

*Export, Customs & Trade*  
**Sentinel**

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**DOJ Raises the Bar for Pre-Acquisition FCPA Due Diligence**

**13 Pages in 13 Days**

On January 15, 2008, the U.S. Department of Justice (“DOJ”) issued its first Opinion Procedure Release of the year. The Requestor was a Fortune 500 company headquartered in the United States that sought approval from the DOJ to make a majority investment in a foreign company (the “Investment Target”). The Investment Target, a provider of public services for a foreign municipality, was owned by the foreign government and a foreign private company. The owner of the private company investor also served as the general manager of the Investment Target. The private foreign owner reportedly was to buy out the government’s interest, remain a minority owner, and enter into a joint venture with the Requestor. Given the private foreign owner’s roles and relationships, the Requestor deemed the private foreign owner to be a “foreign official” for purposes of the Foreign Corrupt Practices Act (“FCPA”). Thus, the Requestor was concerned that its bid for the privatization, which valued the controlling interest in the Investment Target at a premium, could be construed as an improper payment under the FCPA. Under a tight deadline, the Requestor sought an Opinion from the DOJ on an expedited basis Jan. 2, 2008. In a record 13 days and with a record length of 13 pages, the DOJ issued a Release finding that the payments would not violate the FCPA.

**Aggressive Pre-Acquisition Due Diligence**

Prior to executing a joint venture agreement, the Requestor conducted extensive due diligence on the potential joint venture, including evaluating potential FCPA-related risk. The Requestor wanted to ensure that the purchase of the shares at a substantial premium above their initial public purchase price would not be a FCPA violation, and that the private foreign owner’s actions were appropriate under the laws of the foreign country at issue. The due diligence identified no negative information pertaining to the transaction.

The due diligence conducted by the Requestor, and endorsed by the DOJ in this Release, included:

- The Requestor commissioned a report on the private foreign owner by a reputable international investigative firm.

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## Proposed CFIUS Regulations: Enhanced Examination of Inbound Investment

### **Introduction**

As previously reported in the *Sentinel*, the July 26, 2007, revisions to the Foreign Investment and National Security Act of 2007 (“FINSA”) codified and expanded the role of the Committee on Foreign Investment in the United States (“CFIUS”) in reviewing foreign direct investment in the United States. Consistent with the FINSA revisions, on April 21, 2008, the Treasury Department released proposed implementing regulations. See [www.treas.gov/press/releases/reports/proposed\\_regulations42108.pdf](http://www.treas.gov/press/releases/reports/proposed_regulations42108.pdf). This article highlights some of the general features of the proposed regulations.

### **Exon-Florio/FINSA Overview**

Under the Exon-Florio Amendment of the Defense Production Act of 1950, the President is authorized to suspend or prevent any acquisition or other transaction that poses a risk to national security. Pursuant to this authority, the President has delegated to CFIUS the power to review potential foreign investment transactions for national security concerns. CFIUS is chaired by the Secretary of the Treasury and is currently composed of members from 12 executive agencies.

Because of the desire for a greater degree of certainty regarding potential acquisitions and other investment transactions by foreign entities, one or more parties to a proposed deal may voluntarily petition CFIUS for a determination regarding whether the proposed transaction may implicate national security concerns. Red flags are often raised where a transaction involves the proposed purchase of a defense contractor or other entity performing tasks that implicate national defense or security. Under current applicable implementing regulations,

31 C.F.R. § 800, CFIUS must first undertake a 30-day review to determine if a voluntary notice needs further review. If CFIUS believes that there is credible evidence to support the belief that a proposed acquisition may threaten national security, CFIUS can initiate a 45-day investigation. After completing the investigation, CFIUS submits a recommendation to the President, who then has 15 days to decide whether to allow the acquisition to move forward. The process must be completed within 90 days. See *Sentinel* Vol. IV, No. 3.

### **Proposed Regulations**

The proposed new regulations implement the major changes contained in FINSA, which are outlined below. As a threshold matter, however, in many instances, they formalize the current state of play of CFIUS “practice.” For example, the new regulations make explicit reference to the pre-filing contacts between the filing party and CFIUS. Likewise, frequently asked questions are incorporated. In addition, the proposed new regulations formally require that voluntary notifications now contain information that CFIUS has requested in recent years, but that was not previously spelled out in the regulations. The new requirements include personal identifier information for Board members and other senior company officials in the acquiring company’s ownership chain. The parties to the transaction are now required to certify that the information provided is complete and accurate, and failure to do so will cause a notification to be deemed incomplete. Submissions that are inaccurate or incomplete may result in the imposition of penalties. Penalties, including liquidated damages, may also now be imposed on parties that

*Voluntary CFIUS filings  
may not seem so  
voluntary.*

breach mitigation agreements entered into with CFIUS.

