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DP World, the CFIUS, and Congressional Opposition

How the Committee for Foreign Investment in the United States (CFIUS), if left to operate independently, provides preexisting protections for the American public and may encourage cooperation in the continuing War on Terror.

by

Steven Shoemaker

Submitted in partial fulfillment of the requirements of the King Scholar Program  
Michigan State University College of Law  
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## **THE SETTING**

The War on Terrorism began shortly after commercial airliners struck the World Trade Centers and the Pentagon in the early morning hours of September 11, 2001. Correspondingly, and seemingly unknown at the time of the attacks, the battle between capitalistic ideals and economic security rose quickly with the ensuing wars in Afghanistan and Iraq. The battle between capitalism and security has never been as prevalent as its modern day standing. Capitalism and security concerns do not stand as diametric opposites, but they do present differing foundations of consideration.

Streamlining these divergent themes of economics and security is difficult, because capitalism is no longer limited to the boardroom and the floors of the world's financial exchanges. Capitalist effects now stretch from the ongoing battlefields, to the ports of the U.S., to the check-in lines of domestic airports, and in turn, to the bottom lines of each Multinational Corporation (MNC). The best method by which to analyze the battle between capitalism and economic security necessitates consideration of the recently proposed transaction where DP World purchased Peninsular & Oriental Steam Navigation ("P&O"), a British company that holds leases at several U.S. ports.<sup>1</sup>

As the most advanced capitalist country in the world, the U.S. has espoused the benefits of free market transactions for over 200 years. Although Adam Smith might be shocked at many of the so-called free market implementations over the last century, the U.S. arguably offers the most opportunistic markets, as well as the most efficient investment venue in the world.<sup>2</sup>

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<sup>1</sup> DP World is Dubai Ports World, based in Dubai, which is one of seven emirates that make up the United Arab Emirates (UAE). The UAE is a Middle Eastern country.

<sup>2</sup> Casey, M.A., How to think about globalization, First Things: A Monthly Journal of Religion and Public Life, October 1, 2002

Closely related to the battle between economic security and capitalism are the players involved in the game. Similar to the aforementioned change in the definition of capitalistic battlegrounds, the “players” in geopolitical affairs differ greatly from their conventional definitions. Although nation states and their leadership regimes remain prominent players in international affairs, the executive branch of a nation state no longer exerts the same degree of control over global affairs. Rather, MNCs exert increasingly significant control throughout the world economy and the intricately connected geopolitical landscape.<sup>3</sup>

In a sense, it is necessary to consider the divergence of capitalist ideals and economic security by analyzing the ability of almost any foreign enterprise to acquire ownership and control of practically any multinational enterprise. The process of acquiring a multinational enterprise trading on a security market involves applying the Williams Act or the equivalent foreign takeover regulatory statute.<sup>4</sup> The following research develops the legal framework under which DP World, a United Arab Emirates (“UAE”) enterprise, might takeover a British entity owning U.S. assets by using merger and acquisition techniques (“M&A”). With regard to each level of analysis, there must be equal consideration of the justice afforded to the shareholders of both the acquiring enterprise and the target enterprise, the underlying promotion of economic efficiency, and an evaluation of the comparative M&A openness within the UAE. Additionally, the relationship between the U.S. and the UAE in ongoing War on Terror acts as an important determinative in the ever-expanding definition of a “security industry.”

Although M&A transactions between a UAE and U.S. enterprises are a relatively new phenomenon within the international M&A market, the emergence of Dubai City as a central

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<sup>3</sup> Blumentritt, Timothy, The integration of subsidiary political activities in multinational corporations, Journal of International Business Studies, March 22, 2002

<sup>4</sup> 15 U.S.C.S. §78m

locale of investment growth, foreign business tax haven, and a technological hub will likely increase the number of future UAE-U.S. transactions.<sup>5</sup> Regardless of the relatively short history of these transactions, the topic recently surfaced when DP World attempted to acquire P&O.

In September 2005, DP World offered to purchase P&O. An ensuing bidding war between DP World and Singapore's PSA International ("PSA") pushed the overall purchase price to \$6.8 billion. Ultimately, DP World received 99% of P&O shareholder approval on February 18, 2006. The deal resulted in DP World controlling P&O for 520 pence per share, approximately a 70% premium for P&O shares.<sup>6</sup> After shareholder approval, DP World received approval from all relevant regulatory authorities<sup>7</sup>, including the Committee on Foreign Investment in the United States ("CFIUS") and under the Hart-Scott Rodino Antitrust Improvements Act.<sup>8</sup>

Prior to completing this acquisition, DP World was a leading global port operator with 22 container terminals in 15 countries across the Middle East, Asia, Australia, Europe, and Latin America, handling around 13 million containers in 2005.<sup>9</sup> Dubai ranks as the 9<sup>th</sup> largest port operation in the world and DP World is the 6<sup>th</sup> largest global port operator.<sup>10</sup>

However, U.S. congressional opposition readied to overturn the DP World lease transfer from P&O over concerns about port security falling into the hands of questionable Dubai-based businesspersons. Concerns about port security prompted lawmakers in the House of

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<sup>5</sup> Chester, Laura, Shifting sands: building cities in the sea with the riches from oil - Is it sustainable? Property Week, February 4, 2005

<sup>6</sup> Reed, Stanley, The Real Shipping News, Behind the furor over the Dubai deal is a well-respected company with global reach, Business Week, March 6, 2006

<sup>7</sup> Vasan, Vimala, P&O Stockholder approve DP World Bid, Business Line, February 18, 2006

<sup>8</sup> 15 USCS §15c

<sup>9</sup> Official opening of new DP World Djibouti oil terminal facility, Middle East Company News Wire, February 27, 2006

<sup>10</sup> *Id.*

Representatives to attempt to block the transfer of the P&O port leases through a procedural vote or by any other possible means, including the threatened introduction of new foreign acquisition review standards.<sup>11</sup>

The legal issues surrounding attempts by foreign enterprises to acquire strategic U.S. assets are extensive. Considering only the pure market efficiency rationale of DP World acquiring P&O, lawmakers are taking an anti-capitalistic stance in attempting to subvert the existing regulatory process provided by the Williams Act and the CFIUS. However, given the extensive legal review of any potential national security acquisition, the involvement of the UAE government in controlling DP World, and the seeming media frenzy over Middle Easterners operating major U.S. ports, one must also consider the view that U.S. apprehension regarding these types of security transactions is reasonable in the circumstances of modern day security concerns.

Analyzing the P&O takeover involves consideration of the Williams Act, the EU Takeover Directive relating closely to the British City Code on Mergers and Acquisitions (“British City Code”)<sup>12</sup>, evaluation of the UAE’s cooperation in the War on Terror, advancement as a technological marvel in the Middle East, and review of the Exon-Florio provision as applied by the CFIUS.

Part I, the regulatory scheme, compares the protections of the Williams Act, the future implementation of the EU Takeover Directive, and the British City Code, which served as the basis for DP World to takeover P&O.

