Boston University School of Law

Scholarly Commons at Boston University School of Law

Faculty Scholarship

1-2009

The Impact of Sovereign Wealth Funds on the Regulation of Foreign Direct Investment in Strategic Industries: A Comparative View

Maya Steinitz

Michael Ingrassia

Follow this and additional works at: https://scholarship.law.bu.edu/faculty_scholarship

Part of the Banking and Finance Law Commons, and the Comparative and Foreign Law Commons

The Impact of Sovereign Wealth Funds on the Regulation of Foreign Direct Investment in Strategic Industries: a Comparative View

Maya Steinitz and Michael Ingrassia*

Introduction

Investments by sovereign wealth funds ('SWFs') – pools of capital accumulated by and under the control of sovereign states, mostly from the Persian Gulf and East Asia – in European and North American companies have changed dramatically both in scope and in nature in the last few years. In terms of scope, SWFs are estimated to currently control USD$2–3 trillion in assets – more than all hedge funds and private equity funds combined – and within the next five years, they are expected to direct USD$6–10 trillion in assets.[1] In terms of the nature of the investments made, these funds have recently moved from largely small-scale, low-key, passive investments to larger, higher-profile, more active investments. Given the nature of the investors in question ie, sovereigns, these recent changes have stirred up the long-standing debate between protectionism versus free-market approaches towards foreign direct investment ('FDI') especially as it relates to industries that are viewed as 'strategic'. These dramatic changes, the effects of which on the global economy and, indeed, international affairs, are only starting

---

* Dr Maya Steinitz is an associate at Latham & Watkins and a visiting scholar at Columbia Law School. Michael Ingrassia is an associate at Latham & Watkins. We are deeply grateful to Stefan Paulovic for his dedicated research assistance and Taisuke Igaki for his invaluable comments to earlier drafts.

1 International Monetary Fund, 'IMF Intensifies Work on Sovereign Wealth Funds', 24 March 2008, available at **www.imf.org/external/pubs/ft/survey/so/2008/POL03408A.htm**.

Electronic copy available at: https://ssrn.com/abstract=2685934

to become clear, have propelled states with screening mechanisms for the review of such investments to re-evaluate and bolster these mechanisms. In the last two years eg, at least 11 major countries, which together accounted for over 40 per cent of all world inflows of FDI in 2006, have approved or are seriously considering new laws that would either restrict certain types of FDI or expand government oversight of certain cross-border investments. Most of these regulatory changes have been justified on the basis of protecting national security or safeguarding so-called strategic industries.[2]

This article examines the screening mechanisms in place, recently changed or currently under consideration by the United States, France and India. While by no means an exhaustive or even representative survey, this sample highlights how different jurisdictions apply varying degrees of scrutiny to FDI in an age of increased sovereign-directed investments. As such, it illustrates some of the key issues an investor and its advisers may wish to examine when contemplating a potentially sensitive investment such as the role of the executive in the review, the availability of judicial review in national or transnational courts, the definition of key concepts such as foreign investment/investor, and the sectors regarded as sensitive.

For each jurisdiction, the article examines: (1) the governing law and recent changes thereto; (2) the screening mechanisms including (i) the composition of the review body, (ii) key concepts such as 'foreign investment', (iii) the industries subject to review, and (iv) review timelines and other key features of the review process; and (3) notable recent deals or public controversies.

Overview of recent developments

Many of the largest economies have screening mechanisms in place for the review of FDI in strategic industries. Other jurisdictions, such as the Netherlands and the United Arab Emirates, have laws restricting FDI in sensitive industries but do not have formal screening mechanisms in place as yet. In response to the rising influence of SWFs, leaders of several countries with screening mechanisms in place have recently called for stricter regulatory scrutiny of investments by SWFs. German Chancellor Merkel has stated that 'with those sovereign funds we now have a new and completely unknown elements [sic] in circulation. One cannot simply react as if these are completely normal funds of privately pooled capital'. As of the writing of this article, the German government is still considering proposed legislation to amend the German Foreign Trade Act that would, if passed, introduce