### **Expansion of CFIUS Review**

Passed in part as a response to concerns that arose after Dubai Ports World's proposed takeover of operations at a number of major U.S. ports, FINSA is designed to increase CFIUS' effectiveness and oversight in reviewing proposed foreign transactions. Although FINSA affects existing CFIUS protocol in a number of ways, several changes warrant highlighting because of their potential affect on foreign investment transactions:

**Critical Infrastructure** – When a review is initiated by a voluntary filing, or at discretion of CFIUS or the President, CFIUS is required by FINSA to conduct a 45-day investigation of a transaction where national security concerns are present. Such circumstances arise where there is a threat that may impair national security where the acquiring company is controlled by, or acting for, a foreign government, where or the transaction could result in foreign control of “critical infrastructure” or “critical technologies,” which are assets considered vital to national security.

The proposed new regulations also give definitions for certain new key terms, including:

- “critical infrastructure,” which is defined as “systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of the systems or assets... would have a debilitating impact on national security;” and
- “critical technologies,” which are defined as: (1) defense articles or services covered by the Interna-

tional Traffic in Arms Regulations; (2) items included on the Commerce Control List of the Export Administration Regulations that are controlled pursuant to multilateral regimes (e.g., chemical and biological weapons proliferation), regional stability, or surreptitious listening; (3) specially designed nuclear parts, equipment, facilities, etc.; and (4) specific agents and toxins.

**“Covered Transactions”** – The new proposed regulations also serve to clarify and broaden the definition of a “covered transaction” that is subject to CFIUS review. The current CFIUS review of mergers, acquisitions, and takeovers is broadened to include joint ventures, the acquisition of convertible voting securities, and certain long-term leases.

The key issue in determining whether a transaction is covered is whether a foreign person will have “control” of the U.S. entity, which may be direct or indirect and need not be exercised. For example, a foreign entity's right to control significant business decisions will be considered control, regardless of its overall ownership share. While the question of control is not a “bright-line” test, the proposed new regulations do provide a two-pronged test for where a foreign person does not control a U.S. entity: (1) the foreign person holds 10 percent or less of the voting interest; and (2) the interest is held solely for the purpose of investment. An interest is held solely for the purpose of investment where the person does not intend to exercise control and takes no actions inconsistent with holding the interest solely for the purpose of investment.

Foreign “greenfield” investment in a start-up will generally not constitute

a covered transaction. The transfer of control from one foreign entity to another foreign entity may constitute a covered transaction. In general, the acquisition of stock options will not constitute a covered transaction, but the conversion of securities may, depending on the degree of control involved.

### **Foreign Government Control** –

Following the initiation of a review, an acquisition by a foreign government may only avoid the 45-day investigation upon the agreement of the Secretary, or Deputy Secretary, of the Treasury and head of the “lead” agency within CFIUS for that investigation, as designated by the Secretary of the Treasury.

### **CFIUS Review Process**

- **Review Initiated by the President or CFIUS** – While the CFIUS review process is generally deemed voluntary, the President and CFIUS have possessed authority under the regulations to initiate a review of a transaction even without voluntary notification. FINSA strengthens that authority by codifying it, thus increasing the prospect of non-voluntary review by CFIUS.
- **Authority to Re-Open Review** – FINSA codifies CFIUS' authority to re-open its review of an otherwise cleared transaction where: (1) false or misleading information has been provided, or material information has been omitted, from a CFIUS notice; or (2) there is an intentional, material breach of a mitigation agreement and CFIUS does not have any other adequate remedy to address the breach. This provision will ensure ongoing monitoring of mitigation

*(continued on page 4)*

‘Proposed CFIUS Regulations...’ – *cont’d from page 3*

agreements by CFIUS, resulting in increased accountability by the parties to the agreement.

- **Increased Oversight of Withdrawal of Notification** – While current regulations provide that a request to withdraw a notification to CFIUS will ordinarily be granted, FINSA adds the requirements of CFIUS approval before a notification may be withdrawn. Further, under FINSA, CFIUS may monitor a transaction after the notification has been withdrawn and implement any necessary interim measures to protect national security. Finally, CFIUS has the authority to set deadlines for any re-submission of notification.
- **Additional Factors for CFIUS to Consider** – FINSA expands those factors that CFIUS must consider in reviewing a transaction to include: (1) the impact of the transaction on “critical infrastructure” and “critical technologies;” (2) the long-term effect of the transaction on energy assets and other critical resources; (3) in those cases involving a government-controlled transaction, a review of (a) the adherence of the foreign country to nonproliferation control regimes, (b) the foreign country’s record on cooperating in counter-terrorism efforts, (c) the potential for transshipment or diversion of technologies with military applications;

and (4) such other factors as the President or CFIUS determine to be appropriate.

**Penalties**

Under the new proposed regulations, CFIUS has the authority to impose civil penalties of up to \$250,000 per violation for material misstatements, omissions, or false statements made in connection with a CFIUS filing. In addition, CFIUS may impose a civil penalty of \$250,000 per violation for any intentional or grossly negligent violation of a mitigation agreement. A civil penalty imposed for violation of a mitigation agreement will be separate from any liquidated damages provisions contained in that mitigation agreement, which CFIUS will likewise have the right to enforce.