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<sup>11</sup> The Ports Deal - The Demagogues Win, National Review, March 27, 2006

<sup>12</sup> The City Code is a voluntary agreement concluded by financial institutions in the City of London. Tender Offers in the UK are regulated by the Panel on Takeovers and Mergers, a self-regulatory organization that functions pursuant to the City Code on Takeovers and Mergers

Part II focuses on the problematic stance of congressional opposition to a fully approved and legal acquisition, whereby DP World acquired P&O's leases on six U.S. ports through a tender offer for P&O shares. In this respect, one must balance the reasonableness of congressional opposition because of the UAE's former support for the Taliban regime, questionable financing practices of possible terrorist operations, and close relationship between DP World corporate officers and the Dubai government. Oppositely, the reasonableness of congressional opposition requires a counterbalancing against the cooperation of the UAE since the attacks of 9/11, the Western style operations, standards, oversight, and accountability of DP World, and the U.S. ideal to support capitalism and democracy without discriminating against specific nationals.<sup>13</sup>

Part III analyzes the preexisting regulatory scheme of the CFIUS and the approval process by which a foreign enterprise acquires security related assets within the U.S. Clearly, efficiency, certainty in international business transactions, and respect for American due process are strong arguments in support of the CFIUS' decision to authorize the DP World transaction. Congressional attempts to amend the CFIUS powers lessen the certainty of financial transactions and the reliability of the international M&A market. Additionally, DP World appeared before the CFIUS voluntarily, with the full intent of disclosing all material and adverse information, in the ultimate hope of alleviating any security fears of Middle Eastern ownership.<sup>14</sup>

Part IV touches upon Congress' opposition to the DP World deal and the forced divestiture agreement calling for DP World to sell its U.S. port leases to a U.S. based entity. As well, this analysis involves special consideration of the Taking Clause and any potential lawsuit based on

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<sup>13</sup> Fonda, Daren, Inside Dubai Inc., The ambitious emirate, already a tourism giant, wants to run U.S. ports and be the Wall Street of the Persian Gulf. Isn't that the American way? Time, March 13, 2006

<sup>14</sup> Committee reviewing foreign deals comes under fire, Gannett News Service, March 3, 2006

the lacking “public purpose” or the possible economic loss suffered by DP World in violation of the “just compensation” aspect of the 5<sup>th</sup> Amendment of the U.S. Constitution.

Consequently, the Williams Act, the UAE’s advancement as a nation working closely with the U.S. in the War on Terror, and the preexisting regulatory powers approving the DP World transaction require that Congress cease its discriminatory behavior towards foreign businesspersons and companies, specifically potential Middle Eastern and Chinese acquirers.

## **I. THE REGULATORY SCHEMES**

### **a. The Williams Act**

The Williams Act passed in 1968 as an amendment to the Securities and Exchange Act of 1934 (“Exchange Act”).<sup>15</sup> The Exchange Act provides governance of securities transactions on the secondary market. The Williams Act amended certain unregulated cash transactions in regards to tender offers and other takeover related actions.<sup>16</sup> As stated in the case of *Piper v. Chris-Craft Industries*, the Williams Act was the congressional response to the increased use of cash tender offers in corporate acquisitions.<sup>17</sup> Congress feared that the use of cash in tender offers "removed a substantial number of corporate control contests from the reach of existing disclosure requirements of the federal securities laws."<sup>18</sup> The Williams Act added to §13 and §14 of the Exchange Act.<sup>19</sup>

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<sup>15</sup> 15 USCS §78m

<sup>16</sup> Tender Offers and Leverage, Quarterly Journal of Economics, November 2004

<sup>17</sup> Piper v. Chris-Craft Industries, 430 U.S. 1, at 22

<sup>18</sup> Id.

<sup>19</sup> Appraisal Rights And Fair Value Determinations, The Metropolitan Corporate Counsel, August 1996



Comparatively, the acquisition of P&O, a European incorporated enterprise trading on the London Stock Exchange, falls within the auspices of the proposed EU Takeover Directive (“the Directive”) and the British City Code. Similar to the Williams Act, the British City Code is primarily concerned with shareholder rights, disclosure, and punishment of fraudulent transactions.

b. The EU Takeover Directive and the British City Code

The Directive came into force on May 20, 2004 after many drafts, reports, and 20 years of negotiation among EU Member States.<sup>20</sup> Each Member State must implement the Directive by May 20, 2006.<sup>21</sup> The Directive addresses similar concerns to those of the Williams Act, including:

- (1) Creating a level playing field for takeover regulation across the EU;
- (2) Equivalent treatment of shareholders;
- (3) Safeguarding the rights of minority shareholders;
- (4) Avoiding false markets for shares;
- (5) Disclosing sufficient information for target shareholders to make an informed decision<sup>22</sup>

While the Directive is not without its problems, its future ratification remains a subject of contention for Member States. Ultimately, the uncertainty of the Directive did not affect DP World’s ability to acquire UK based P&O because the British City Code provisions controlled the transaction. There are strong similarities between the British City Code and the Directive. Specifically, the implementation of the Directive requires primary legislation by Member States.

In the case of the UK, the result of the Directive will be the statutory recognition of the British City Code.<sup>23</sup> The Pennington Report, a prior report negotiation between Member States,

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<sup>20</sup> UK takeover regulation: no change or sea change? In implementing the EU Takeover Directive, the UK is trying to keep changes to its takeover regime to a minimum. But hopes that this will be the result might be dashed; United Kingdom International Financial Law Review, April 1, 2005

<sup>21</sup> *Id*

<sup>22</sup> *Id.*

incorporated many of the provisions of the British City Code into a former draft of the Directive.<sup>24</sup> Although the Directive serves as the future vehicle of EU M&A activity, as mentioned above, the protocol followed by DP World relied upon the British City Code.

Conclusively, the P&O Board of Directors followed all proper British City Code provisions in accepting the DP World offer. Once the bidding between DP World and PSA was complete, Citigroup Global Markets Limited and NM Rothschild & Sons Limited advised P&O that it considered the terms of the Revised DP World Proposal to be fair and reasonable.<sup>25</sup> In response to this recommendation, the Board of Directors of P&O withdrew their recommendation of PSA's offer, announced on January 26, 2006, and unanimously recommended that P&O shareholders vote in favor of the Revised Proposal at the Shareholder Meeting scheduled to take place on February 13, 2006.<sup>26</sup>

## **II. DP WORLD CONCERNS AND CONSIDERATIONS**

As related to DP World's attempted to acquire P&O, Dubai's economy is one of the healthiest in the world, growing at 16%.<sup>27</sup> Additionally, for a Middle Eastern emirate, the economy of Dubai recently began diversifying itself internationally, including many industries beyond oil revenues, which account for only 6% of GDP. Dubai's government has built Dubai Media City and Dubai Internet City, which has attracted some of the U.S.' greatest technology

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<sup>23</sup> Dean, Carol, EU Takeover Directive falls short of expectations: The EU Takeover Directive has been a long time in the making and for many, has fallen short of its initial promise. European Venture Capital Journal, April 1, 2005

