

CASE STUDY OF THE PORT OF NEW YORK OF DUBAI PORTS WORLD

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In October 2005, a London-based company, Peninsular and Oriental Steam Navigation Company (P&O), agreed to be acquired by a Dubai-based port company called “Dubai Ports World” for US\$6.85 billion. The potential sale was controversial in the U.S. because the transaction would have given the foreign investor operating rights to six major U.S. ports, including terminals in the New York and New Jersey area, raising national security concerns.

Dubai Ports World is owned by the government of Dubai. It was created in 2005 through the merger of the Dubai

Ports Authority with another Dubai state-owned company. By 2006, Dubai Ports World had become the world’s sixth largest port operator, present in China, Australia, Germany, the Dominican Republic and Venezuela, and with additional projects under development in India, Peru and South Korea.

While P&O had started as a leading ferry company in the United Kingdom, its port facilities operations had become so significant internationally, including the operating rights to the six major U.S. ports, that the proposed acquisition - if completed - would propel Dubai Ports World to

become the world's fourth largest container port operator.

Both parties considered that the transaction might raise national security issues that would need to be reviewed by the U.S. government. Accordingly, in September 2005, they notified the Committee on Foreign Investment in the United States (CFIUS) of their intention to file a voluntary notification with the Committee. The parties also held a full briefing for CFIUS, as well as multiple pre-notification briefings for all CFIUS agencies. As a result, CFIUS requested an intelligence assessment of the foreign acquirer, Dubai Ports World, to assess any potential threat to the national security of the United States even before the transaction was formally declared.

CFIUS has the authority to review and assess all foreign investments that take place in the United States to ensure that acquisitions by foreign companies or states do not pose significant threats to U.S. national security. CFIUS operates on a consensus basis, with each member government agency conducting its own internal analysis of the national security effects of the proposed transaction, including a thorough analysis of the foreign investor.

The Treasury Department serves as the point of contact between the parties and the Committee as a whole and is responsible for leading and organizing each investigation. Federal regulations governing CFIUS operations provide for an initial 30-day investigation period, which may be followed by an additional 45-day period if necessary for further evaluation.

On December 16, 2005, the companies submitted their official statement with CFIUS, which started the initial 30-day investigation period. The agency that co-led this investigation with Treasury was the Department of Homeland Security, which is the CFIUS member agency with specific expertise in port security.

The CFIUS investigation found that the acquisition would not adversely affect U.S. national security because the foreign investor would not directly manage port security and would not own any of the ports it manages. Indeed, Dubai Ports World's role would be limited to the loading and unloading of cargo, as had previously been the case for P&O, with all security-sensitive operations being outsourced to U.S. contractors.

In addition, the UAE had been a strategic counterterrorism and nonproliferation partner of the United States, having allowed the pre-positioning of American military personnel and aircraft on its territory prior to the 2003 gulf war and generally supporting the presence of U.S. armed forces in the region. In addition, the UAE had been

a U.S. partner since 2002 in the area of port security within the the Container Security Initiative (CSI), a multinational program to protect global trade from terrorism.

The U.S. Departments of Transportation and Energy were also involved in the CFIUS review. During the review period, the Department of Homeland Security negotiated letters of assurance with the investor that all facilities in the United States would be managed exclusively by U.S. nationals, that they would fully cooperate with the Department, and that they would designate an American business executive to serve as the point of contact with the Department of Homeland Security on all security matters.

CFIUS approved the transaction in January 2006, finding that there was no threat to U.S. national security.

The proposed sale quickly met with widely publicized political opposition in both state governments and the U.S. Congress, which led the parties themselves to request a more thorough 45-day investigation to address the concerns that had been raised. As a result, the commission began a more thorough investigation of the transaction in February 2006. President Bush, however, considered that the sale was harmless following the initial investigation and approval by CFIUS, leading him to state publicly, amidst political objections from Congress including members of his own political party, that he would veto any potential legislation to block the transaction.

In an attempt to address public concerns, Dubai Ports World announced in February 2006 that it would temporarily postpone the transaction pending the results of the in-depth CFIUS investigation, which they also believed would be favorable to the transaction. Nevertheless, in March 2006, during the 45-day investigation by CFIUS, the U.S. House of Representatives Finance Committee approved an amendment by a vote of 62 to 2 that would have blocked the transaction. Although the amendment never became law (having failed to pass the Senate), the investor nonetheless took this high-profile vote by the House Finance Committee as a sign that there would likely be continuing public opposition to the transaction even if it were approved by CFIUS. Shortly after the House Finance Committee vote, Dubai Ports World sold the controversial port management operations to a U.S. company, Global Investment Group.

Local port authorities that would have been affected by the acquisition took different approaches to the investment. The chief executive officer of the Port of New Orleans distanced himself from the debate, leaving the decision in the hands of the federal government. But, the

Governor of New Jersey and the Port Authority of New York and New Jersey filed several lawsuits against CFIUS and its federal agencies for failing to provide local authorities with adequate information, in alleged violation of the sovereignty of the various states involved: the courts ultimately dismissed these claims.

In addition, the Port Authority of New York and New Jersey filed another lawsuit claiming that the transfer of the contract with the Port of Newark violated a lease agreement entered into in 2000 because the Port Authority was not consulted. In other words, the lessee of the leased premises (the port) was alleged to have sublet the property without the owner's required prior approval. The Port Authority threatened to terminate the lease of the container terminal at the port of Newark in order to exclude the Dubai-based company from all port operations.

In response to the politicization of this case, CFIUS regulations were rewritten in 2007 as the Foreign Investment and National Security Act (FINSAs), which was finalized in 2009. This law ensured the preeminence of CFIUS among U.S. government agencies in assessing national security threats that might result from foreign acquisitions of U.S. companies.

The new law was also designed to provide the Committee with a degree of insulation from congressional pressure. In particular, FINSAs amends Section 271 of the Defense Production Act of 1950 to establish a new statutory basis for CFIUS, giving it explicit independent authority to negotiate mitigation agreements with companies, which had previously been only an administrative practice of CFIUS. FINSAs also reduced the Committee's membership to six cabinet members, namely the Department of Homeland

Security, the Department of Defense, the Department of Commerce, the Department of State, while adding the Department of Energy as a new member. The existing time limits for conducting safety investigations previously established by the 1988 Exon-Florio Amendment were maintained.

In addition, FINSAs identified with greater specificity the responsibilities of officials within CFIUS, creating a new position assigned to the Assistant Secretary of the Department of the Treasury to oversee the CFIUS process and to report regularly to Congress. These reports are also provided to local elected representatives in affected jurisdictions in cases involving foreign investment in local critical infrastructure.

These reports describe the actions taken by CFIUS, identify the factors considered in the assessment of risk, and provide written assurance that the agreed-upon transaction does not threaten the national security of the United States. The written assurance is also required if mitigation agreements have been entered into with the foreign investor and must identify the concerns underlying those actions. Any member of Congress who has received such notice may request a briefing on the transaction or on the conditions contained in a mitigation agreement accepted by a foreign investor. These briefings may be classified, consistent with CFIUS' confidentiality obligation.

The *Dubai Ports World* case demonstrates both the level of scrutiny by U.S. agencies of foreign investment but also the responsiveness of the U.S. regulatory system to newly perceived risks and challenges from foreign investment in the United States.