**Conclusion**

As regulators and industry work to implement FINSA in a way that strikes the proper balance between the benefits of foreign investment and the need for national security, those considering transactions involving foreign direct investment should be aware of the possible need for CFIUS review and the likely increased scrutiny for any transaction affecting U.S. critical infrastructure and critical technologies.

– *Jason P. Matechak and Gregory S. Jacobs*

**Reed Smith in Print and at the Podium**

- On June 4, 2008, Leigh Hansson will be speaking at the ITAR Compliance in Europe Conference, in Munich.
- On June 24, Jim Gallatin and Jason Matechak will be speaking at a firm-sponsored event in London on U.S. government contracting.

## Notice on the Sale, Purchase, or Other Transfers of Certified Cuba Claims Held by U.S. Nationals

### Introduction

On March 5, 2008, the U.S. Department of Justice issued a notice generated by inquiries to the Department related to the transfer of claims against the Government of Cuba. The Department is encouraging anyone considering the transfer or purchase of a certified Cuban claim to contact his or her attorney.

### What are Certified Cuba Claims?

The U.S. has had two programs for the adjudication of claims against the Government of Cuba. The first claims program was completed July 6, 1972 by the Foreign Claims Settlement Commission of the Department of Justice (“the Commission”). The Commission certified 5,911 claims to the U.S. Department of State as valid claims. These claims were settled pursuant to Title V of the International Claims Settlement Act of 1949.

In August 2006, the Commission completed the administration of a second Cuban claims program, evaluating previously un-adjudicated claims of U.S. citizens or corporations against the Government of Cuba for losses of real and personal property taken after May 1, 1967. These claims were reviewed pursuant to 22 U.S.C. 1623(a)(1)(C), which allows the Commission to evaluate categories of claims referred to the Commission by the Secretary of State.

During the Second Cuban Claims Program, the Commission received a total of five claims, and certified two of those claims as valid: the Claim of STARWOOD HOTELS & RESORTS WORLDWIDE, INC., Claim No. CU-2-001, Decision No. CU-2-001, in the total principal amount of \$51,128,926.95 (plus 6 percent simple annual interest); and the Claim

of IRAIDA R. MENDEZ, Claim No. CU-2-002, Decision No. CU-2-004, in the principal amount of \$16,000 (plus 6 percent simple annual interest). These two claims will be added to the claims already certified in the previous program.

### Recent Announcement by the Department of Justice, Foreign Claims Settlement Commission

On March 5, 2008, the Commission issued a notice that Title 22, Chapter 21, Subchapter V, of the U.S. Code contains a limitation on the transferability of certified Cuban claims, codified at 22 U.S.C. § 1643f(b): “The amount determined to be due on any claim of an assignee who acquires the same by purchase shall not exceed (or, in the case of any such acquisition subsequent to the date of the determination, shall not be deemed to have exceeded) the amount of the actual consideration paid by such assignee, or in case of successive assignments of a claim by any assignee.”

The Department notice states that the aforementioned provision “may

also apply to the transfer of interests in certain entities that own certified Cuban claims. Furthermore, regulations issued by the Office of Foreign Assets Control (“OFAC”) of the Department of Treasury may also govern the transfer of certified Cuban claims.”

The notice concluded, “The Commission is not aware of any plans for, or any indications of, a settlement between the United States and Cuba, nor is the Commission aware of any bilateral negotiations between the United States and Cuban governments regarding these claims.”

No funds are currently available to make payment on any U.S. claims against the Government of Cuba. The aforementioned certification will serve as a basis for the future negotiation of a claims settlement with the Government of Cuba.

The total value of certified claims by U.S. nationals against the Government of Cuba is approximately US \$8 billion.

– Jason I. Poblete

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## Defense Regulations to Require Export Controls Compliance

The FY 2008 National Defense Authorization Act includes a requirement that defense acquisition regulations be amended to require additional export compliance efforts on the part of government contractors. Specifically, Section 890(a) will require Federal Acquisition Regulation modifications to include a separate contractual requirement to comply with export control laws. Section 890(b) will require government contractors to maintain export control compliance plans; provide training on export compliance; and conduct periodic export controls compliance audits. Section 890(c) requires the Secretary of Defense to report to Congress within 180 days as to the efficacy of the new regulations set forth in the National Defense Authorization Act. This new law will certainly provide another avenue for export controls enforcement on a contractual basis, in addition to the legal and regulatory regime currently faced by government contractors.

– Jason P. Matechak and Leigh T. Hansson

## Navigating Trade and Related Matters in the U.S. Congress in a Post-Lobbying Reform Environment

*Business goes on, but no longer business-as-usual.*

During the first quarter of 2008, Reed Smith's Washington, D.C. office noted an increase in questions from our foreign-based clients and non-U.S. Attorneys regarding how the U.S. Congress lobbying and ethics reforms would impact efforts to successfully navigate and secure legislative victories in the trade policy arena. The new law that went into effect earlier this year was implemented in response to a series of illegal activities that took place during the past few years involving several Members of Congress, former legislative and executive branch officials, and the private sector. These reporting measures are not a ban on lobbying activity; rather, they build upon existing laws and regulations related to lobbying activity.