2 D Marchick and M Slaughter, 'Global FDI Policy – Correcting a Protectionist Drift', CSR No 34, June 2008 at 2, 22.

Electronic copy available at: https://ssrn.com/abstract=2685934

a CFIUS-like screening process for foreign investments. French President Sarkozy has also criticised SWFs: 'We've decided not to let ourselves be sold down the river by speculative funds, by unscrupulous attitudes which do not meet the transparency criteria one is entitled to expect in a civilised world. It's unacceptable and we have decided not to accept it.'[3]

Country overviews

The United States[4]

PRIMARY LAW REGULATING FDI

In the United States, the President has authority under the 1988 Exon-Florio Amendment to the Defense Production Act of 1950 to review the 'national security effects' of foreign acquisitions of US companies.[5] The national security effects of a given transaction are not defined in the legislation, although 'the preamble to the regulations provides guidance that products, services and technologies important to U.S. defense requirements would be significant to national security'.[6] This authority has been implemented through an inter-agency group known as the Committee on Foreign Investment in the United States ('CFIUS').

RECENT REGULATORY DEVELOPMENTS

In 2007, Congress passed the Foreign Investment and National Security Act of 2007 ('FINSA')[7]. FINSA retains the fundamental framework under which CFIUS reviews foreign investments but broadens the scope of the transactions potentially subject to the jurisdiction of CFIUS and expands the information that the parties to the transaction must submit to commence the review process.

3 See, respectively, Carter Dougherty, 'Europe Looks at Controls on State-owned Investors', *International Herald Tribune*, 13 July 2007, available at **www.iht.com/articles/2007/07/13/business/protect.php** and Larry Elliott, 'Darling Backs G7 Move on Sovereign Funds', *The Guardian*, 19 October 2007, available at **www.guardian.co.uk/business/2007/oct/19/usnews.globalisation**.

4 Unless otherwise noted, this section is based on Latham & Watkins Client Alert Number 617, 'Congress Passes Legislation to Strengthen Review of Foreign Investments in the United States', by Teresa D Baer and Phillip J Perry, 11 July 2007 and Latham & Watkins Client Alert Number 702, 'US Treasury Department Issues Draft Rules to Implement Changes to CFIUS Review Process', by Teresa D Baer, Phillip J Perry and Edward Shapiro, 8 May 2008.

5 Omnibus Trade and Competitiveness Act of 1988 § 5021, Pub L No 100-418, 102 Stat 1107 (1988) (codified at 50 USC App § 2170 (1994)).

6 Notice issued by the Office of International Investment of the Department of the Treasury regarding the Committee on Foreign Investment in the United States, October 2007.

7 HR 556, 100th Cong (2007).

Electronic copy available at: https://ssrn.com/abstract=2685934

Among the other clarifications and changes required by FINSA are the following: first, an informal pre-filing notification by the parties is now strongly encouraged. The parties are encouraged to submit draft notices to CFIUS at least five business days before submitting a formal filing. Secondly, increased scrutiny of transactions that may affect 'critical infrastructure' (eg, port, rail, electrical generation, telecommunications and other assets) or 'critical technologies' is now required. Thirdly, acquisitions of convertible securities or proxies from holders with a voting interest in a company and the formation of a joint venture involving the contribution of a US business are all now deemed transactions that are potentially subject to CFIUS review. Fourthly, in addition to its ability to unwind transactions entered into without CFIUS approval, CFIUS may now impose civil penalties of up to USD$250,000 per violation for material misstatements or omissions in notices if made intentionally or with gross negligence.

Description of reviewing body

CFIUS is composed of 12 members chaired by the Secretary of Treasury. The other members are the Secretaries of State, Defense, Homeland Security and Commerce, the Attorney-General, the Director of the Office of Management and Budget, the US Trade Representative, the Chairman of the Council of Economic Advisers, the Director of the Office of Science and Technology Policy, the Assistant to the President for National Security Affairs and the Assistant to the President for Economic Policy.