<sup>24</sup> Painter, Richard, & Kirchner, Christian, 50 Am. J. Comp. L. 451, at 456

<sup>25</sup> P&O Steam - P&O Adjournment of Meetings, Company News Feed, January 20, 2006

<sup>26</sup> *Id.*

<sup>27</sup> Lindsay, Greg, Welcome to Dubailand; Emirate rises up as latest global hot spot for real estate, retail and marketing. Advertising Age, March 20, 2006

companies, such as Microsoft and IBM.<sup>28</sup> While congressional opposition gathered in the U.S., the high court in London approved the DP World deal on March 6, 2006.<sup>29</sup>

In judging the reasonableness of congressional objections over the DP World transaction, it is necessary to consider many of the questionable aspects of the company, the Dubai emirate, and the emirate's connection to the greater UAE. The DP World transaction involved possible terrorist links, money laundering concerns, and UAE government involvement in the control and operation of P&O's leased U.S. ports. Each of these separate concerns caused a political, banking, and corporate responsibility concern for Congress.

a. Political Concerns

Politically, the result of regulatory authorization meant that a state-owned Middle Eastern company would act as a primary operator of commercial shipping at terminals in New York, Newark, Philadelphia, Baltimore, Miami, and New Orleans.<sup>30</sup> Thus, even though it seems as if DP World operates as a private enterprise, in essence, its only shareholder is the Dubai government.<sup>31</sup> There are concerns about the UAE boycott of Israel, even though DP World does business with Israeli firms.<sup>32</sup> DP World received strong support from Idan Ofer, the Chairman of the Board of ZIM lines, Israel's largest shipping company. Ofer recognized the inherit

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<sup>28</sup> Fonda, Daren, Inside Dubai Inc., The ambitious emirate, already a tourism giant, wants to run U.S. ports and be the Wall Street of the Persian Gulf. Isn't that the American way? Time, March 13, 2006

<sup>29</sup> Macalister, Terry, and Gow, David, Foreign threat: Business and unions concerned as British firms are snapped up: Uneven playing field leaves UK an open goal for takeovers, The Guardian (London), March 7, 2006

<sup>30</sup> Blitzer, Wolf, Interview With Dubai Ports World CEO; Sentencing Proceedings Begin for Zacarias Moussaoui, CNN, March 6, 2006

<sup>31</sup> Thrush, Glen, Bill's Dubai input; Ex-president told ports firm to submit to a review, referred execs to PR company that backs Sen. Clinton, Newsday (New York), March 3, 2006

<sup>32</sup> Fonda, Daren, Inside Dubai Inc., The ambitious emirate, already a tourism giant, wants to run U.S. ports and be the Wall Street of the Persian Gulf. Isn't that the American way? Time, March 13, 2006

differences between the UAE and Israel and the significant importance of security for Israeli firms doing business internationally. Nonetheless, Ofer stated,

“As an Israeli Company, we require rigorous security measures from terminal operators in every country in which we operate, but especially in Arab countries. [ZIM] is very comfortable calling at DP World's Dubai ports. During our long association with DP World, we have not experienced a single security issue in these [Arabs] ports or in any of the terminals operated by DP World and have received exemplary service that enhances our efficiency and the smooth running of our operations.”<sup>33</sup>

In spite of these positive reinforcements from a national opponent of the UAE, the UAE's pre-9/11 support for the Taliban and boycott of Israel may have simply been too distressing for Congress.

b. Financial Concerns

Financially, some of the 9/11 hijackers took advantage of loopholes in Dubai's financial system to transfer funds.<sup>34</sup> The U.S. Treasury Department has complained about the UAE's lack of cooperation in tracking down Osama Bin Laden's bank accounts.<sup>35</sup> The main congressional concern seems to be the fact that Dubai is fast becoming the equivalent to Swiss banking in the Middle East. Dubai International Financial Center is a “financial free zone,” whose aim is to advance financial prospects of the Middle East and to serve as the main Middle Eastern securities exchange center.<sup>36</sup> The perception is that the UAE and Dubai are lax in their enforcement of terrorist financing and the lack of oversight may be secretly financing current and future terrorists operations.

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<sup>33</sup> Port Deal Surprise; Bush: Karachi Bombing Won't Stop Visit to Pakistan; Americans Give President Bush Some New Numbers. CNN, March 2, 2006

<sup>34</sup> Burnham, James, Ports are not endangered, University Wire, March 1, 2006

<sup>35</sup> Official opening of new DP World Djibouti oil terminal facility, Middle East Company News Wire, February 27, 2006

<sup>36</sup> *Id.*

c. Corporate Concerns

Corporately, DP World's mere creation as a corporate entity only occurred in September 2005 when the Dubai government successfully integrated Dubai Ports Authority ("DPA") and Dubai Ports International Terminals ("DPI"). As referenced in a press release, the merger of these two entities provided "internal expertise in container handling, while allowing the two separate entities to combine themselves to satisfy local supervisory responsibilities."<sup>37</sup> As stated by DP World Chairman, Sultan Ahmed Bin Sulayem ("Sulayem"), "the new DP World combines the strengths of both DPA and DPI legacy organizations to create a very powerful global player in the ports operator industry."<sup>38</sup> However, it is possible that the merging of these two entities served only to increase the international power and reputation of DP World for planned international M&A transactions.

d. Dubai Government Connections

Executively, there are concerns about the relationships of executives at DP World and their connection to the Dubai and UAE governments. As the CEO of DP World, Mohammed Sharaf is a high ranking executive with important access to the Dubai government, and in turn, the UAE government. In a congressional review of the acquisition, the COO of DP World, New Jersey native Edward Bilkey, discussed DP World's organizational structure. "DP World exists based on a decree of the PCFC Corporation. The two shareholders of PCFC are Sulayem and Sheikh Mohammed Bin Rashid Al Maktoum, the Emir of Dubai and the Vice President of the UAE"<sup>39</sup> As stated, DP World operates as a private enterprise, but control of the corporation remains in

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<sup>37</sup> Porter, Janet, Dubai Ports in three way shake-up: Aim is to focus on global competitiveness, Lloyd's List, September 29, 2005

<sup>38</sup> *Id.*

<sup>39</sup> Hunter, Duncan, Chair, Hearing of the House Armed Services Committee, Subject: National Security implications of the Dubai Ports World deal to take over management of U.S. ports. Federal News Service, March 2, 2006

the hands of the ruling elite of Dubai. Essentially, the government of Dubai owns the corporation by way of being the sole shareholder of DP World. The sole board member of DP World is the Chairman, Sultan Ahmed Bin Sulayem.