Registration, quarterly and semi-annual reporting of lobbying activity, and abiding by the ethics rules is a part of doing business in Washington, D.C. It has been so, in some form or another, since at least the latter part of the 19th century when the House of Representatives required registration for just a session with Clerk of the House. The registration process became much more formal at the end of the World War II period and has been evolving ever since. The most recent changes increase the number of times per year that lobbying activity must be reported, and requires the disclosure of campaign contributions on a semi-annual basis on a new form filed with the U.S. Congress, among other things. There are also new civil and criminal penalties that include jail time for failing to comply with registration requirements. The overall purpose of these laws is increased transparency in the U.S. political process, and it should not dissuade an

individual or business from engaging in a Constitutionally protected activity.

With regard to trade and trade-related legislative efforts, the more immediate matter should not be the registration issue, but rather the economic and political marketplace considerations involving your particular issue. The political and economic ramifications of your issue can, and many times will, have a unique set of circumstances that must be taken into account while developing an effective legislative trade strategy. Whether your goal is to inform, persuade, or change the law, these latter considerations are much more important than registration rules that, as a matter of course, must be done in any case as it is required by law when you decide to engage in lobbying activity.

With that backdrop in mind, how can you engage the U.S. Congress on trade policy issues, and what opportunities are available to inform, persuade, or change the law in a given area? No matter how technical the trade rule or your particular issue in this area, there are methods to make your views known. Lobbying opportunities range from informational meetings with Members of Congress, Committee or Leadership Staff, as well as other, more formal, options such as testifying before a Congressional Committee, drafting legislation, lending your support to existing legislation or commenting on proposed rules. Less direct but by no means less effective is engaging the Washington, D.C. trade press and Capitol Hill media or working through an association that specializes in a given market or area of interest to your business.

Despite 2008 being an election year, the 110th Congress has been somewhat active with trade policy matters. A wide variety of measures that impact many industries are under consideration. For example, there are bills to extend the temporary suspension of duties or revise antidumping duties and countervailing duties on many products ranging from plasma television sets to wool and wool products; substances such as carbamic acid, application adjuvants, low-enriched uranium; and many other items. Keeping track of these issues through legislative monitoring and aggressive information-gathering should form the basis of your Washington, D.C. efforts.

The Congress has also considered proposals to combat illegal arms trafficking; taken up several free trade agreements, including agreements with Colombia, South Korea, and Peru; and considered Trade Adjustment Assistance (“TAA”). Several pieces of legislation have been introduced that would enhance or remove economic sanctions on several countries. Also on the agenda for the balance of 2008 is extending trade preference programs for the Caribbean, including extending the Generalized System of Preferences; and changes to U.S.-Cuba policy is also under review. Of interest to our foreign clients are reforms and new regulations surrounding executive branch review of foreign investments in the United States through the Committee on Foreign Investments in the United States (“CFIUS”).

Congressional Committees have also held public comment periods for trade-related matters. These comment-

submitting periods present unique opportunities for individuals, companies, or associations to make their views known on key pieces of legislation. For example earlier this month, the House Committee on Ways and Means, one of the key Committees that has jurisdiction over legislation to amend the U.S. tariff schedule and to make corrections to trade legislation, invited the public to submit comments on several pieces of tariff-related legislation as well as miscellaneous corrections to the trade laws. The comment period closed April 10, 2008, and the Committee is currently reviewing all comments to determine which bills should be included in a miscellaneous tariff bill (“MTB”) to be introduced later this year.

Over in the Senate, the Senate Finance Committee may consider the Trade Enforcement Act and other trade-related measures. The Trade Enforcement Act’s aim is to strengthen U.S. trade remedy laws, create a Senate-confirmed enforcement officer, and increase oversight of dispute settlement implementation. According to one of the bill’s primary sponsors, “fair and firm enforcement includes a WTO-consistent approach to addressing misaligned currencies, like China’s RMB.” Many trade associations have been active expressing their views on these and related measures that will surely impact trade for years to come. As in the other examples cited previously, there will be ample opportunity for stakeholders to engage the Congress and the executive branch on this issue.

In summary, individuals or companies seeking to engage in lobbying activity should not be dissuaded from doing

so just because of the recent lobbying rules changes. Just like filing income taxes on an annual basis, lobbying registration is a requirement of doing business. If you are going to engage the Congress, the executive branch, or both; registration must be done as a matter of course. Transparency and openness is part of our political tradition, and we expect many more reforms in this arena for years to come.

A more primary concern that should drive your engagement decision includes the political and economic marketplaces for your particular issue or problem. What are the regulatory and other legal hurdles and advantages of my issue? What are some of the public relations considerations? What is my political and economic footprint? Are there competitors or other stakeholders that could complement or, in some cases, complicate my efforts? These and other questions should be thought out well in advance of any project to ensure that your strategic plan for trade-related efforts will be as effective as possible. The process is not easy; it is not designed to be. Yet, there is ample opportunity to be an effective advocate, and there are many tools to reach your goal.

