appellate Body interpreted the meaning of 'affecting trade in services' in a broad manner.[110] Based upon this broad

106 *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 33 International Legal Materials 1167 (entered into force 1 January 1995), Annex 1B (*'General Agreement on Trade in Services'*), art I(3).

107 Ibid art XXVIII(d).

108 Ibid art II. With respect to any measure covered by GATS, each member shall accord immediately and unconditionally to service and service suppliers of any other member treatment no less favorable than that it accords to like service and service suppliers of any other country.

109 *Marrakesh Agreement Establishing the World Trade Organization;* above n 104, art I (3).

110 The use of the term 'affecting' reflects the intent of the drafters to give a broad reach to the GATS. The ordinary meaning of the word 'affecting' implies a measure that has 'an effect on', which indicates a broad scope of application. See Appellate Body Report, European Communities – Regime for the Importation, Sale and Distribution of Bananas, WTO Doc WT/DS27/AB/R (9 September 1997).

coverage and interpretation, countries cannot discriminate among service suppliers of other countries in the absence of an applicable exception.

Specifically, the US has a WTO obligation to treat DP World the same as other foreign port operators with US investments, such as the current ownership of US terminal operations by State-owned firms in China and Singapore. DP World could have challenged the discriminatory treatment by the US. The US should bar all state-owned foreign terminal operators from US ports, not only DP World.

Because countries often favour local shippers and hinder international carriers by controlling access to their port facilities, access to and use of port facilities is considered an important issue.[111] The US could have claimed that it is immune from WTO dispute settlement action by virtue of a 1996 WTO agreement suspending the application of the MFN principle to the maritime sector, a decision taken when WTO talks on liberalizing maritime services failed.[112] The suspension of MFN treatment gives the US the right to discriminate among foreign port operators, including those that are state-run and those that are privately owned.

The UAE may have counter-argued that the 1996 decision to suspend MFN treatment does not specifically mention port management. The legal basis for suspending the negotiations, as well as MFN treatment, refers to the right to suspend MFN privileges in international shipping, auxiliary services, and use of port facilities.[113] The DP World activities may not be captured by the language of the 1996 decision. Moreover, the US claimed a specific maritime MFN exemption in 1993 with regard to the loading and unloading of vessels in US ports (longshore work) by the crews of foreign ships whose home countries refused to allow crews on US ships to unload and load in their ports.[114] That claim - and the failure of the US at the time to claim an MFN exemption for port management services - could conceivably allow the UAE to argue that the US never intended to

111 See Ted L McDorman, 'Regional Port State Control Agreements: Some Issues of International Law' (2000) 5 *Ocean & Coastal Law Journal*, 207, 221.

112 See Decision on Maritime Transport Services, 28 June 1996, WTO Doc S/L/24 (96-2539) (adopted by the Council for Trade in Services) 1.

113 See Annex on Negotiations on Maritime Transport Services, 33 International Legal Materials 1192 (1994).

114 Exemptions are located in Table 23.A13b, entitled 'Overview of MFN exemptions affecting movements of natural persons: sector specific exemptions.' See WTO Secretariat, *Guide to the GATS: An Overview of Issues for Further Liberalization of Trade in Services* (Kluwer Law International, 2001) 650.

include port services in its MFN exemption list.[115] Therefore, the general MFN suspension should not apply to the US in the maritime sector.

Notwithstanding the obligations undertaken in GATS, the US could have always resorted to Article XIV*bis*(b) of the GATS to thwart any legal challenge to the barring of DP World. Article XIV*bis*(b) allows WTO Members to derogate from their multilateral trade commitments if the measures are deemed necessary for national security reasons. There is no internationally recognized definition of national security interests. The right of a country to invoke an exception for actions taken in pursuance of its security interests is without qualification.[116] There is a degree of self-judgment on the country invoking the exception that makes a successful challenge by another country that feels itself aggrieved by such action difficult.

