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The impact of CFIUS on foreign investors in the US: A round-table discussion with Jeffrey Shafer (Citi), George Kleinfeld (Clifford Chance) and Ivan Schlager (Skadden Arps) held on Wednesday, May 7, 2008, at Armourers' Hall, 81 Coleman Street, London, EC2R 5BJ, from 12:30-2:15pm.

It's hardly surprising there is so much debate and hand wringing over the Committee on Foreign Investment in the US (CFIUS). Yet the issues raised were part of a global phenomenon, the first speaker said. There is increased politicisation of takeover deals and a return to economic protectionism across the globe. Countries as far a field as Germany and New Zealand are worried about takeovers and national security. Of course the US has a historic reputation for openness, thus the concern is greater.

It is also important to remember CFIUS has been around since the 1970s. It was set up to calm popular anxiety over investment by OPEC countries. Ronald Reagan delegated Presidential oversight to CFIUS by Executive Order in 1988 after growing Japanese power created a second wave of concern. The latest wave has been triggered by three factors: the growth of Chinese economic power replicating Japan's two decades ago; Homeland Security's post-9/11 agenda; and a specific sensitivity over Middle Eastern countries. Two cases have brought the issues to the fore. The first was interest by China's state-owned CNOOC in buying UNOCAL. Although the US firm's assets were mainly abroad, the idea of an iconic US brand falling into Chinese hands triggered a backlash and a bid was never made. The more famous case was the bid by Dubai Ports World (DPW) for P&O, which then owned six US ports. Although CFIUS and President Bush approved it, the idea of nuclear missiles being smuggled through US ports created too much heat.

Congress felt the need to strengthen CFIUS and codify what it was doing via passed the Foreign Investment and National Security Act (FINSA). Given that the atmosphere has been very hostile previously, this has helped clear the air and not materially broadened the scope of CFIUS, the speaker said. The second speaker said this was far too optimistic, given the recent collapse of Huawei's bid for just 16.5% of 3-Com with no management control in the face of political opposition. He said US trade associations had made a poor gamble by welcoming FINSA and then seeking to neuter it on Capitol Hill.

The speaker said the Treasury was "talking out of both sides of its mouth". It maintained a public stance of open to all investment and recently signed a tripartite deal agreement with the sovereign wealth funds of Singapore and Abu Dhabi that pledged to "treat like-situated investors equally". Yet this clearly does apply to bids that go through CFIUS. The fact is certain countries will always find themselves referred to the full 75-day inquiry. He said this would have an unintended consequence of leading firms who believe their takeover probably meets CFIUS tests simply to close the deal and see if anyone objects. Would the President really order the divestiture of a foreign company?

The third speaker said he believed the system worked fine, given the current political climate. He cited the example of Toshiba, which won the bid for Westinghouse in an auction and was approved without a full inquiry – in the middle of the DPW storm. Similarly Dubai Aerospace bought Standard Aero – which maintains USAF jets – from Carlyle Group because its backers made sure they got senior politicians on board ahead of the deal. The process is a slog but is entirely manageable, the speaker said. In fact other regulators such as the FCC for telecoms can be even more arduous.

The second speaker said that it was more damaging than that, as it sent a negative image to the rest of the world. China was being blocked from building a stakeholder relationship in the US that it must eventually be allowed to do. The first speaker said it was a fact of life that attitudes to foreign investment depended on where you came from – the British were seen as “brothers” with a descending scale after that going down to China and the Middle East.

The first speaker said of the 150 deals that went to CFIUS last year none was referred to the President. Of course it is impossible to know how many more deals would have been done without the threat of a CFIUS probe. The second speaker believed it had had a chilling effect – the third speaker disagreed.

To test this one member threw out a hypothetical notion. What if a European stock exchange wanted to buy a US exchange – what would happen? The third speaker expected it would be approved albeit at a high premium. He posed an alternative question – what if a US exchange wanted to buy a continental one? He doubted that would get through. The second speaker said the lesson from DPW was that CFIUS approved had it but that Congress usurped executive authority with a legislative one and embarked on “scuttle diplomacy” to get DPW to sell on the ports. If it’s politically controversial, the threat of a Congressional veto will always hang over any deal.

The first speaker took a step back to look at the big picture. The US needed to sell assets to fund its deficit. At the same time the Middle East and China have huge surpluses that are in state hands that it wants to find investments for. This will continue to create huge tensions over this process of “resocialisation” of assets. Against that background it seems highly likely that CFIUS will find itself in the spotlight for months, if not years to come.