DP World has grown drastically in size and stature, and in 2005 profits were an astounding \$330M on only \$570M in revenues.<sup>40</sup> Regardless of its individual financial might, DP World's government connections are important in receiving financial backing for large acquisitions. Specifically, PCFC was integral in the cash-financing package for the P&O acquisition. As stated in the press release following the cash offer recommendation to P&O, "a combination of PCFC support and credit facilities with Deutsche Bank and Barclays Capital will serve as consideration for the transaction."<sup>41</sup> The ease of governmental access provides DP World with the advantage of internal government relationships to help secure and support financing such as the \$6.7 billion price tag for P&O. Prior to defeating PSA in the bidding war over P&O, Dubai defeated PSA in a similar bidding war for the assets of CSX Corporation. It is interesting to note that PSA is a Singapore state-owned enterprise operated through an investment company named Temasek Investment.<sup>42</sup> In a sense, it is almost necessary to have governmental financial backing since both PSA and DP World are government-controlled corporations battling with each other for independently owned Western and North American enterprises.

Nonetheless, it is unfair to imply any greater connection between DP World and the UAE government or between PSA and the Singapore government than U.S. enterprises such as Boeing or the Carlyle Group, or EU companies such as Airbus or Suez, the French energy company. It is

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<sup>40</sup> Reed, Stanley, The Real Shipping News, Behind the furor over the Dubai deal is a well-respected company with global reach, Business Week, March 6, 2006

<sup>41</sup> DP World, Recommend Cash Offer for P&O, Company News Feed, November 29, 2005

<sup>42</sup> Dubai beats Singapore for P&O, Daily Deal/The Deal, February 13, 2006

well known that many U.S. and EU companies receive subsidies for a variety of international transactions and oftentimes, these Western enterprises must receive foreign regulatory approval for cross-border takeovers between U.S. and EU transactions.<sup>43</sup>

Recently, there has been a host of Western enterprises involved in international M&A transactions. In the steel industry, Arcelor, a French and Spanish combined steel behemoth purchased Canadian steel giant Dofasco, and later, Mittal, the world's largest steel producer, formed in Rotterdam and operated from London, made a cash tender offer to Arcelor shareholders.<sup>44</sup> With such a large number of international transactions being approved, even those between two Western enterprises, Congress must consider the rejection of capitalist advancement within the M&A market and attempt to work around concerns based solely on nationality because many of the most well known U.S enterprises, assets, and trademarks are foreign owned or operated.<sup>45</sup>

DP World was genuine in its attempt to adopt open business practices and accountabilities.<sup>46</sup> As stated by Jamal Majid Bin Thaniah, a high-ranking executive with connections to DP World, the integration of DPA and DPI into DP World evidences 'the commitment to implementing the highest levels of corporate governance and accountability within our new structure.'<sup>47</sup> As opposed to many Middle Eastern corporations, the Sheik of Dubai has embraced the ideals of

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<sup>43</sup> Chinese airlines cast doubt on Airbus' firm-order tally, The Seattle Times, February 18, 2006

<sup>44</sup> Arcelor CEO says firm not interested in U.S. Steel, Pittsburgh Tribune Review March 9, 2006

<sup>45</sup> Burgess, John, Television Takeover; Foreign domination of U.S. industry means jobs, but eventual costs may be high, The Washington Post, May 26, 1991

<sup>46</sup> Dubai Ports reorganized to create one global business, Middle East Company News Wire, September 28, 2005

<sup>47</sup> *Id.*

open Western accounting and transparency rules.<sup>48</sup> DP World has also worked closely with the U.S. Navy and Coast Guard, and Dubai services more military ships than any other port in the world.<sup>49</sup> Additionally, DP World's website lists U.S. shipping company veterans on its payroll, such as the aforementioned Edward Bilkey and Senior Vice-President, Michael Moore.<sup>50</sup>

e. The "Chinese Discount" and the "Middle East Effect"

Congress must recognize the possibility of ensuing consequences by discriminating against Middle Eastern, Chinese, or other prospective foreign acquirers. Opposite to the concerns about U.S. security, the economic consequences of refusing to authorize the DP World acquisition according to the preexisting CFIUS regulatory process may result in backlash throughout the business community, global trade market, and the volatile Middle East region.

Recently, the UAE central bank governor, Sultan bin Nasser Al Suwaidi, stated that ongoing opposition in the U.S. over DP World's acquisition could have a negative impact on free trade talks between the two countries.<sup>51</sup> As predicted by Mr. Suwaidi, after DP World succumbed to congressional opposition, the U.S. and the UAE postponed free trade discussions because "additional time was needed to prepare."<sup>52</sup> While many news releases were clear that these delays often arise in the normal course of negotiating free trade agreements, the delays lend credence to the theory that ensuing backlash will result from the protectionist behavior on Capital Hill.

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<sup>48</sup> Inside Dubai Inc., The ambitious emirate, already a tourism giant, wants to run U.S. ports and be the Wall Street of the Persian Gulf., Isn't that the American way? Time, March 13, 2006

<sup>49</sup> Bush: I'm worried by message sent by failed port deal, CNN.com, March 10, 2006

<sup>50</sup> Reed, Stanley, The Real Shipping News, Behind the furor over the Dubai deal is a well-respected company with global reach, Business Week, March 6, 2006

<sup>51</sup> UAE – US FTA TROUBLE, ME Financial Newswire, March 7, 2006

<sup>52</sup> DP World concedes defeat in battle for US ports: Political opposition mounts, Lloyd's List, March 13, 2006



Unfortunately, since the turn of the century, many Chinese enterprises have suffered similar discriminatory fates to DP World. These failures include Minmetals, a China state-owned group, which failed in a \$5B bid for the Canadian group, Noranda and Haier, a white goods manufacturer, lost in the race to acquire Maytag, the U.S. maker of Hoover vacuum cleaners. Recently, China National Offshore Oil Corporation (“CNOOC) failed in its quest to acquire Unocal, in hopes of acquiring Unocal’s large Southeast Asian oil reserves.<sup>53</sup> The only notable acquisition by a “questionable” foreign enterprise was Lenovo’s \$1.75B acquisition of IBM’s personal computer business in December 2004.<sup>54</sup> Chinese enterprises have dealt with similar discrimination to that of DP World since long before the events of 9/11. This is not surprising, since the main military nemesis of the U.S. before the events of 9/11 was the growing economic and military threat of China. In light of these concerns, since the early 1990s, Chinese corporations evolving and operating on an international level have dealt with a corresponding “China discount,” evidenced by the failures of Minmetals, Haier, and CNOOC.

The Chinese attempt to acquire Unocal revolved around the strategic important of assets located in Southeast Asia, but controlled and owned by Unocal.<sup>55</sup> Oppositely, the case of DP World involves a foreign entity acquiring U.S. assets located within the continental U.S. Congressional opposition gathered against both of these attempted takeovers, but Congress seemed more concerned with DP World owning these U.S. based assets when in reality, the Unocal oil located offshore is cause for greater protectionist concern. In reality, Congressional concerns as to the security of U.S. ports seems misplaced because the ports are located within the continental U.S. and all employees of the P&O North American subsidiary are either U.S.