Interestingly, a clear example exists of the US backtracking on a WTO services commitment in the name of national security. The US effectively nationalized its airport security services following the September 11 terrorist attacks even though it had made market-access commitments for foreign services providers in this sector. The US decided that future contracts would only be given to US-run security firms.[117] No WTO Member has ever questioned the US move or sought compensation from the US in the form of concessions in other services sectors, which, under the GATS, they are arguably entitled to claim.

The UAE could have made the argument that any such security concerns should have been advanced when the P&O takeover was reviewed by the CFIUS. Procedures of clarification, transparency and peer review should have been followed by the US when it applied measures motivated by national security interests. National security measures should not go

115 The US could claim that the MFN exemption for longshore work is under the heading of movement of persons (Mode 4) and not maritime, thus making it difficult to prove that the US never intended to exclude port management from its MFN exemption list. However, no article can be found in GATS which distinguishes between the four modes of supplies, all of them being subject to the same discipline. If the use of a different mode of supply was sufficient for a WTO member to escape its obligations, this would seriously undermine the effectiveness of the GATS.

116 Art XIV of GATS provides for general exceptions which allow countries to escape their obligations. However, GATS requires that such measures shall not constitute, or be applied in a manner which would constitute, arbitrary or unjustifiable discrimination. See GATS, art XIV. The requirements of art XIV of GATS are not carried over to the security exception provisions of art XIV*bis*(b).

117 Paul R Verkuil, 'The Publicization of Airport Security' (2006) 27(5) *Cardozo Law Review* 2243, 2251. See also Ian Patrick McGinley, 'Regulating "Rent-A-Cops" Post-9/11: Why the Private Security Officer Employment Authorization Act Fails to Address Homeland Security Concerns' (2007) 6 *Cardozo Public Law, Policy & Ethics Journal* 129, 143.

beyond what was strictly necessary. The US should reduce to a bare minimum the type of measures classified as being motivated by security interests so as not to frustrate trade liberalization.

At any rate, there is no effective way to predict whether a WTO dispute panel would rule that an Article XIV*bis* defense would be justified. No WTO panel has ever ruled on a claim made under the national security provisions of the GATS or those of the parallel provisions of Art XXI of the General Agreement on Tariffs and Trade ('GATT').[118] Therefore, an Article XIV*bis* claim by the US is largely hypothetical.

D *The DP World Transaction Spillover Effect on US-UAE Free Trade Agreement*

In 2005, the US commenced free trade agreement ('FTA') negotiations with the UAE.[119] The talks were to be a stepping-stone to the US Administration's goal of creating a Middle East Free Trade Area in 2013.[120] The US-UAE FTA was intended to be a comprehensive agreement that would enhance economic growth and trade between the parties.[121] This FTA was to build on those already concluded between the US and Jordan, Morocco, Bahrain and Oman.[122]

The UAE is a larger and more complex economy than for example, Jordan, Oman, or Morocco, which have already concluded FTA talks with the US.[123] The UAE is a regional center and a country where many US

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118 Nicaragua invoked the national security exemption when Colombia challenged a tax imposed by Nicaragua on Colombian goods in retaliation for a border dispute. Colombia succeeded in getting a dispute panel established to rule on its complaint, but the panel proceedings never went ahead. See WTO Secretariat, *Guide to the GATS: An Overview of Issues for Further Liberalization of Trade in Services* (Kluwer Law International, 2001), 600-610.

119 See Rossella Brevetti, 'USTR Opens FTA Talks with UAE, Oman; Negotiations Expected to Proceed Rapidly' *International Trade Reporter (BNA)* 22, 10 March 2005, 404.

120 See Grary G. Yerkey, 'President Bush Lays Out Broad Plan for Regional FTA with Middle East by 2013' *International Trade Reporter (BNA)* 20, 15 May 2003, 856.

121 The US trade relationship with the UAE is its third-largest in the Middle East, following Saudi Arabia and Israel. Major US exports to the UAE include machinery, aircraft, vehicles, and electrical machinery. Mineral fuel and woven apparel are among the major US imports. See Brevetti, above n 119.