Key concepts

In addition to 'national security effects' noted above, and to 'critical technologies' and 'critical infrastructure' discussed below, under the Exon-Florio Amendment, as amended by FINSA, the President and CFIUS are empowered to review any merger, acquisition, or takeover by or with a foreign person which could result in foreign control of any person engaged in interstate commerce in the United States. The definition of a 'foreign person' whose acquisition would trigger CFIUS jurisdiction has been expanded by FINSA to include 'foreign entities' which refers to 'entities organised outside of the United States that CFIUS considers to be foreign persons because of their substantial foreign ownership, even though ownership is widely dispersed among different foreign persons and no single foreign person may control the entity'.[8]

8 31 CFR Part 800, Department of the Treasury, 'Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons', §§ 800.212, 800.216 (2005).

Electronic copy available at: https://ssrn.com/abstract=2685934

INDUSTRIES SUBJECT TO REVIEW

Under the Exon-Florio Amendment, as amended by FINSA, investments in all industries are potentially subject to review. FINSA does, however, require increased scrutiny for investments in 'critical technologies' and 'critical infrastructure'. 'Critical technologies' are defined as critical technology, critical components or critical technology items essential to national defence identified pursuant to this section.[9] 'Critical infrastructure' is defined as systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems or assets would have a debilitating impact on national security.

REVIEW AND REPORTING PROCESS

Parties to a transaction that are subject to CFIUS's mandate voluntarily notify CFIUS of their proposed transaction, although CFIUS may also commence reviews on its own. The CFIUS review process entails a 30-day review followed, if necessary, by a 45-day investigation of the proposed acquisition. After this 45-day investigation, the President then has an additional 15 days to determine whether to suspend or prohibit the transaction. There is no judicial review of the President's determination. Exempted from the ambit of CFIUS review are passive investments of ten per cent or less. However, FINSA clarified that only transactions that are 'solely for the purpose of investment' are sheltered by this safe harbour.

DEVELOPMENTS AND INVESTMENTS REPORTED ON RECENTLY

In the last several years the number of CFIUS reviews has increased dramatically. There were eg, more second-stage investigations in 2006-2007 than in the previous 15 years combined.[10] A case in point is the 'DP World' transaction. In November 2005, a strategic bid to complement DP World's existing port assets was announced. DP World thereby gained terminals in 18 countries, including the United States, Canada, Britain, France, India and China. The deal was approved by CFIUS after resolving some objections by the Coast Guard and the Department of Homeland Security. While there was little political resistance elsewhere, the deal sparked a political furore in the United States as citizens and the media were aghast at the idea of an SWF owning sensitive US assets. The House Appropriations Committee voted 62

9 HR 556, 100th Cong § 2 (adding subsection (a)(7)).

10 The Carlyle Group, 'Sovereign Wealth Funds and National Security', OECD/City of London Conference, 31 March 2008.

Electronic copy available at: https://ssrn.com/abstract=2685934

to two to reject the transfer and political pressure was placed on Dubai to transfer the assets to a US company. In March 2006, the Prime Minister of Dubai, Sheikh Mohammed bin Rashid al Maktoum, resolved the situation by announcing that DP World would transfer the assets to a US company, essentially as a favour to the Bush administration.

France[11]

PRIMARY LAW REGULATING FDI

Articles 43, 48, 56 and 57 of the European Community Treaty ('EC Treaty') prohibit EU Member States from restricting either the free movement of capital in the European Union or the conduct of business by investors from other countries within the Member State. National law in all EU Member States must comply with the provisions of the EC Treaty, but an EU Member State may nonetheless 'take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions or war materials'.[12] In 2004, France enacted Law 2004-1343 based on the quoted language from the EC Treaty. This law governs the foreign investment review process for France and was passed in response to a European Court of Justice ('ECJ') ruling in 2000 holding that France had contravened European Community law by prohibiting the transfer of funds from abroad to the French Church of Scientology on the grounds that French public security interests were at stake. In 2005, an accompanying Ministerial Decree (the 'Decree') was issued. The Decree identifies 11 economic sectors in which a foreign investor may not obtain a controlling share or a specified portion of a French company without the prior approval of the French Ministry of Economy, Finance and Employment.