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<sup>53</sup>CNOOC retreat makes a martyr of Chairman, Financial Times (London, England), August 3, 2005

<sup>54</sup> *Id.*

<sup>55</sup> Hutton, Will, Head to head over scarce oil, Opinion & Editorial Manila Bulletin, July 8, 2005

citizens or pre-screened to live and work in the US.<sup>56</sup> The only resulting change from DP World operating these six U.S. ports is the transfer of profits to a Dubai-based parent company rather than a UK based parent company. Additionally, U.S. port security is under the control of the U.S. Coast Guard and not the individual port operator.<sup>57</sup> This includes the Coast Guard enforcing both The International Ship and Port Security Code<sup>58</sup> and The Maritime Transportation Security Act.<sup>59</sup>

Ostensibly, U.S. lawmakers are concerned about the control of U.S. ports landing in the hands of DP World and its governmentally connected officers. However, the worrisome nature of the deal extends further than assets located upon the entrances of the U.S.' most important ports. There seems to be a rather strong anti-Middle Eastern sentiment growing throughout Congress. In the post-9/11 world, with a seemingly strong "Islamophobia" among Western nations, the initial failure of the DP World transaction indicates that Middle Easterners will have to deal with an equivalent and possibly greater "Middle Eastern effect" upon bidding for Western assets.

### **III. THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES**

As referenced by numerous publishers in the days following DP World's attempt to acquire P&O, the CFIUS is a usually forgotten interagency panel headed by the Treasury Department.<sup>60</sup> The CFIUS reviews foreign investments and approves or disapproves a transaction based on

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<sup>56</sup> Sanyal, Santanu, Where is the threat? The Hindu Business Line, April 3, 2006

<sup>57</sup> *Id.*

<sup>58</sup> 67 FR 79742

<sup>59</sup> 46 USCS §70101

<sup>60</sup> Keeping America Safe, From Foreign Buyouts, Business Week, October 24, 2005

national security grounds. The Committee has the power to investigate attempted foreign acquisitions and to report these findings with a recommendation to the President.

a. The Exon-Florio Provision

The most important section of the statute specifying the CFIUS's responsibilities is §721, also known as the Exon-Florio provision. In 1988, the Exon-Florio provisions came under the power of the Committee, as the President's designee.<sup>61</sup> The Omnibus Trade and Competitiveness Act of 1988<sup>62</sup> added §721 to the Defense Production Act of 1950.<sup>63</sup> The provision provides the authority to "the President to suspend or prohibit any foreign acquisition, merger, or takeover of a U.S. company where the President determines that the foreign acquirer might take action that threatens to impair the national security of the U.S."<sup>64</sup>

The provision broadened the call of notice to bring foreign entities before the Committee. The call of notice determines whether an enterprise or industry takeover warrants an investigation. The President (now the CFIUS as the President's designee) may suspend or prohibit any foreign acquisition, merger, or takeover of a U.S. enterprise that the CFIUS determines is a threat to the national security of the U.S. Under §721, the CFIUS can block a foreign acquisition if:

- (1) There is credible evidence that the foreign entity might take action that threatens national security, and
- (2) The provisions of law do not provide adequate and appropriate authority to protect the national security.<sup>65</sup>

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<sup>61</sup> GAO report calls for foreign merger, acquisition review changes, Inside the Pentagon, October 6, 2005

<sup>62</sup> 50 USCS § 2404

<sup>63</sup> 50 USCS §2170

<sup>64</sup> Kimmitt, Robert, M., Dubai Purchase of U.S. Port Facilities, Federal Document Clearing House Congressional Testimony, March 2, 2006

<sup>65</sup> Key Terms Still Hazy Under Exon-Florio, The National Law Journal, January 13, 1992

The Exon-Florio provision allows the CFIUS to receive written notice of an acquisition, merger, or takeover of a U.S. enterprise by a foreign entity. Only upon receiving complete notification of a takeover does the Committee begin a thorough review of the transaction. The acquiring enterprise receives notice of the review and the foreign party to the transaction is required to provide all documentation requested, which will remain confidential. In some situations, there may be a requirement for further investigation. Any extension of the review period must be determined within 30 days of the original call of notice. The original call of notice is a more informal type of review.<sup>66</sup> The extension can only take a maximum of 45 days, but this extended review period is a more formalistic type of investigation.

DP World informed the CFIUS in October 2005 that it was interested in purchasing P&O. DP World provided information of its interest to the CFIUS before informing the potential target, P&O.<sup>67</sup> Later, after congressional opposition gathered, DP World subjected itself to the extended review period.<sup>68</sup>

Regardless, the CFIUS language states that a process should not exceed 90 days of investigation. The final 15 days provides the President with time to approve or deny the transaction. The 15-day window of opportunity was immaterial in this case. The President made it clear that the deal did not pose a security risk and threatened to veto any legislation thwarting the acquisition.<sup>69</sup>

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<sup>66</sup> Orol, Ron, CFIUS gets overhaul, Daily Deal/The Deal, April 3, 2006

<sup>67</sup> Dubai purchase of U.S. port facilities, Federal Document Clearing House – Congressional Testimony March 2, 2006

<sup>68</sup> Dubai purchase of U.S. port facilities, Federal Document Clearing House – Congressional Testimony March 2, 2006

<sup>69</sup> Yaukey, John, Foreign deals face levels of scrutiny, Gannett News Service, March 3, 2006

Requiring a decision by the CFIUS within a maximum time minimizes any undue delay in the takeover finalization.<sup>70</sup> The CFIUS maximum review period allows prospective foreign acquirers to budget their time accordingly should they have to appear before the Committee.

In creating the CFIUS, the intent was not to delay or antagonize prospective foreign acquisitions. Rather, the intent is regulatory in nature to ensure the protection of national security interests.<sup>71</sup> When used correctly, the CFIUS limited review process strikes a necessary balance between the protection of strategic industries and foreign investment freedom. The CFIUS considers the following factors in determining whether to block a takeover:

- (1) Domestic production needed for projected national defense requirements;
- (2) Capability and capacity of domestic industries to meet national defense requirements;
- (3) Control of domestic industries and commercial activity by foreign citizens as it affects the capability and capacity of the U.S. to meet the requirements of national security;
- (4) Potential effects of the transaction on the sales of military goods, equipment, or technology to a country that supports terrorism, proliferates missile technology, or chemical and biological weapons;
- (5) Potential effects of the transaction on U.S. technological leadership in areas affecting U.S. national security<sup>72</sup>
- (6) *“Byrd Amendment” – This additional factor requires an automatic extended review when control of the acquirer rests in the hands of a foreign government or individuals acting on behalf of a foreign government.*<sup>73</sup>

The objective of the CFIUS is keeping key security assets from falling into the hands of foreign governments or enterprises working on behalf of foreign governments. However, the economic freedoms within the U.S. are not solely the privilege of U.S. citizens. The CFIUS must balance the ideals of economic freedom, nondiscriminatory practice, and equality of opportunity with the least intrusive economic safeguards. The Exon-Florio provision “maintains the credibility of the U.S.’ open investment policy and preserves the confidence of foreign investors

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<sup>70</sup> Key Terms Still Hazy Under Exon-Florio, The National Law Journal, January 13, 1992