122 See *United States-Jordan Free Trade Agreement* (2001)<http://www.jordanusfta.com/free_trade_agreement_text_en.asp>; *United States-Morocco Free Trade Agreement* (2006), preamble, < http://www.moroccousafta.com/pdf/00-preamble.pdf>; *United States-Bahrain Free Trade Agreement* (2006) <http://www.fta.gov.bh/images/UploadFiles/00-preamble.pdf>; and *United States-Oman Free Trade Agreement* (2009) < http://www.omanusfta.com/documents/Preamble.pdf >.

123 For example, because of the small size of Jordan and Oman, they would not be able to affect the US economy in any meaningful way. See US International Trade Commission, Economic Impact on the United States of a US-Jordan Free Trade Agreement, 5-1 Publication No 3340 (September 2000). See also US International Trade Commission,

companies have chosen to establish regional headquarters. Therefore, in the US-UAE FTA talks, there were some fundamental and complex issues, notably over market access for industrial and agricultural products, investment and services.

The Arab countries' boycott of Israel might have been a sticking point in the US-UAE FTA negotiations.[124] One US concern is how it can turn over port operations to DP World; a company owned by a government that expresses allegiance to the boycott. The US may have wanted the UAE to formally disavow the boycott.[125]

The dispute over the DP World transaction was another issue that had a major negative impact on negotiations toward a US-UAE FTA as well as on Congressional sentiment toward that FTA. The dispute over the DP World transaction slowed down and ultimately stopped the US-UAE FTA talks.[126] Members of Congress did not view the ports issue as entirely separate from the US-UAE FTA talks. As of 2011, the FTA negotiations between the US and UAE have not resumed and there is no evidence that suggests that the US has any interest in pursuing them.

At any rate, trade agreements are not simply vehicles for economic development; those with the Middle Eastern nations, including Israel, have frequently been justified on national security and foreign policy grounds. They are also an integral part of US national security and its efforts to

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US-Oman Free Trade Agreement: Potential Economy Wide and Selected Sectoral Effects, Investigation No TA-2104-19, USITC Publication 3837 (February 2006).

124 The Arab League formalized the boycott upon Israel's birth in 1948 to block not only Israeli goods but also goods from companies that exported to Israel or had operations there - the so-called secondary and tertiary boycotts. The US maintains two sets of policies designed primarily to prevent compliance with the Arab countries' boycott of Israel. The US Commerce Department administers rules that generally forbid US companies and their controlled overseas affiliates, among other things, to refuse, knowingly agree to refuse, or require any other person to refuse to do business with or in Israel. In addition, federal income tax provisions withhold a variety of tax benefits from US taxpayers if they or certain related parties participate in or co-operate with the boycott. Both sets of measures require US companies to report certain types of boycott-related communications. See Robert A Diamond, 'US Anti-boycott Law and Regulations' (2001) 830 *Practicing Law Institute* 721, 730–731;

125 In 2005, during consideration of the US trade pact with Bahrain, officials from that Persian Gulf nation made a side commitment to end participation in the Arab boycott. A similar assurance has been made by the Sultanate of Oman, ahead of Congressional consideration in 2006 of its trade deal with the US See Rossella Brevetti, 'Finance Committee Approves Recommendations on Bahrain FTA' *International Trade Reporter (BNA)* 22, 17 November 2005, 1854. See also Gary G Yerkey, 'US has Commitment from Oman on Arab League Boycott of Israel, Aide Says' *International Trade Reporter (BNA)* 23, March 9, 2006, 377.

126 See Gary G Yerkey, 'US, UAE Postpone Free Trade Talks in Move USTR Official Calls "Not Unusual"' *International Trade Reporter (BNA)* 23, 16 March 2006, 422.

combat terrorism. Any eventual FTA with the UAE would undoubtedly contain a clause that allows each country to protect its essential security interests.[127] Therefore, the national security waiver would allow the President to suspend any terms of the agreement to protect the security interests of the US.

In the unlikely event that the FTA negotiations resume, the UAE could possibly use the US hysteria about the DP World issue in its favor. In the US-UAE trade negotiations, US trade negotiators will likely feel compelled to quell an embarrassing situation and show some contrition for Congress's posture. That could mean fewer US demands and more US accommodation during the negotiations, as well as similar sympathies from Congress when it comes time to vote on the FTA.