RECENT REGULATORY DEVELOPMENTS

Despite the regulatory changes enacted by the French government in 2004 and 2005, the European Commission formally asked France to amend its regulations in October 2006. Tension points between the European Commission and France include the French decision to specify gambling as one of the sectors subject to review and distinctions made between EU and

11 Unless otherwise noted, this section is based on the US Government Accountability Office (GAO), 'Foreign Investment – Laws and Policies Regulating Foreign Investment in 10 Countries', GAO-08-320 (February 2008) at 11, 54–59.

12 Article 296(1)(b) EC Treaty.

Electronic copy available at: https://ssrn.com/abstract=2685934

non-EU investors. In response, France has made proposals to address the European Commission concerns, with discussions ongoing.

In addition, in June 2007, the French parliament issued a report asking the French government to consider whether energy should be added to the list of sectors specified in the Decree. However, no legislation has been discussed that would provide for such an addition to the Decree.

DESCRIPTION OF REVIEWING BODY

The foreign investment review process is led by France's Ministry of Economy, Finance and Employment. After considering input from various other ministries, including the Ministry of Defence, this ministry issues an approval or denial based on the input of all government reviewers. In the event that the Ministry of Economy, Finance and Employment does not approve a given transaction, an investor has the right to appeal the decision in the French administrative courts. If an investor can demonstrate that the ministry inaccurately applied French law, the adverse decision may be overturned. In addition, an investor can challenge the decision before the ECJ based on an allegation that EC Treaty provisions have been violated. Yet, as there has never been a denial, there have been no appeals since the Decree was promulgated in December 2005.

KEY CONCEPTS

French law treats EU and non-EU investors differently, with a corporate investor being deemed an 'EU investor' if at least 80 per cent of the firm's capital is owned by EU residents (if the investor is a publicly-traded entity) or, for a non-publicly-traded entity, if at least 66.6 per cent of the firm's capital is owned by EU residents.[13] In relation to non-EU investors, the Decree states that a review of a proposed FDI within a specified sector must be conducted if a non-EU investor will (a) acquire control of a firm whose corporate headquarters is located in France, (b) acquire a branch of a firm whose corporate headquarters is located in France, or (c) acquire more than one-third of the capital or voting rights of a firm whose corporate headquarters is located in France. According to Article L 233-3 of the French Commercial Code, a company is deemed to 'control' another company when it (a) directly or indirectly holds a fraction of the capital that gives it a majority of the voting rights at that company's general meetings, (b) alone holds a majority of the voting rights in that company by virtue of an agreement entered into

13 See US Department of State 2005 Investment Climate Statement – France, available at **www.state.gov/e/eeb/ifd/2005/42036.htm**.

Electronic copy available at: https://ssrn.com/abstract=2685934

with other partners or shareholders that is not contrary to the company's interests, (c) effectively determines the decisions taken at that company's general meetings through the voting rights it holds, and (d) is a partner in, or shareholder of, that company and has the power to appoint or dismiss the majority of the members of that company's administrative, management, or supervisory structures.

In relation to EU investors, on the other hand, the Decree states that a review of a proposed FDI within must be conducted if (i) the investment is in one of the last four sectors listed below and the investor will either (a) acquire control of a firm whose corporate headquarters is located in France or (b) acquire a branch of a firm whose corporate headquarters is located in France or (ii) if the investment is in one of the first seven sectors listed below and the investor will acquire a branch of a firm whose corporate headquarters is located in France.[14]

INDUSTRIES SUBJECT TO REVIEW

France has chosen a sector-based approach in which it identifies the sectors that require government approval for foreign takeovers. Here, again, French law distinguishes between EU and non-EU investors. For non-EU investors, the following sectors are subject to review:

1. gambling and casinos;
2. private security;
3. research, development, or production of means to stem the unlawful use of pathogens or toxins;
4. equipment designed to intercept correspondence and monitor conversations;
5. testing and certification of the security of information technology products and systems;
6. production of goods, supplies or services to ensure the security of the information systems;
7. dual-use items and technologies;
8. cryptology equipment and services;
9. activities carried out by firms entrusted with national defence secrets;
10. research, production, or trade in weapons, ammunitions, powders, and explosives;
11. activities carried out by firms holding a contract for the design or supply of equipment for the Ministry of Defence to produce an item or supply a service for one of the sectors referred to above.