**– Jason I. Poblete**

*Jason I. Poblete worked several years in the U.S. Congress with a senior Member of Congress. He was ranked several times as one of the Fifty Most Influential Staffers on Capitol Hill by Roll Call newspaper – the leading oldest Capitol Hill newspaper.*

## The Enforcement of Foreign Arbitral Awards in India

### Summary

It may be an understatement to say that it is very irritating to anyone who has gone through the hard slog of winning an arbitration to then discover that: (a) the loser refuses to pay the award, and (b) the loser then begins to challenge the award in its local courts. In India, an Indian company can attack a foreign arbitration on two levels:

- It can seek to have the award overturned; and/or
- It can seek to have enforcement in India barred.

The recent decision of the Supreme Court of India (“the Supreme Court”) in *Venture Global Engineering vs. Satyam Computer Services Ltd. & Anr.* has sparked debate as to the current position regarding the enforcement of foreign arbitration awards in India, and how enforcement interacts with the ability of the losing party to challenge the very basis of the award. For example, some commentators have advocated that anyone who deals with an Indian counterparty should make sure that the contract excludes India’s Arbitration and Conciliation Act 1996 (“the Act”).

When one delves more deeply into the decision and the way it seeks to interpret the effect of the Act, it becomes clear that the broad effect of this case is limited and does not substantially alter the status quo. BUT, because India is a new global, economic superstar, the case demonstrates three important points:

- Every significant move made by this superstar is now subjected to intense scrutiny;
- That intense scrutiny has, rightly or wrongly, increased India’s risk profile in the minds of commentators on the Indian legal system;

- The case is already being used by Indian lawyers as an excuse to increase the number of challenges made against foreign arbitration awards

### Grounds for Overturning an Award

Foreign arbitration awards are open to challenge under the grounds listed in section 34 of Part I of the Act, which includes the ground that the award is against Indian public policy. Public policy in this sense is stated to encompass the illegality and fundamental policy, interests, justice or morality of India. If an arbitration agreement does not specifically exclude the application of this part of the Act, the award is open to a challenge under the Act. It is possible to exclude the effect of this part of the Act from any contract.

### Grounds for Opposing Enforcement

The grounds for opposing enforcement are found in Part II of the Act. But these grounds are, for the most part, the same as the grounds for challenging the award set out in Part I. The Part II grounds are set out in section 48 of the Act and, as in section 34, cover an award that is considered to be against Indian public policy. There is no case law on the point, but it is generally accepted that any attempt to exclude the effect of Part II of the Act would fail.

### The New York Convention

Where there is a valid agreement for arbitration in, say London, any arbitration award made should be automatically enforceable in all countries that have ratified the New York Convention (“NYC”) without further recourse to the courts for analysis. India has ratified the NYC and therefore, in theory at least, an English award can be enforced in India directly.

*Success on the merits and success in the pocketbook are separate matters.*

Because the decision of *Venture Global Engineering* has, in its application of Part I of the Act, endorsed previous case law to the effect that any foreign arbitration award can be challenged before an appropriate/competent court in India by the losing party, it has provoked complaints that it runs contrary to the spirit of the NYC. Although the NYC permits an award to be challenged on grounds of public policy, in most NYC jurisdictions this is given a far more restrictive interpretation than that given by the Indian courts in the context of the Act.

### **Public Policy as a Justification for the Rejection of Awards**

The facts of *Venture Global Engineering* are interesting, at least to lawyers, but are perhaps not really the point of this piece. What is important is that it continues a line of Supreme Court cases that underpin the willingness of Indian courts to reject foreign arbitral awards on the ground of public policy. The 2002 case of *Bhatia International vs. Bulk Trading S.A. & Anr.* was instrumental in this trend as it established that, in cases of international commercial arbitration held outside of India, the provisions of Part I of the Act will apply unless the parties agree to exclude all or any of its provisions.

As a result of the Supreme Court case of *Oil & Natural Gas Corporation Ltd. vs. Saw Pipes Ltd.*, the definition of “public policy” in section 34 of the Act was controversially expanded such that anything that is against any Indian law is deemed to be opposed to Indian public policy. This means that any foreign awards that are subject to the application of section 34 can be challenged under wider grounds than would usually be permitted under the NYC alone.

In *Venture Global Engineering*, the Supreme Court went one step further in its interpretation of the public policy ground: the winning party was held to have breached the public policy of India in trying to enforce the English award in the United States. This was on the basis that the first Respondent had been motivated by the intention of avoiding the operation of section 48 of the Act, which the Supreme Court viewed as an attempt to avoid the legal and regulatory scrutiny of the Indian courts in the face of facts that had an “intimate and close nexus” with India.

### **The Impact of *Venture Global Engineering***

Following the judgment in *Venture Global Engineering*, if the arbitration agreement does not specifically exclude the application of Part I of the Act, foreign awards are open to challenge by the losing party under the grounds listed in section 34 of Part I.