E *The DP World Compromise*

In efforts to find a moderate compromise to the controversy, DP World decided to transfer its US holdings.[128] That development came as heavy political pressure was building. The DP World move may have been precipitated by pressure from the UAE and US governments, which recognized the circumstances surrounding the deal and the potential collision between the US Administration and Congress.

DP World had several models to fully transfer its US operations to a US entity. For example, DP World could have transferred the US assets through a sale. It could have also subcontracted the operation of cargo terminals to a US company. Under this arrangement, it would have received a flat fee but would not have any access to security information. It could have created a corporate structure under which the US business has no management ties to its parent in Dubai. DP World might have adopted a strict arm's length model in its US assets whereby separate US supervisory boards may be created to insulate DP World employees and shareholders without security clearances from sensitive information. Finally, DP World could have chosen a trust or proxy agreement to create a separate subsidiary. Through trust or proxy agreement, foreign investors

127 Representative Sherrod Brown (D-Ohio) sponsored legislation - the Trade-Related American National Security and Accountability (TRANSEA) Act of 2006 - that would create a new Congressional Executive Commission on Trade Security requiring the appointment of commissioners by Congress. The Commissioners would be charged with certifying every year that the terms of a trade agreement do not pose a threat to US national security interests and, if they were to find that compliance with the agreement would pose a threat, the President would be obligated to exercise his waiver authority to the extent necessary to ensure the safety and security of the US. See Gary G Yerkey, 'Rep. Brown Calls on Administration to Halt Free Trade Talks with UAE, Plans Legislation' *International Trade Reporter (BNA)* 23, 2 March 2006, 326.

128 Hitt and King, above n 91.

are required to eliminate any right to control or influence the operations or directions of a subsidiary.[129] Trustee or proxy board members – who are US citizens eligible for security clearance – would actually run the US subsidiary on a daily basis.

Ultimately, DP World agreed to sell all its US port operations within four to six months to an unrelated US buyer.[130] DP World needed that time window in order to finalise the sale in an orderly fashion so that it would not suffer economic loss. Any step short of divestiture or sale could have been opposed by members of Congress as they could have questioned whether DP World plans were to truly divest its US operations or whether it was simply setting up some sort of US subsidiary.

V CFIUS Reforms

In the wake of the wide Presidential authority granted under the Exon-Florio Amendment, the ambiguity of the term 'national security', the post-9/11 world, and the furore surrounding the purchase of terminal operating rights at six US ports by DP World, pressure increased to revamp the CFIUS process. In 2007, the *Foreign Investment and National Security Act* ('*FINSA*') brought about a comprehensive reform of the CFIUS process.[131] Many provisions of *FINSA* are simply codifications of existing regulations governing CFIUS, clarification, or reorganization of the existing statutes governing CFIUS.

In general, *FINSA* retains the existing composition of CFIUS, with the Secretary of Treasury as chairperson of CFIUS, the Secretaries of Commerce, Defense, State, and Energy, as well as the Attorney General of the US as full members of CFIUS. Due to the creation of the new Department of Homeland Security, the Act adds the Secretary of Homeland Security as an official member. By adding the Department of Homeland Security, the CFIUS's balance of power has shifted in favour of agencies that prioritise security over economic policy considerations. The Act also adds the

129 See Roberta S Karmel, 'Voting Power Without Responsibility or Risk: How should Proxy Reform Address the Decoupling of Economic and Voting Rights?' 2010 55(1) Villanova Law Review 93, 98.

130 See Amy Tsui, 'Dubai Ports World to Sell US Holdings to AIG in Wake of Security Concern Flap' *International Trade Reporter (BNA)* 23, 21 December 2006, 1820. Dubai Ports World sold its holdings in a US port terminal operator to the AIG Global Investment Group. AIG is an asset management company, and a subsidiary of American International Group Inc. Since DP World withdrew from the CFIUS process, there was no traditional 30- or 45-day investigation into the transaction between DP World and AIG by CFIUS.