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> Changes in Exon-Florio Affect Foreign Buyouts, The National Law Journal, November 16, 1992

within the U.S. and U.S. investors abroad. The underlying principle is that all investors will not be subject to retaliatory discrimination.”<sup>74</sup>

DP World’s main condemnation should not have been Congress’ ideological opposition relative to a UAE enterprise controlling U.S. ports. Rather, DP World should have criticized congressional attempts to alter the preexisting CFIUS regulatory powers. Altering the CFIUS review process in the face of an attempted acquisition by a Middle Eastern entity leads to animosity among Arab citizens and evidences a sort of congressional “Islamophobia.”<sup>75</sup>

Any proposed amendment in light of a specific transaction runs against certainty in capitalist markets. Proposed and hurried congressional amendments create greater confusion within the CFIUS’ review process. Altering the regulatory powers during a transaction increases the costs of acquiring assets and risks loss to target shareholders. Foreign acquirers such as DP World rely upon the certainty of the CFIUS process before attempting a foreign acquisition totaling \$6.7B. When DP World considered the possibility of having to appear before the CFIUS, it understood the process as specified by the current regulatory powers, not the resulting politicized post-approval threat of amendment.

Nevertheless, as stated above, the CFIUS provides for an extended review when certain countries or industries are involved. As mentioned above, DP World understood that it might trigger the automatic 45-day extended review period.<sup>76</sup> Clearly, the need for an extended investigation increases when the sole shareholder of DP World is the Dubai government (and presumably any other ‘questionable’ government) and the two shareholders of PCFC are the

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<sup>74</sup> State Department, November 2, 2005

<sup>75</sup> Bush feels chill in the Right's winter of discontent, The Daily Telegraph, March 11, 2006

<sup>76</sup> Committee reviewing foreign deals comes under fire, Gannett News Service, March 3, 2006

Sheik of Dubai and the Chairman of DP World.<sup>77</sup> The CFIUS and DP World understood that there would be serious questions about the singular ownerships of DP World by Sulayem and the Emir. In light of these concerns, DP World requested the 45-day extension.<sup>78</sup>

Even though DP World requested a 45-day extension to clarify any concerns, Congress must realize that the M&A market is no longer a one-way street, with U.S. enterprises controlling the means and avenues of financial takeovers. The CFIUS has previously approved transactions involving security concerns.<sup>79</sup> Thus, while the CFIUS is a voluntary process, it acts like a required regulatory review committee because the President has the ultimate say under a final 15-day review.<sup>80</sup> By appearing voluntarily, DP World opened its corporate documents to the CFIUS and allowed a pseudo-due diligence effort to take place.<sup>81</sup>

The benefit of any foreign acquisition presumably increases economic efficiency, thus providing increased shareholder value. Middle Eastern and other questionable nations with communist or terrorist connections must be prepared to divulge all requested information to expedite the process smoothly. Correspondingly, DP World was fully open and honest in its appearance before the CFIUS. Congressional representatives engage in political diatribe for the potential voting gains among constituents and the popularity of countering the perceived threat of the UAE.

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<sup>77</sup> Hunter, Duncan, Chair, Hearing of the House Armed Services Committee, Subject: National Security implications of the Dubai Ports World deal to take over management of U.S. ports, Federal News Service, March 2, 2006

<sup>78</sup> Committee reviewing foreign deals comes under fire, Gannett News Service, March 3, 2006

<sup>79</sup> CNOOC retreat makes a martyr of Chairman, Financial Times (London, England), August 3, 2005

<sup>80</sup> Committee reviewing foreign deals comes under fire, Gannett News Service, March 3, 2006

<sup>81</sup> *Id.*

b. Past CFIUS Transactions

Congressional lawmakers should realize that Middle Eastern enterprises are not the only parties that require additional scrutiny when attempting to takeover a strategic enterprise. Deals between U.S. enterprises and “friendly” countries are also subject to the stringent CFIUS review. In early 2005, BAE Systems, a UK entity and the world’s fourth largest defense contractor, offered to acquire United Defense for \$4.2B. United is a U.S. corporation that produces combat vehicles, naval guns, precision munitions, and missile launchers.<sup>82</sup> The CFIUS closely scrutinized the proposed transaction because of its impact on defense contracting and military efforts. Ultimately, the BAE deal, completed on June 24, 2005, and the vast majority of all the CFIUS reviewed transactions receive approval without difficulty.<sup>83</sup>

Among the prior deals mentioned, DP World should have been concerned about the attempted takeover of Global Crossing by Hutchinson Whampoa Limited (“Hutchinson”). Hutchinson’s use of existing legal channels served as a lesson for DP World because Hutchinson is involved in ports as well as sensitive data collection. In 2003, a negative review by the CFIUS forced Hong Kong based Hutchinson Whampoa Limited to retract its bid for Global Crossing’s assets.<sup>84</sup> Hutchinson has extensive interests in container facilities in Hong Kong, the Panama Canal, Rotterdam, and China and controls 12% of all container port capacity in the world.<sup>85</sup> It is also a telecommunication company with extensive holdings in East Asia. By purchasing Global Crossing, Hutchinson would have controlled the most extensive fiber optic network in the world. The national security concern involved Global Crossing’s administration of the Pentagon’s

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<sup>82</sup> GAO Report calls for foreign merger and acquisition review changes, Inside the Pentagon, October 6, 2005

<sup>83</sup> Mergers and Acquisitions; British Defense Firm Buys U.S. Producer, World News Digest, May 5, 2005

<sup>84</sup> Li Ka-Shing drops bid for Global Crossing, The Independent (London), May 27, 2002

<sup>85</sup> Publicity Sinks Container Deal, Tampa Tribune (Florida) May 14, 2002



communication lines and the possible risk of wiretapping.<sup>86</sup> While the issue at hand was the telecommunications network, the CFIUS made certain to highlight the port operations of Hutchinson.

The IBM-Lenovo and Global Crossing-Hutchinson deals “suggest that the CFIUS’ focus is shifting from the traditional defense and component manufacturer industries to a broader range of industries, such as technology, energy, and import/export industries.”<sup>87</sup> In addition, with recent changes to the U.S. securities laws, U.S. enterprises must consider the Sarbanes-Oxley Act when contemplating an acquisition transaction with a UAE enterprise.<sup>88</sup> Therefore, the CFIUS compliance increases M&A costs because “companies need to map out the possible security concerns at the start of the planning process, decide what deal structure and timing makes sense, and then overlay that with the other regulatory agencies involved.”<sup>89</sup>

As mentioned above, the CFIUS has the power to review and submit its recommendation to the President through the Exon-Florio provision. Generally, the President follows the CFIUS’ recommendation. However, in 1990, President George H. W. Bush required the Communist Party of China controlled China National Aero Technology (“CNAT”) to divest itself of ownership in Seattle aircraft component maker Mamco Manufacturing.<sup>90</sup> Unfortunately, the President, George W. Bush, supported the DP World acquisition, but congressional opposition dominated the headlines and eventually forced DP World to divest itself of the U.S. port leases.