However, the grounds for opposing enforcement under Part II of the Act mirror those in Part I. Therefore, an exclusion of Part I will be ineffec-

tive where Part II applies. Part II of the Act will always apply to foreign awards when they are enforced in India.

Therefore, although technically the judgment has not made any material changes to the status quo in relation to enforcing English awards in India, it appears to have had significant practical effects:

- The decision is likely to result in an increase in challenges to foreign arbitral awards in India
- It has set alarm bells ringing over the extent to which India is willing to comply with its New York Convention obligations

Since the judgment in *Venture Global Engineering* re-affirms the Supreme Court's views on this issue in previous cases, it seems unlikely that the decision will be overturned. However, there are several pending Supreme Court cases involving the review of foreign awards, and it is possible that these cases may be referred to a higher bench for consideration.

– Paul M. Dillon

## **Competition Corner**

Below is a list of the most recent articles and publications by our Competition lawyers.

- “Competition Law and Policy Developments in China: The New Anti-Monopoly Law,” Sharon Mann (April 2008)
- “Bid-Rigging – the Risks, Office of Fair Trading investigating 112 construction companies” (April 2008)
- “A Small But Important Matter – The Office of Fair Trading approach to the de minimis exception can be hard to predict,” *Competition Law Insight*, Fred Houwen (April 8, 2008)
- *Competition and EC Law Update* – February 2008 (March 14, 2008)
- *Antitrust Regulator* – Winter 2008
- *Competition and EC Law Update* – March 2008 (April 7, 2008)

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*DOJ Opinion Procedure  
Release provides roadmap  
for FCPA due diligence.*

- The Requestor retained a business consultant in the foreign municipality who provided advice on possible due diligence procedures in the foreign country.
- The Requestor commissioned International Country Profiles on the Investment Target and the foreign private company.
- The Requestor searched the names of all relevant persons and entities involved in the transaction on the side of the Investment Target, through the various services and databases accessible to the Requestor's International Trade Department—including a private due diligence service—to determine that no relevant parties were included on lists of designated or denied persons, terrorist watches, or similar designations.
- The Requestor met with representatives of the U.S. Embassy in the foreign municipality and learned that there were no negative records at the Embassy regarding any party to the proposed transaction.
- Outside counsel conducted due diligence and issued a preliminary report, and will issue a final report before the closing of the transaction.
- An outside forensic accounting firm prepared a preliminary due diligence report, and will issue a final report before the closing of the transaction.
- A second law firm has reviewed the due diligence.

**Compliance With Host Country Laws**

The Requestor identified two FCPA-related risks associated with the transparency of the proposed transaction before the relevant host country

authorities and the potential illegality under the host country's laws. The Requestor requested that the private foreign owner disclose his ownership interests and the proposed transaction to the foreign government owner of the Investment Target and its state-owned parent organizations. The private foreign owner refused, arguing it was neither necessary nor customary to do so in the country. In response, the Requestor told the private foreign owner that it was going to abandon the proposed joint venture.

The private foreign owner then sought to renew negotiations with the Requestor, eventually leading to an agreement between the two parties under which the Requestor would conduct additional due diligence to resolve the Requestor's concerns regarding the disclosure and the private foreign owner's compliance with the privatization regulations. The Requestor met with officials and legal representatives at various government-owned entities to discuss the privatization. With the support of the private foreign owner, the Requestor fully disclosed the parties' respective interests and the terms of the proposed transaction. The Requestor received assurances from cognizant officials at the applicable government entities that the proposed transaction complied with the country's privatization regulations.

Following these additional efforts, the Requestor determined that it was prepared to proceed with the proposed transaction.

**FCPA Considerations**

In finding that the proposed transaction would not violate the FCPA, the DOJ made note of the following:

- The private foreign owner is purchasing the Investment Target

shares without assistance from the Requestor.

- The Requestor will make no extra or unjustified payments to the private foreign owner.
- The Requestor will make no payments to any other foreign officials.
- The premium between the private foreign owner's purchase price of the Investment Target shares and the Requestor's purchase price is justified based on legitimate business considerations.
- The private foreign owner's status as a "foreign official" will soon cease.
- The private foreign owner's purchase of the foreign government-owned shares is lawful under the foreign country's laws.
- In pursuing the proposed transaction, the private foreign owner is not illegally or inappropriately acting on a corporate opportunity belonging to the joint venture.

#### **Representations by the Requestor and Private Foreign Owner**

The Requestor represented to the DOJ that it has fully documented its due diligence. In addition, the private foreign owner represented and warranted that there have been no past violations of anti-corruption laws, including the FCPA; that there would be none in the future; and acknowledged its ongoing anti-corruption compliance obligations.

The Requestor further represented that, under the joint venture agreement, it will have the right to withhold payments to the private foreign owner, and/or terminate the joint venture agreement and dissolve the joint venture entity in the event of a breach

of the agreement, including violations of relevant anti-corruption laws. The joint venture agreement also provides for one party to buy out the other in the event of breach of the agreement.