131 See *Foreign Investment and National Security Act of 2007*, Pub L No 110-49, 12, 121 Stat 246, 260 (establishing that the provisions of the Act will become effective 90 days after its enactment).

Secretary of Labor and Director of National Intelligence as non-voting, *ex officio* members, and permits the President to appoint additional members as he determines to be necessary.[132] Thus, *FINSA* allows for the President to appoint additional members as he deems necessary, so it is possible that the existing members of CFIUS who are not mentioned in the Act will continue to serve on CFIUS. While leaving the composition of CFIUS largely intact - adding only the Secretary of Homeland Security as a full member – *FINSA* adds a new requirement that the chair of CFIUS shall designate one or more members of CFIUS as the 'lead agency' for each covered transaction - thus giving them responsibility to act on behalf of CFIUS for that transaction.[133] The designation of a lead agency for each covered transaction is also a positive development because it allows the Chair to assign transactions to agencies based on institutional specialty and assures that at least one agency will be directly responsible for reviewing any given transaction.

FINSA outlines the review process for foreign acquisitions.[134] The Act retains the same definition of 'covered transactions' that may be reviewed by CFIUS that has existed since the passage of *Exon-Florio* in 1988: 'any merger, acquisition, or takeover … by or with any foreign person which could result in foreign control of any person engaged in interstate commerce in the US'[135] Review of a potential acquisition by CFIUS may commence in either of two ways. The parties contemplating an acquisition that may be a covered transaction for the purposes of CFIUS may voluntarily submit notice to CFIUS, or 'any member of CFIUS may submit an agency notice of a proposed or completed acquisition if that member has reason to believe that the acquisition may have adverse impacts on the national security.'[136] In practice, however, if a transaction warrants CFIUS review, CFIUS will advise a company to voluntarily submit notice of its transactions.

FINSA specifies that any transaction that would result in control of any critical infrastructure of or within the US by a foreign entity is subject to investigation if CFIUS determines that the transaction could impair national security.[137] In addition, any transaction that could result in the control of a US entity by a foreign government or an entity controlled by or acting on behalf of a foreign government is subject to a full investigation. Hence, *FINSA* responded to perceived non-compliance with the intent of the *Byrd Amendment* by mandating investigations of all acquisitions that

132 Ibid art 3(k)(2)-(3), 121 Stat at 252.
133 Ibid art 3(k)(5), 121 Stat at 252-53.
134 Ibid art 2(b), 121 Stat at 247-49.
135 Ibid art 2(a)(3), 121 Stat at 246.
136 Ibid art 2-3, 121 Stat at 247-49.
137 Ibid art 2 (b)(2)(B), 121 Stat, 249.

would result in control of a US entity by a foreign government.[138] These provisions remove the language of the *Byrd Amendment* making such investigations mandatory only when the proposed acquisition resulting in foreign-government control has the potential to 'affect the national security of the United States', which apparently has been used by CFIUS as an escape valve to avoid conducting full investigations of acquisitions by foreign-government controlled entities.[139] Transactions involving foreign government-controlled entities or the acquisition of critical US infrastructure deserve added scrutiny, and thus this added provision will be an improvement on the existing CFIUS regime.

FINSA addresses concerns that CFIUS was secretive and unaccountable to anyone outside of the Executive Branch by adding various provisions requiring specific reporting to Congressional leaders. The Act requires a report to Congress either at the conclusion of the review process - if CFIUS determines that no further investigation of the covered transaction is required - or if an investigation is undertaken, but the matter has not been sent to the President for decision as soon as is practicable after completion of the investigation.[140] This reporting requirement represents an attempt by Congress to exert pressure on the CFIUS decision-making process and open it up to Congressional scrutiny, after the provisions of *Exon-Florio* and the *Byrd Amendment* failed to accomplish these objectives. The CFIUS must certify, at the highest levels of authority, that the transaction does not present national security concerns.