14 *Supra* n 12 at 56.

Electronic copy available at: https://ssrn.com/abstract=2685934

Investments by EU-based investors require less stringent review than that applied to investments by non-EU investors if they are in any of the first seven sectors listed above; but if they are in any of the last four sectors listed above, they are subject to the same review as is applied to investments by non-EU investors.

In addition to the requirements imposed by the Decree, France has several single-sector restrictions, including the following: non-EU media companies are restricted from acquiring more than a 20 per cent stake in French-language audiovisual communications and media companies; foreign investment in the French banking and insurance sector requires approval from French banking and insurance regulators; and foreign investment in the aerospace sector may be restricted by the French government.

REVIEW AND REPORTING PROCESS

An investor's failure to apply for a national security review when required to do so, can result in criminal and civil penalties. If investors are not sure whether the proposed investment is subject to review they may request an opinion from the Ministry of Economy, Finance, and Employment, which then has two months to respond to the investor. However, the Decree notes that a lack of response on the part of the ministry within the two-month time frame does not release the investor from the review requirement.

DEVELOPMENTS AND INVESTMENTS REPORTED ON RECENTLY

Several recent cases are noteworthy: China's State Administration of Foreign Exchange's ('SAFE') acquisition of a 1.6 per cent stake in France's Total, the fourth-largest oil group in April 2008; Dubai International Capital LLC's acquisition of a 3.1 per cent stake in France-Germany European Aeronautic Defence and Space Company ('EADS'), the manufacturer of Airbus aircraft, in July 2007; and Russian state-owned Vneshtorgbank's acquisition of more than five per cent of EADS in August 2006.

In 2005, rumours of a takeover of Danone by PepsiCo (a US company), which the French daily *Le Figaro* described as the 'American Ogre', sparked a national outcry. Former French Prime Minister Dominique de Villepin intervened by saying that a group like Danone was an industrial treasure and assured the company that 'we will of course defend the interests of France', and coined the phrase 'economic patriotism' in the process. Jean-Louis Borloo, at the time Minister for Employment, said that the government

Electronic copy available at: https://ssrn.com/abstract=2685934

'would do everything to oppose a hostile takeover'.[15] Perhaps not surprisingly, no transaction was ever consummated.

India

PRIMARY LAW REGULATING FDI

FDI in Indian companies is policed pursuant to the Foreign Exchange Management Act of 1999 ('FEMA'), with foreign investment policy applicable to each sector established through 'Press Notes' issued by the Department of Industrial Policy and Promotion. The Press Notes establish which sectors require the prior approval of the Foreign Investment Promotion Board ('FIPB') (described below) before foreigners may directly invest in them and which do not require such approval. Additionally, the Press Notes establish the maximum percentage of a company that can be owned by a foreign investor based on the sector in which that company operates. It should be noted that there are some sectors that, while open to 100 per cent foreign ownership, nonetheless may not be invested in by foreigners without required FIPB approval. Additionally, there is a cap of ten per cent on the ownership that a foreign institutional investor (an 'FII') (such as a mutual fund or an SWF) may own in an Indian company, regardless of the sector within which that company operates.[16]

RECENT REGULATORY DEVELOPMENTS

Indian foreign investment policy is reviewed annually and the recent trend has been towards increasing liberalisation of government policy. Press Note Number 7, issued in June 2008, increased the FDI cap for several industries, while clarifying that FDI in certain industries is still prohibited. Telecommunications and other technology-intensive areas have seen a particular increase in liberalisation of FDI policy in recent years, while the Indian government has shown a reluctance to increase FDI caps for the retail trading industry.[17]

---

15 Thomas Fuller, 'French Fear Eye of "Ogre" is on Danone', *International Herald Tribune*, 21 July 2005, available at **www.iht.com/articles/2005/07/20/business/danone.php?page=1**. See also Richard McGregor, 'China Buys 1.6% Stake in Total', *Financial Times*, 3 April 2008.

16 'Investing in India: Foreign Direct Investment Policy and Procedures', Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of India (2008) at 23 and *supra* n 12 at 65–72.