These strong remedial measures available to the Requestor are exactly the sort of FCPA compliance feature the DOJ likes to see. This can be contrasted to an earlier Opinion Procedure Release, dated May 24, 2001, where the DOJ criticized a proposed joint venture where the Requestor could only terminate the agreement on the basis of anti-corruption law violations when the violation "has a material adverse effect on the joint venture."

#### **Raising the Bar**

In endorsing the proposed transaction in this Release, the DOJ commended the Requestor for its thorough due diligence efforts, its insistence on proper transparency and disclosure to the relevant foreign government entities, its securing of representations and warranties for anti-corruption compliance from the Foreign Owner, and its maintenance of contractual rights to terminate the relationship in the event of breach of the joint venture agreement. Nonetheless, the Opinion Procedure Release has given industry clear guidance on just what level of pre-acquisition due diligence the DOJ will deem to pass muster. Companies considering similar style transactions may very well be on notice that any diligence less than that set forth in the first opinion procedure of 2008 could possibly raise compliance concerns. On the flip-side, however, companies that have undertaken sophisticated pre-acquisition due diligence may find that they are likewise afforded the rapid turn-around provided to the Requestor in the subject Opinion

Release. While FCPA enforcement has become more and more aggressive over the past few years, companies may find that solid corporate FCPA compliance is good for business when it comes to advice from the DOJ as well.

– Jason P. Matechak and  
Anne M. Richardson

## Enforcement Highlights

### **Foreign Corrupt Practices Act (“FCPA”) Violations**

■ On Feb. 21, 2008, Flowserve Corporation (“Flowserve”) agreed to pay a \$4 million penalty as part of a settlement agreement regarding criminal charges that its subsidiary, Flowserve Pompes SAS, engaged in conspiracy to commit wire fraud and to violate the books and records provisions of the FCPA when employees and agents paid kickbacks to the Iraqi government in order to obtain contracts for the sale of large-scale water pumps and spare parts for use in Iraqi oil refineries in violation of the United Nations (“U.N.”) Oil for Food Program. According to the agreement, between July 2002 and February 2003, Flowserve Pompes employees paid a total of \$604,651 and offered to pay an additional \$173,758 in kickbacks by inflating the price of contracts by approximately 10 percent before submitting them to the U.N. for approval, and concealed from the U.N. the fact that the contract prices contained a kickback to the Iraqi government. Flowserve acknowledged responsibility for the actions of its subsidiary and agreed to cooperate in the ongoing Oil for Food Program investigation. The DOJ also filed criminal information against Flowserve Pompes, but has agreed to defer prosecution for three years in recognition of Flowserve’s compliance with the investigation; if Flowserve and Flowserve Pompes abide by the terms of the agreement, the DOJ will dismiss the criminal information. In a related matter, Flowserve reached a settlement agreement with the SEC under which it agreed to

pay a \$3 million civil penalty and approximately \$3.5 million in disgorgement of all profits in connection with the above kickbacks. In total, Flowserve has agreed to pay approximately \$10.5 million in penalties in the criminal and SEC cases.

■ On March 20, 2008, AB Volvo agreed to pay a \$7 million penalty as part of a settlement agreement regarding charges that its subsidiaries Renault Trucks SAS and Volvo Construction Equipment AB (“VCE”) engaged in separate conspiracies to commit wire fraud and to violate the books and records provisions of the FCPA by paying kickbacks to the Iraqi government in violation of the U.N. Oil for Food Program in order to obtain contracts for the sale of trucks and heavy commercial construction equipment. According to the agreement, between November 2002 and April 2003, employees and agents of Renault Trucks paid a total of approximately \$5 million in kickbacks to the Iraqi government by inflating the cost of the contracts approximately 10 percent before submitting them to the U.N. for approval, and concealed from the U.N. the fact that the contract prices contained a kickback to the Iraqi government; they were awarded approximately €61 million worth of contracts. In some cases, Renault Trucks paid inflated prices to companies that outfitted the trucks produced by Renault Trucks, and those companies then used the excess funds to pay kickbacks to the Iraqi government on behalf of Renault Trucks. Further, between December 2000 and January 2003, the predecessor to VCE and its distributors

*A slowing economy doesn’t slow FCPA, Export, and Sanctions Enforcement.*

paid approximately \$1.3 million in kickbacks to the Iraqi government by inflating the price of the contracts by approximately 10 percent before submitting them to the U.N. for approval, and concealed from the U.N. the fact that the contract prices contained a kickback to the Iraqi government; they were awarded a total of approximately \$13.8 million worth of contracts. AB Volvo acknowledged responsibility for the actions of its subsidiaries and agreed to cooperate in the ongoing Oil for Food Program investigation. The DOJ also filed criminal information against Renault Trucks and VCE, but has agreed to defer prosecution for three years in recognition of AB Volvo's thorough review of improper payments and implementation of enhanced compliance policies and procedures; if AB Volvo, Renault Trucks, and VCE abide by the terms of the agreement, the DOJ will dismiss the criminal information.

