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National Security Regulation of International Telecommunications Infrastructure and the Law of Unintended Consequences

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Presenter Profile

Kent Bressie is a partner with the law firm of Harris, Wiltshire & Grannis LLP in Washington, D.C. An expert on telecommunications and international trade and investment, he advises companies, international organizations, and governments regarding the legal and policy problems of conducting business internationally and deploying new technologies. He advises carriers and infrastructure suppliers on a wide range of issues affecting the undersea telecommunications industry, including telecoms regulation, trade and investment, commercial negotiations, security and law enforcement, environmental, and public international law/law of the sea matters.



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Overview

- In recent years, governments have increasingly defined their efforts to protect international telecommunications infrastructure largely in terms of national security—guarding against terrorism and against compromise of government communications.
- Multilateral and bilateral trade and investment agreements generally permit countries to take measures consistent with their security and public policy interests.
- Yet countries have generally focused their efforts to scrutinize foreign direct investment, with unintended consequences that may actually undermine infrastructure protection efforts or serve as cover for protectionism and economic nationalism.

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Developments in the United States Have Received the Most Attention

- **Post 9/11, U.S. foreign ownership reviews have shifted focus from protection of defense industrial base and scrutiny of technology transfers to protection of critical infrastructure protection broadly defined**
- **Phenomenon first took hold with original ST Telemedia/Hutchison Whampoa bid for Global Crossing, boiled over with Dubai Ports World's bid for P&O Ports and CNOOC's bid for Unocal**
- **Increasing investment flowing from new sources, particularly China, India, and the UAE**
- **Increasing investment by state-owned or – controlled enterprises**
- **Increasing investment flows into critical infrastructure sectors**

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U.S. Scrutinizes Foreign Ownership as Proxy for Threats to National Security

- Acquisitions of existing telecommunications infrastructure are subject to foreign ownerships review by the interagency Committee on Foreign Investment in the United States (“CFIUS”) under the Exon-Florio law
- Authorizes President to block acquisitions that threaten national security
- Exon-Florio law does not define national security
- Proposals to broad Exon-Florio to protect “economic welfare” and “essential commerce” have faltered over the years

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CFIUS Reviews Increasingly Politicized, Contentious

- CFIUS agencies increasingly seek mitigation agreements with acquirers, sometimes with “evergreen” provisions (e.g., Alcatel-Lucent) allowing President to withdraw approval at *future* date based on national security concerns
- CFIUS increasingly scrutinizes acquirers with substantial foreign-government ownership, and transactions involving “critical infrastructure”
- Increasing percentage of transactions subject to second-stage review
- U.S. Congress considering substantial changes to CFIUS review process

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U.S. Scrutinizes Foreign Ownership Outside the CFIUS Process - 1

- **Both acquisitions of existing telecommunications infrastructure and applications for new FCC authorizations (including international Section 214 authorizations and cable landing licenses) are subject to scrutiny by the Executive Branch agencies known as Team Telecom: the Departments of Justice, Homeland Security, and Defense and the Federal Bureau of Investigation**
- **Unlike CFIUS, Team Telecom does not act pursuant to any particular law, has adopted no formal regulations, and retains substantial power and discretion**

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U.S. Scrutinizes Foreign Ownership Outside the CFIUS Process - 2

- **Acquisitions or restructurings involving telecommunications infrastructure are also subject to export controls by the Commerce Department (dual-use goods) and the State Department (munitions)**
- **State Department just blocked proposed transaction by GE Capital and CITIC to take Hong Kong satellite operator AsiaSat private**

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Yet U.S. Is Not Unique in Focusing on Foreign Ownership; Trend is Global:

- **Hostility to foreign takeovers of perceived national champions, e.g., AT&T/América Móvil negotiations over Telecom Italia and numerous cases involving European energy companies**
- **Nationalization of foreign-owned infrastructure in Latin America, e.g., CANTV in Venezuela**
- **Adoption of new foreign ownership restrictions and review processes in France, with broad restrictions on non-EU investors and more narrow, terrorism- and crime-focused restrictions for EU investors**
- **Significant political opposition to (largely foreign) private equity firms investing in Germany, including those invested in Deutsche Telekom**

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Are There Safeguards to Ensure that National Security and Law Enforcement Measures Are Not Discriminatory or Protectionist?

- Few procedural or substantive safeguards
- Authority to address security and law enforcement concerns seen as core component of sovereignty
- Most international trade and investment agreements contain security exceptions and public policy exceptions

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Security Exceptions

- **Example: WTO General Agreement on Tariffs and Trade (“GATT,” which governs trade in goods) and General Agreement on Trade in Services (“GATS,” which governs trade in services, including telecommunications) each allow a member state to take “any action which it considers necessary for the protection of essential security interests” in specified cases, including actions “taken in time of war or other emergency in international relations”**
- **These exceptions are generally self-judging, meaning that the party invoking the exception has the final say on its meaning, and can more easily serve as cover for protectionist ends**
- **There has never been a WTO dispute settlement case interpreting the security exceptions to the GATT or GATS**

Public Policy Exceptions

- **Example: WTO GATS allows a member state to adopt or enforce measures necessary to protect public morals or to maintain public order, though such measure may not be arbitrary, discriminate unjustifiably, or serve as a disguised restriction on trade in services**
- **Although these exceptions are often broadly-written and poorly defined, they are subject to review and dispute settlement, as the United States learned in its WTO dispute with Antigua & Barbuda over U.S. restrictions on online gambling**

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**Unintended Consequence #1: Singular Focus
on Foreign Ownership Encourages
Protectionism and Economic Nationalism
While Undermining Liberalization and
Reform in the International
Telecommunications Sector**

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Unintended Consequence #1 (continued)

- **Countries may feel compelled to strengthen foreign ownership reviews to maintain parity with other countries**
- **UNCTAD reported that 2005 saw more unfavorable policy changes than ever before with respect to climate for foreign direct investment**
- **Public opinion increasingly holds that it's too easy for foreigners to buy domestic companies or invest (Brunswick Group data re U.S. public opinion; Harris/Financial Times data re European public opinion)**
- **Application processing times for foreign-owned applicants creeping back up at FCC**
- **Most recently, the FCC denied streamlined processing for the Trans-Pacific Express cable landing license application due to Team Telecom objections**

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Unintended Consequence #2: Singular Focus on Foreign Ownership Ignores Home-Grown Threats to National Security

- Approach relies on increasingly fallacious assumption that threats come from outside a country, rather from within it
- In the United States, domestic carriers not subject to personnel screening, domestic record-retention requirements (many use offshore outsourcing solutions), or other law enforcement requirements, even when they own and operate similar infrastructure or offer similar services

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Unintended Consequence #3: Singular Focus on Foreign Ownership Ignores Dangers Posed by Natural Disasters and Other Users of the Seabed

- **Hurricane Katrina effect: bias toward national security concerns in telecommunications infrastructure protection came partly at the expense of planning for natural disasters**
- **Many governments caught off-guard by recent Taiwan earthquake**
- **Few countries have developed systematic policies to ensure geographic diversity, network redundancy, or protection from other seabed users**
- **Environmental permitting concerns often dictate planning outcomes**

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The Need for More Broadly-Defined and Comprehensive Infrastructure Protection Policies

- National security and law enforcement concerns should be defined less by foreign ownership concerns
- Focus on actual threats and needs
- Avoid providing cover for protectionism or economic nationalism
- Need for proactive, systematic policies addressing geographic diversity, network redundancy, and protection/liability regimes
- Permitting policies must balance environmental concerns with infrastructure protection, particularly with respect to natural disasters and risks posed by other seabed users

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