In addition to the provisions aimed at promoting the transparency and accountability of CFIUS, the US Congress sought to understand where CFIUS had failed to comply with Congressional mandates in the past. Thus, *FINSA* requires the Chair of CFIUS to publish in the Federal Register guidance regarding the types of transactions that the Committee has reviewed and that have presented national security considerations, within 180 days of the effective date of the Act.[141] Furthermore, the Inspector General of the Department of the Treasury must conduct an independent investigation regarding each failure of the Department of the Treasury to make any report to the Congress that was required under existing law prior to passage of the Act.[142] While it is understandable that Congress would want these issues addressed in order to shed light on the

138 Ibid.

139 See Lauren Etter, 'Dubai: Business Partner or Terrorist Hotbed?' *Wall Street Journal* 25 February 2006, A9 (discussing how CFIUS initially approved the attempted acquisition by Dubai Ports World without conducting a full investigation of the transaction).

140 See *Foreign Investment and National Security Act of 2007*, Pub L No 110-49, 12 at art. 2(b)(3), 121 Stat 246, 249.

141 Ibid art 2(b)(2)(E), 121 Stat. at 249.

142 Ibid art 7(d)(1), 121 Stat at 258.

CFIUS process and to expose perceived non-compliance by the executive branch with Congressional mandates, it might have been more beneficial to all involved parties, as well as to the public at large, to have moved forward and not dwelled on the past. Congress should have worried less about exposing past non-compliance, and more about ensuring that the new reporting requirements described above, which are aimed at transparency and accountability, are followed by CFIUS. However, it is possible that bringing past failings to comply with Congressional mandates out in the open will allow Congress to better monitor future compliance by CFIUS.

VI Recent Developments

The UAE is determined not to see a repeat of the collapse of the DP World deal. Dubai Aerospace Enterprise Ltd bought two firms that owned small US airports and maintenance facilities that serviced some Navy transport-plane engines.[143] The Dubai firm pledged to submit to government security reviews and submit its employees for security screening.[144] It also thoroughly briefed US lawmakers on the deal. The deal ran into no obstacles. The transaction was a success because, in part, the UAE launched a three-year, $15 million Washington lobbying campaign, the US-Emirates Alliance, to burnish its reputation.[145] In addition, to avoid scrutiny by US agencies, Dubai Aerospace Enterprise sought passive interests - one in which investors do not seek to influence a company's behaviour - which is presumed not to pose national security problems.

In sum, the investments made have been carefully designed to avoid triggering close US government oversight. A backlash could still develop if SWFs or SOEs meddle in US companies.

VII The UAE Regulatory Approach To National Security And Foreign Investment

As is the case in the US, the UAE have enacted laws and instituted policies regulating foreign investment, often to address national security concerns. However, the UAE has its own concept of national security that influences which particular investments may be restricted. As a result of the differing concepts, UAE restrictions range from requiring informal approval of investments in a narrowly defined defence sector to broad restrictions on the basis of economic and demographic concerns.

143 See Bob Davis and Dennis K Berman, 'Lobbyists Smoothed the Way for a Spate of Foreign Deals' *Wall Street Journal* 25 January 2008, A1.

144 Ibid.

145 Ibid.

The UAE has also introduced a list of strategic sectors in which foreign investment is off-limit.

There are several laws that restrict foreign investment in the UAE.[146] In particular, the UAE's Companies Law and the Agencies Law limit foreign ownership to 49 per cent and mandate that trade must be conducted through an Emirati agent.[147] The restrictions could be designed to ensure that UAE citizens are beneficiaries of the country's economic growth because a majority of residents and private sector employees are not UAE citizens.[148] The UAE's labour market and society structure is another national security concern.[149] These are very broad definitions of national security compared to CFIUS. These restrictions can be used as platforms to protect the country's national security interests.