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<sup>86</sup> Keeping the U.S. safe from competition, Inside Line: Telecom Asia, August 1, 2003

<sup>87</sup> The China Syndrome; Rules and regulations for the world's fastest-growing economy change all the time, Here are ten tips for doing business in the country now, Corporate Counsel, June 2005

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> UAE companies on global buying spree, Ventura County Star (California), October 22, 2004

Both the DP World and CNAT transaction attempts came at a time when U.S. national security and the health of the U.S. economy were main concerns of politicians and the American citizenry. During 1990, tensions were high in the Middle East because of Iraq's invasion of Kuwait, and the U.S. economy was entering a downturn in activity. The DP World attempt to acquire P&O comes at a time when tensions are at their highest in the Middle East with the uproar of U.S. war efforts in Iraq, the high price of oil throughout the world, and the slow recovery of the U.S. economy.

However, DP World's location in Dubai is important. As stated above, Dubai is one of the fastest growing economies in the world, a service provider to more U.S. military ships than any other port in the world, and acts as an ally in the War on Terror.<sup>91</sup>

c. Membership and Security

The recent addition of the Department of Homeland Security ("DHS"), an agency created solely in response to the 9/11 attacks, to the CFIUS membership provides the proper protections for reviewing Middle Eastern countries or countries with terrorist ties. With the addition of the DHS, the CFIUS' membership total now stands at 12.<sup>92</sup> The members determining whether there are any national security concerns that would warrant a prohibition of a proposed foreign acquisition transaction are:

- |   |                  |
|---|------------------|
| (1) Secretary of the Treasury (Chair) :                       | John Snow        |
| (2) Secretary of State:                                       | Condoleezza Rice |
| (3) Secretary of Commerce:                                    | Carlos Gutierrez |
| (4) Secretary of Defense:                                     | Donald Rumsfeld  |
| (5) Secretary of Homeland Security:                           | Michael Chertoff |
| (6) Director of the Office of Management and Budget:          | Joshua Bolton    |
| (7) Director of the Office of Science and Technology Policy:  | John Marburger   |
| (8) Assistant to the President for National Security Affairs: | Stephen Hadley   |
| (9) Assistant to the President for Economic Policy:           | Allan Hubbard    |

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<sup>91</sup> Sanyal, Santanu, Where is the threat? The Hindu Business Line, April 3, 2006

<sup>92</sup> China looking for U.S. brands, The Washington Times, August 10, 2005

(10) Attorney General:	Alberto Gonzales
(11) U.S. Trade Representative:	Robert Portman
(12) Chairman of the Council of Economic Advisors:	Edward Lazear

The inclusion of each of these members is strategic in nature and provides the needed protection for the American public, the investing public, and the acquiring enterprise. With each of these parties reviewing the transaction, it was unnecessary for Congress to oppose the CFIUS because it undercuts the reasoning behind appointing such a diverse group of government agencies. Not only did U.S. lawmakers intervene politically, they also threatened to alter the CFIUS' national security criterion to require broader 'security' language.<sup>93</sup> Evan Bayh, a House Representative, and possible Presidential candidate, suggests a systemic reform for the CFIUS, requiring a greater role for intelligence officials, a broader definition of security, and publicly scrutinized hearings.<sup>94</sup> International business groups are concerned that these protective measures will significantly damage U.S. economic interests because of possible political repercussions.<sup>95</sup> The U.S. Treasury Department Head (Chair of the CFIUS), has previously criticized any protectionist measures, stating that restrictions on foreign investment into the U.S., could lead to barriers for U.S. companies investing abroad.<sup>96</sup> The DHS provides the necessary membership to investigate, question, and determine whether Middle Eastern countries and enterprises should be disapproved because of terrorist connections, security concerns, or lacking government cooperation in the War on Terror.

Consequently, based upon the evidence of transactions coming before the CFIUS, the review process is unbiased. Congressional representatives who complain about the possibility of a

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<sup>93</sup> More than Dubai port deal deserves scrutiny, St. Petersburg Times, March 8, 2006

<sup>94</sup> Committee reviewing foreign deals comes under fire, Gannett News Service, March 3, 2006

<sup>95</sup> Kirchgaessner, Stephanie, & Roberts, Dan, Unease flows from highest levels of Wall Street, Financial Times (London, England), February 27, 2006

<sup>96</sup> Takeover panel under fire, Financial Times, September 28, 2005

Middle Eastern corporation controlling U.S. port operations seem to be using politics to garner support. The current process provides ample protection and existing laws to plan future corporate decisions. Free market integrity and the regulatory process require only that DP World appear before the CFIUS for an authoritative review. The CFIUS has covered each extreme by reviewing deals between friendly nations, such as the BAE acquisition and deals with worrisome governments, such as Lenovo.

#### **IV. DP WORLD'S DIVESTITURE AND THE 5<sup>th</sup> AMENDMENT**

As described below, according to the CFIUS process, DP World fell within the required 45-day extension because of the high-risk concern of a Middle Eastern enterprise acquiring important U.S. assets.<sup>97</sup> Ultimately, the extension failed to alleviate any congressional fears, and with DP World moribund, on March 10, 2006, the company decided to divest itself of the U.S. ports leases.<sup>98</sup> President Bush spoke of serious fallout from the staunch congressional opposition. As stated by the President, "In order to win the war on terror, we've got to strengthen our relationships and friendships with moderate Arab countries in the Middle East."<sup>99</sup>

Financially, the risk of divestiture creates uncertainty in the international markets. The requirement that DP World divest itself of the U.S. port operations also creates a possible U.S. constitutional Takings Clause problem. Although DP World ultimately agreed to divest itself of the U.S. port leases, had DP World decided to fight this divestiture in Federal Court, there is some question as to whether a complaint based on the Takings Clause of the 5<sup>th</sup> Amendment

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<sup>97</sup> Inside Dubai Inc., The ambitious emirate, already a tourism giant, wants to run U.S. ports and be the Wall Street of the Persian Gulf., Isn't that the American way? Time, March 13, 2006

<sup>98</sup> *Id.*

<sup>99</sup> Bush: I'm worried by message sent by failed port deal, CNN.com, March 10, 2006

might succeed.<sup>100</sup> Most recently, in the case of *Kelo v. City of London*, the Supreme Court found that a private redevelopment plan served a public purpose. As a result, the Court deemed that the redevelopment constituted a “public use” under the Takings Clause of the 5<sup>th</sup> Amendment. As per the requirements of the Taking Clause, the Court reiterated that:

- (1) The plan did not benefit a particular class of individuals;
- (2) The City’s determination of economic justification was entitled to deference;
- (3) The broad definition of “public purpose” includes economic development.<sup>101</sup>

*City of London* serves as a valuable comparison to the DP World divestiture because of the private implications taken into the “public purpose” context. Potentially, DP World could sue based on seemingly forced divestiture of U.S. port leases. It is important to consider whether the congressional opposition acted as a legal taking in response to a “security concern” or an illegal demand for divestiture of an approved U.S. asset acquisition.

