National Policies toward Foreign Investment and the Economic Crisis

Another Excuse for Protectionism?

Dixon Miller
Porter Wright Morris & Arthur LLP

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Three Trends

- Enhancement of laws to scrutinize foreign direct investment on national security grounds
- Multi-lateral initiatives to reduce protectionism and trade restrictions
- Home-country protections during hard economic times
National Security Review of FDI

- USA: FINSA (2007); enabling regulations (2008)
- Canada: Revisions to Investment Canada Act (2009);
Trade-Promoting Multinational Initiatives

- G20 London summit (April 2009)
- G20 Pittsburgh summit (September 2009)
  - Reaffirmed commitment to “refrain from raising new barriers to investment or to trade in goods and services”
  - Pledge to minimize negative impact from domestic policy actions in support of the financial sector
Protection of local industries in difficult times

- Loan and guarantee programs
- Preferential purchasing
- Capital injections
- Tax law changes
- Specialized aid programs
And how bad is the downturn?

● 12% drop in world trade in 2009
● 27 million jobs lost in 2009 worldwide; 200 million jobless at year-end 2009
● Global FDI dropped 39% from 2008 to 2009
Questions to consider during presentations

- Are countries increasing enforcement of national security restrictions to help local competitors?
- Is the better response to economic challenge more open borders, or local protectionism?
- Is the pursuit of socially worthwhile goals ("green" initiatives) protectionism in disguise?
- Should public support extend to foreign-owned entities with home-country assets?
- Will this continue beyond the current downturn?
FDI Before the Crisis

- FINSA amendments to Exon-Florio
  - Former process maintained but formalized
    - CFIUS formally established and expanded to include Secretary of Energy
    - Mandatory 45-day review in certain situations
    - Restriction of, but expanded opportunity for, mitigation agreements
  - Accountability achieved by mandating “sign-offs” on any FDI reviewed by CFIUS
  - Increased reporting to Congress
FDI Before the Crisis (cont.)

- Expanded list of national security factors to be considered by CFIUS and the President
  - Potential national security impact on U.S. critical technologies
  - Potential effects on projected U.S. requirements for energy and critical resources
  - Potential effects on U.S. critical infrastructure
  - Potential effect on transshipment of technologies with military applications
FDI Before the Crisis (cont.)

- Expanded list of national security factors
  - Potential for control of a U.S. business by a foreign government or government-controlled entity
  - Foreign country’s record of adherence to nonproliferation regimes and U.S. counterterrorism efforts
Treasury Guidance

- Focus of CFIUS review is only on “genuine national security concerns” and not other national interests
- Mitigation agreement must be justified by written analysis which identifies national security risk
- Mitigation agreement not permitted if other provisions of law adequately address risk
- CFIUS review is based on voluntary—not mandatory—notice
Business-Related Factors Identified as Presenting National Security Considerations

- Target business provides products or services to U.S. or state/local government agencies
- Nature of target’s business impacts national security
  - Energy/natural resource sector
  - Transportation/shipping sector
  - Financial sector
- Target’s products involve technologies which could be used to defend or impair national security
Acquirer-Related Factors Identified as Presenting National Security Considerations

- Foreign-Government Control of Acquirer
Recent Experience under FINSA

- 2008 Covered Transactions Report
  - 155 notices filed which were “covered transactions”
  - 23 investigations
  - 23 notices withdrawn (18 during review, 5 during investigation)
  - 20 withdrawn notices were refiled; 3 abandoned
  - No presidential action taken to block any transaction in 2008
Recent Experience under FINSA

- **2008 Covered Transactions by Home Country**
  - United Kingdom: 48 transactions
  - France: 12 transactions
  - Israel: 12 transactions
  - Australia: 11 transactions
  - Japan: 8 transactions
  - Russia: 8 transactions
  - Canada: 6 transactions
  - China: 6 transactions

- **Two Mitigation Agreements**
Recent Experience under FINSA

- Firstgold Corp./Northwest Non-Ferrous International Investment Company
- Terra Industries/Yara International ASA (v. CF Holdings Industries)
American Recovery and Reinvestment Act

- Iron, steel, and manufactured products used in ARRA-funded projects must be produced in the U.S.
- Department of Homeland Security may not use ARRA funds to acquire clothing, equipment, or textile products made outside U.S.
Recent experience

- OECD Status report (March 2010)
  - Trade and investment policy response to recession “relatively muted”
  - Recourse to new trade restrictions “less pronounced” than in June 2009 report
  - “Significant risk” of discrimination in application of emergency measures
  - New trade restrictions most likely to be found in protected sectors