In addition to the above restrictions, the UAE limits foreign ownership of land, with rules varying from emirate to emirate.[150] The UAE also has sector-by-sector limits on foreign ownership. Some sectors, like insurance, telecommunications and travel agencies, are still mostly closed to foreigners.[151] Traditionally, foreign investment in the UAE's oil and natural gas sectors has been limited to 40 per cent, divided among several foreign

146 For instance, the Government Tenders Law provides that government suppliers and contractors must be UAE citizens or companies at least 51 per cent owned by UAE citizens. The Federal Industry Law also provides that industrial projects must be 51 per cent owned by UAE citizens, and that projects must be managed by a UAE citizen or have a board of directors that has a majority of UAE citizens. See WTO Trade Policy Review Body, Trade Policy Review of United Arab Emirates-Report of the Secretariat, WTO Doc No WT/TPR/S/162/Rev 1, 16-20 (June 28 , 2006).

147 See *Federal Commercial Companies Law No 8 of 1984* as amended by the Federal Laws No. 13 of 1988 and 4 of 1990, arts 22, 100, and 314, Official Gazette No 196 (January 8, 1989). See also *Ministerial Decision No 69 of 1989 Regarding Conditions and Procedures for Licensing Foreign Companies to Practice its Activities in the State*, art 404 & 505 (September 16, 1989). See *Law for Organizing Commercial Agencies No 18 of 1981 as amended by Federal Law No 2 of 2010*, art 2, Official Gazette No 99 (August 11, 1981).

148 See Gawdat Bahgat, 'The Silent Revolution: Education and Instability in the Gulf Monarchies' (1998) 22(1) *Fletcher Forum of World Affairs* 103, 107. The UAE has presence of a huge number of expatriates. Foreign workers represented more than 80 per cent of the labor force.

149 See Amira Agarib, 'Dhahi for Expat Quota to Preserve Identities' *Khaleej Times* 27 December 2010 <http://www.khaleejtimes.com/DisplayArticle09.asp?xfile=data/theuae/2010/December/theuae_December719.xml&section=theuae> (Dubai Police Chief Lt General Dhahi Khalfan Tamim recommended a quota system for all nationalities in the UAE to keep the expat population in the country in check. Expatriates may endanger the identity of the UAE nationals in a way that they could influence the culture and the language of the local children, noting that expatriates have brought with them many things that are today misunderstood to be the traditional elements of Emirati culture).

150 WTO Trade Policy Review Body, above n 142, 46.

151 Ibid.

joint venture partners.[152] The UAE treats oil and natural gas production as a national security issue since these industries represent a major portion of the country's gross domestic production ('GDP').

In all countries, Foreign Trade Zones ('FTZs') are exempt from many local laws. These FTZs usually have lower labour and tax requirements, and allow foreign companies to own 100 per cent of an enterprise in any FTZ.[153] This makes them attractive locations for foreigners to invest. The presence of FTZs in UAE has created two separate and distinct economies in the UAE - the FTZ economy and the regular UAE economy.

There are many unique characteristics of the system employed by the UAE to regulate foreign investment. In many ways this system is different from the US process under *Exon-Florio*. The UAE does not specifically use the term 'national security' in its laws or define what is covered under this term. Further, the UAE does not use a formal review process to review a transaction based on national security. Rather, UAE review considers economic factors and cultural policy objectives. Foreign investors are informally notified of sensitivities associated with attempted investments.[154] If a foreigner attempts to invest in an area deemed to be unacceptable, the investor will be privately redirected.

The UAE process has not formally designated an economic-related ministry or body within the government to conduct the national security review. This body would generally coordinate as needed with government security bodies. For example, the governmental authority could be vested in the Ministry of Economy, Ministry of Defence, and other relevant ministries, depending on the sector(s) of the proposed investment. In the future, the UAE should have a formal interagency review committee such as CFIUS. As is the case in the US, bureaucratic tension could exist between economic UAE government bodies and generally more conservative, security-focused bodies within the government such as the defence ministry. Nevertheless, this natural tension serves to balance both economic and security concerns when laws and policies are being developed and when decisions are made on individual applications in the review process.

Unlike the US process, the UAE system does not establish time framework for the review ranging for example from thirty days to six months. The

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152 Ibid.