Considering the factors outlined above, there are strong arguments in support of DP World’s Takings Clause complaint. First, the plan of divestiture does not benefit a particular class in any way, but in the converse, it does greatly affect the class of global investors, many of whom are U.S. citizens, as well as serving only as a post hoc divestiture after the CFIUS approval.

Secondly, Congress may attempt to justify its opposition because DP World is a security risk. However, this is a difficult proposition because the statutory right to determine a “security concern” has been legislated to the CFIUS.<sup>102</sup> In arguing the second aspect of the *City of London* case, Congress will have a difficult time undermining the previously awarded statutory powers of the CFIUS, the competent and varied membership of the Committee, and avoiding the reality

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<sup>100</sup> U.S. Const., Amend. 5

<sup>101</sup> *Kelo v. City of New London*, 125 S. Ct. 2655 (U.S. 2005)

<sup>102</sup> Key Terms Still Hazy Under Exon-Florio, *The National Law Journal*, January 13, 1992

that questionable and disconcerting Chinese entities own many of the U.S. ports on the West Coast.<sup>103</sup>

Thirdly, Congress could argue that the “public purpose” in requiring DP World to divest of the U.S. port leases lies in the heightened degree of security at ports in the wake of the 9/11 attacks. While this argument may ring loudly in the ears of most federal judges, it fails to address the aforementioned ownerships of U.S. assets by many other questionable foreign entities. If the basis of congressional opposition is the complexity of geopolitical affairs throughout the Middle East and China, a federal judge will not consider these executive branch concerns in balancing the legal principles of the Takings Clause. In considering this balance, the case of Berman v. Parker specifically states, “The public end may be as well or better served through an agency of private enterprise than through a department of government, or so the Congress might conclude.”<sup>104</sup> Berman also creates an almost unparalleled degree of deference to Congressional determination, by stating, “It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them.”<sup>105</sup>

In light of these judicial statements, there is surely wide deference to congressional determination, but the deference fails where the other legal principles of the Takings Clause are not satisfied. Thus, while prior Takings Clauses precedent supports a certain amount of governmental deference, the divestiture of DP World would most likely fall outside of this realm

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<sup>103</sup> Leach, Peter, Political Volume Stays High on Ports Deal, Pacific Shipper, March 2, 2006

<sup>104</sup> Berman v. Parker, 348 U.S. 26 (U.S. 1954), at 34

<sup>105</sup> *Id.*, at 33

of judicial restraint. For example, Congressional opposition in the ongoing tug-of-war with the CFIUS involves executive branch geopolitical concerns that do not receive lip service in Federal Courts. Congressional opposition based on the American thirst for oil in the Middle East will not receive judicial deference, much like the concern over the U.S. - China trade imbalance would not have been a concern in any possible Unocal – CNOOC litigation.

The sanitation of a city, as described in *Berman* is without debate. However, the already existing legal obligations of the CFIUS stand in the way of weighing the “values” of Congress across an area of already preexisting statutory authority. For this reason, the “public purpose” prong of the Takings Clause fails. Regardless of the taking legality, DP World agreed to the divestiture and such agreement eliminates the need to analyze the three prongs to determine whether the taking was proper.

However, regarding the sale to a U.S. based entity, *City of London* states the well-accepted principle that, “A sovereign nation may not take the property of A for the sole purpose of transferring the property to another private party B, even though A is paid just compensation. On the other hand, it is equally clear that a state may transfer property from one private party to another if future “use by the public” is the purpose of the taking.”<sup>106</sup> While DP World has not reached a sale agreement as of this writing, there is serious concern that DP World might suffer a loss in this highly publicized forced sale. In regards to this issue, any possible litigation may involve DP World suing the U.S. to seek reprieve between the purchasing price from P&O and the eventual sale price to a U.S. based entity.

Thus, if there were a plausible argument of “public purpose” for this divestiture, then Congress might have an argument that the transfer from DP World to an American entity satisfies the just compensation aspect of the Takings Clause. However, as stated above, Congress

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<sup>106</sup> *Kelo v. City of New London*, at 2661

will have a difficult time arguing that the “public purpose” is a security risk because of the preexisting legislative powers already authorized to the CFIUS.<sup>107</sup> Based solely on the failure to meet the standard of a “public purpose,” the transfer from DP World to a U.S. based entity violates the Takings Clause of the 5<sup>th</sup> Amendment.

## **CONCLUSION**

Ultimately, DP World offered to divest itself of the U.S. port leases based on the already gaining congressional opposition. The intent of these congressional complaints was the ultimate reason behind the withdrawal of DP World's bid. Unfortunately, all regulatory schemes, including the Williams Act, the future EU Takeover Directive, the British City Code, and the CFIUS review powers provided the necessary legal basis upon which DP World’s bid received all necessary approvals.

DP World's divestiture should serve as an embarrassing episode for Congress’ image in the global M&A market and throughout the Middle East. Although the claim of discrimination is not the sole reason for congressional opposition, it is a reality of the current congressional climate. Lawmakers exercise great control over the implementation of new regulations, but they are not the sole interested parties in a foreign acquisition. Officially, congressional opposition is based upon protecting U.S. assets from being acquired by Middle Eastern enterprises with questionable government connections. However, in reality, congressional opposition to foreign acquisitions serves as a popular position to influence voting constituents. Not surprisingly, lawmakers will continue to act individualistically in rejecting certain Middle Eastern attempts to acquire U.S. assets because of the political popularity in protecting domestic assets and the politicized nature of the term ‘security.’

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<sup>107</sup> Key Terms Still Hazy Under Exon-Florio, The National Law Journal, January 13, 1992



By expediting its appearance before the Committee, DP World received the necessary approvals within the provided period and enriched the P&O shareholders. However, even after authorization, the extended review period generated broad political resistance and proved effective at forcing DP World to divest itself of the U.S. port leases. Even though P&O shareholders will not suffer any loss of consideration, DP World will now have to find an acceptable suitor to acquire the U.S. leases, perform further due diligence, and may have to sell at a loss because of congressional opposition to complete the sale quickly.

Unfortunately, there is a greater benefit in allowing Middle Eastern controlled companies to use existing legal channels. By allowing these companies to receive due process by appearing before the CFIUS, Middle Eastern enterprises will receive an education in providing open opportunities for all people, whether foreign enterprises or foreign citizens controlling these enterprises. Providing due process within the U.S. will further evidence the benefit of open investment laws and improve the U.S.' image throughout the Middle East and among the globalized economy. With the incredible growth of DP World and the technological advancements of Dubai City, it is irrational to think that Dubai and other UAE citizens will not comprise the next wave of foreign investors. DP World's control of these U.S. ports is solely a profit driven motive without any connected terrorism concerns.

U.S. lawmakers must place themselves at the forefront in bridging the gap between American ideals and Middle Eastern respect of western laws, accountability, and fixed standards of review. U.S. lawmakers should avoid opposing regulatory approved transaction from the CFIUS. Rather, U.S. lawmakers should encourage Middle Eastern nations to enact similar schemes, statutes, and reforms in their home countries, which in turn will generate greater economics integration between the U.S. and the nations throughout the volatile Middle Eastern region.