17 *Supra* n 12 at 65–72; Press Note Number 7, issued by the Government of India, Ministry of Commerce and Industry, Department of Industrial Policy & Promotion, SIA (FC Section), 16 June 2008 and; 'Investing in India: Foreign Direct Investment Policy and Procedures, Department of Industrial Policy and Promotion', *supra* n 17 at 90–101.

Electronic copy available at: https://ssrn.com/abstract=2685934

DESCRIPTION OF REVIEW BODY

The FIPB is the government body charged with reviewing FDI in Indian companies operating in certain sectors identified in the Press Notes as requiring government approval for FDI. The FIPB consists of the secretaries of the following departments and ministries: the Department of Economic Affairs (Ministry of Finance), the Department of Industrial Policy and Promotion (Ministry of Commerce and Industry), the Department of Commerce (Ministry of Commerce and Industry), the Department of Economic Relations (Ministry of External Affairs) and the Ministry of Overseas Indian Affairs. These and other government ministries may also intervene in the FIPB review process, and have done so several times in the past, if foreigners attempt to invest in industries deemed to be within the purview of the intervening ministry.[18]

KEY CONCEPTS

For FEMA purposes, 'foreign investment' means investment in the capital of an Indian company and 'capital' means equity shares, preferential shares and convertible debentures. Pursuant to the Press Notes, there are five maximum foreign ownership levels in companies, depending on the sector in which that company operates. These levels are: 0, 26, 49, 74 and 100 per cent. Additionally, no FII may own more than ten per cent of an Indian company, regardless of the sector within which the company operates, and no Indian company may have more than 24 per cent of its shares owned by FIIs, as a group.[19]

INDUSTRIES SUBJECT TO REVIEW

Pursuant to Press Note Number 7, FDI is prohibited in the following industries: retail trading (except for single-brand product retailing), atomic energy, lottery, gambling and betting, chit funds (savings schemes involving pooled contributions and lottery-like features), Nidhi companies (a type of non-bank financial services company), trading in transferable development rights and activities/sectors not open to private sector investment.[20] In other industries, such as defence production and insurance, foreign investors

---

18 See, 'Investing in India: Foreign Direct Investment Policy and Procedures', *supra* n 17 at 55 and; *supra* n 12 at 65–72.

19 See, 'Investing in India: Foreign Direct Investment Policy and Procedures', *supra* n 17 at 11 and *supra* n 12 at 65–72 and 'Investing in India: Foreign Direct Investment Policy and Procedures' *supra* n 17 at 33.

20 Press Note Number 7, *supra* n 18.

Electronic copy available at: https://ssrn.com/abstract=2685934

may only own up to 26 per cent of a company; for many of these sectors, foreign investors need FIPB approval before making an investment. In other industries, such as coffee and rubber processing, non-atomic power generation, mining and cigars/cigarette manufacturing, foreign investors may own up to 100 per cent of a company; yet in certain of these industries, such as mining and cigars/cigarette manufacturing, FIPB approval is nonetheless required prior to any foreign investment.[21]

TIMELINE AND REVIEW FEATURES

The FIPB can reject those investments requiring its approval based on 'special circumstances' or based on any factors it deems relevant. These factors are established in the FIPB guidelines, but these guidelines are non-binding and the FIPB has emphasised its flexibility in rejecting investments based on 'strategic or defence-related' considerations or based on any other considerations it deems pertinent. In some cases, the FIPB will simply refuse to approve or deny an application if the foreign investor is from a country the government deems a threat (eg, Pakistan and China), leaving the application in a permanent state of uncertainty.[22]

DEVELOPMENTS AND INVESTMENTS REPORTED ON RECENTLY

India's National Security Council (the 'NSC') recently proposed new legislation known as the National Security Exception Act (the 'NSEA') in order to address concerns regarding FDI in sensitive industries and regions. The NSEA was modelled on the Exon-Florio Act and was intended to create a CFIUS-like security-based FDI review process, with a focus on investments in Jammu and Kashmir, the north-eastern states and other sensitive locations and industries such as aviation, ports, shipping and telecommunications.[23] Investments in these regions or industries would have required thorough government screening before being approved, even if the investment was in an industry that would otherwise allow for automatic approval under FEMA. The NSEA was seen as being targeted at Chinese companies, which had faced opposition by the Indian government to several proposed investments in India over the past few years.[24] Fearing a negative impact on the Indian

21 'Investing in India: Foreign Direct Investment Policy and Procedures', *supra* n 17 at 56–70.