153 William G Kanellis, 'Reining in the Foreign Trade Zones Board: Making Foreign Trade Zone Decisions Reflect the Legislative Intent of the Foreign Trade Zones Act of 1934' (1995) 15 *Northwestern Journal of International Law & Business* 606, 612-617.

154 Interview with Edmund R Saums II, Director for Middle East Affairs, (Phone interview, 27 November 2010).

UAE's reviews are not mandatory if the investment reaches certain dollar thresholds or if the buyer obtains a controlling or blocking share in the acquired company. Finally, the UAE system does not allow review process decisions to be challenged in court or through administrative means for reconsideration.

Certain foreign investments are considered sensitive by the host UAE government; therefore, a firm may informally contact the host government to discuss the transaction prior to formal application for review. Informality could be beneficial for the parties involved. Seeking unofficial pre-approval can enable the potential investor to assuage any concerns and public outrages over a pending transaction. Likewise, if the UAE is unlikely to approve a transaction, this can be communicated to the investor prior to the formal application process. In such a case, the investor may never apply for review because of unofficial feedback from government officials concerning the unlikelihood of approval. In other circumstances, a firm may withdraw its application for a review if it receives unofficial feedback from the government that the transaction is unlikely to be approved.

Currently, the UAE government plans to liberalise its investment laws. For example, the UAE finalised changes to allow foreigners to acquire up to 100 per cent ownership of companies outside free zones.[155] Additional changes will probably be implemented in stages on a sector-by-sector basis. The government has also instituted changes to foreign investment policies in UAE. The primary change is that foreign investment in industries with dual use technologies is now subject to prior notification and a government review.[156] This change is intended to prevent the outflow of technology, with a focus on items that have a high probability of conversion to use in weapons of mass destruction.

Overall, the UAE's legal framework favors domestic over foreign investment. The UAE restricts entry into certain sectors, or the extent of ownership allowed in a sector. For example, the UAE does not allow foreign majority ownership of any business outside of designated FTZs. Although no UAE law restricts foreign investment for national security specifically, protection of the UAE's oil and natural gas deposits

155 See Toula Murphy,'UAE to Review Proposal to Allow 100% Ownership by Foreign Firms' *International Trade Reporter (BNA)* 27, 18 March 2010, 40.

156 See Gary G Yerkey, 'United States Welcomes New UAE Law Controlling Exports of Sensitive Technology' *International Trade Reporter (BNA)* 24, 15 March 2007, 395. Tthe UAE has been cracking down hard on illicit export activity in the country and that the new law - containing very stringent rules regarding the illegal diversion of technology - will only help strengthen those efforts. The UAE has already closed 24 companies that were found to be engaged in diversion activities.

is effectively a national security issue. It is possible to vet sensitive transactions through a political process before the transaction is initiated. The UAE should debate the need for a formal and legal security review of foreign investment.

VIII Conclusion

Global investment, whether through SWFs or SOEs, is beneficial and necessary to bring economic prosperity worldwide. However, foreign acquisitions of companies pose a significant challenge for governments because of the need to balance the benefits of foreign investment with national security concerns. In the post-September 11 world, security policies have become increasingly more important. Parties planning such transactions should therefore carefully consider any investment and security policies in place before proceeding further.

Although the DP World transaction was characterised by national security concerns, it was also affected by politics, economic nationalism and protectionism. With expectation for Arab countries to liberalise their legal regimes governing foreign investment, any increased US vigilance would lead to perception of a double standard. It is important that the US maintain a fair and objective foreign investment review process; the CFIUS process could otherwise serve as a significant deterrent to FDI. As national security can be a subjective concept, it can be over-stretched and interpreted so broadly that almost everything can qualify as an issue of national security.

It is important that countries strive to create a reasonable balance between foreign investment and national security. As the DP World showdown demonstrates, increased security concerns can unnecessarily add to investor uncertainty, reduce FDI flow, undermine efforts to achieve investment liberalisation and invite retaliatory measures. Countries should consistently welcome FDI because it provides substantial benefits to host countries. The investment review framework should be based upon rational considerations, rather be influenced by the character of the foreign investor.