22 'Foreign Investment: Laws and Policies Regulating Foreign Investment in 10 Countries', *supra* n 12 at 65–72.

23 Shardul Thacker, 'India: FDI Screening – National Security Exception Act, February 5, 2008', available at **www.mondaq.com/article.asp?articleid=56896**.

24 'India: New Nationalism', Executive Briefing India from the Economist Intelligence Unit, 16 November 2006.

Electronic copy available at: https://ssrn.com/abstract=2685934

economy, the NSEA was abandoned following resistance from the Ministry of Commerce and Industry and the Ministry of Finance. There are indications, however, that similar legislation may be reconsidered in the future.

India has not taken a specific stance on SWF activity, although it has indicated that it is open to investment by SWFs from Norway and Singapore. India appears, however, still to be evaluating SWFs from China and other countries. As recently as December 2007, the Finance Secretary, D Subba Rao, was quoted as saying: 'We are yet to firm up our views on sovereign wealth funds. We have to decide to what extent we can encourage them...We are looking at the issue from different angles.'[25]

Conclusion

The review processes for FDI applied by the United States, France and India are each very distinct, with the differences arising largely in (i) the degree to which the applicable process does or does not differentiate investments in certain 'sensitive' economic sectors versus other sectors, (ii) the amount of discretion granted to the reviewing body, including any appeals process related to the decisions of that body, and (iii) the degree of clarity that the rules in place provide to potential foreign investors.

The review process in the United States applies to all foreign investments (within certain parameters), regardless of the industry in which the target company operates. FINSA has recently sharpened the focus of CFIUS when it comes to investments in companies that are involved with 'critical technologies' or 'critical infrastructure', such that potential foreign acquirers are on notice that their investments in such companies may be more stringently scrutinised. However, even these sectors are defined in somewhat vague terms in order to grant CFIUS the utmost discretion in deciding which investments are deserving of more aggressive policing. The discretion accorded to CFIUS is even more powerful considering that parties may not appeal its decisions.

The review process in France, on the other hand, is sector-based, with certain sectors being deemed more sensitive than others. Further, France makes it clear that some 'sensitive' sectors will be considered less sensitive by the French government if the investor is an EU investor as opposed to a non-EU investor, while other sectors will be deemed sensitive regardless of whether the foreign investor is from an EU or a non-EU country. Once an investment is deemed to be in a sensitive industry, it is then scrutinised by the Ministry of Economy, Finance and Employment (as well as other pertinent

25 Saibal Dasgupta, 'India wary about allowing investment from Chinese government fund', *The Times of India*, 6 December 2007.

Electronic copy available at: https://ssrn.com/abstract=2685934

ministries). These ministries have absolute discretion in deciding whether or not to allow an investment subject to their review to proceed, although this discretion is somewhat tempered by the fact that an investor may appeal to the French administrative courts or to the ECJ.

Finally, the review process in India is somewhat different than the approach taken by either the United States or France. It is very sector-specific, with the FIPB having the power to review FDI in companies in a specific set of industries. As with the French approach, the FIPB has absolute discretion in reviewing any investments subject to its purview. However, while investors can appeal decisions by the FIPB, the FIPB may also effectively reject investments by refusing to provide a decision to the investor, thereby in effect differentiating the Indian approach from the French approach. The Indian approach is most unique in that, in addition to the review process by the FIPB of investments in certain industries, there are also very specific caps on the percentage ownership that foreigners can have in companies based on the industry within which the company operates. However, it should be noted that the recent NSEA debate in India demonstrates the degree to which a more CFIUS-like approach has been and may in the future be evaluated by India as it re-examines its review process for FDI and determines whether or not a US-style approach with absolute discretion would be more useful.

Electronic copy available at: https://ssrn.com/abstract=2685934