**Commerce Export Violations**

■ On April 4, 2008, the Bureau of Industry and Security within the U.S. Department of Commerce ("BIS") renewed its order temporarily denying export privileges under the Export Administration Regulations ("EAR") of Aviation Services International B.V., Delta Logistics B.V., Robert Kraaijpoel, Niels Kraaijpoel, T.P.C., B.V., Mia Van Gemert, Mojir Trading, Reza Amidi, Lavantia, Ltd., and Mita Zarek (collectively "Respondents") for an additional 180 days. The renewed order prohibits Respondents from participating, directly or indirectly, in any transactions involving any commodity, soft-

ware, or technology exported or to be exported from the United States that is subject to the EAR. This denial of privileges is a consequence of Respondents making knowingly false statements regarding the end-user and country of ultimate destination, and concealing that fact that the true destination for the export items was Iran.

■ On March 28, 2008, BIS entered into a settlement agreement with Aviktor Trading Corporation ("Aviktor"), under which Aviktor agreed to pay \$16,000. Aviktor was charged with two violations of the EAR for the unlicensed export of thermal imaging cameras to Ecuador and for the failure to file a shipping export declaration.

■ On March 19, 2008, BIS entered into a settlement agreement with Agility International, Inc. ("Agility"), formerly known as Matrix International Logistics, Inc., under which Agility has agreed to pay \$13,200. Agility was charged with causing, aiding or abetting an attempt by a Bethesda, Md. company to export concealable vests, body armor and bomb blast blankets to Iraq in violation of the EAR. Agility was also charged with making false and misleading representations regarding the matter.

■ On March 17, 2008, BIS ordered that Balli Group PLC, Balli Aviation, Balli Holdings, Vahid Alaghband, Hassan Alaghband, Blue

*(continued on page 14)*

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Leah March · Reed Smith LLP  
 435 Sixth Avenue · Pittsburgh, PA 15219  
 Phone: 412 288 5735 · Fax: 412 288 3063 · [lmarch@reedsmith.com](mailto:lmarch@reedsmith.com)

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Name

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Company

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Title

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Address

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**'Enforcement Highlights' – continued from page 13**

Sky One Ltd., Blue Sky Two Ltd., Blue Sky Three Ltd., Blue Sky Four Ltd., Blue Sky Five Ltd., Blue Sky Six Ltd., Blue Airways, and Mahan Airways (collectively “Respondents”) may not participate, directly or indirectly, in any transactions involving any commodity, software, or technology exported or to be exported from the United States that is subject to the EAR, as a consequence of their reexport and preparation of additional reexport of U.S. origin aircrafts to Iran without required U.S. government authorization under the EAR.

- On March 14, 2008, BIS entered into a settlement agreement with DHL Holdings, Inc. (“DHL”), under which DHL agreed to pay \$37,500. DHL was charged with aiding and abetting an unlicensed transaction by forwarding items designated as EAR99 to Mayrow General Trading in the United Arab Emirates. Because no export license was obtained, this transaction was in violation of the EAR.
  - On March 12, 2008, BIS ordered the denial of export privileges of WaveLab Inc. (“WaveLab”) for five years for acting with knowledge of EAR violations. WaveLab was charged with exporting microwave amplifiers to the People’s Republic of China without the required export licenses.
  - On March 12, 2008, BIS entered into a settlement agreement with MTS Systems Corporation (“MTS”), under which MTS agreed to pay \$400,000. MTS was charged with knowing that the seismic testing equipment exported could be used on behalf of Indian nuclear testing facilities. MTS omitted this information from its licensing application materials
- in violation of the EAR.
- On March 3, 2008, BIS ordered the denial of export privileges of Ali Asghar Manzarpour for 20 years following Manzarpour’s default for failure to file an answer. Manzarpour was charged with ordering a freight-forwarding company to ship aircrafts from the United States to the United Kingdom knowing that Iran was the ultimate destination. The charges against Manzarpour include causing, aiding or abetting in violation of the EAR, acting with knowledge of a violation, and engaging in a transaction with intent to evade the regulations.
  - On Feb. 12, 2008, BIS ordered that the Sept. 12, 2007 Order denying all export privileges of Mohammad Fazeli from his criminal conviction of violating the International Emergency Economic Powers Act is amended to delete two incorrect addresses and to add his current address.
  - On Feb. 11, 2008, BIS entered into a settlement agreement with Alenia Marconi Systems (“AMS”), which was acquired by SELEX Sistemi Integrati, Inc. (“SELEX”), under which SELEX agreed to pay \$13,200. AMS was charged with exporting an instrument landing system to Iran through Italy without a required license, and making false or misleading statements on the shipper’s export declaration in violation of the EAR.
  - On Feb. 5, 2008, BIS entered into a settlement agreement with Protective Products International Corp. (“PPI”), under which PPI agreed to pay \$65,000. PPI was charged with nine violations of the EAR for the export of ballis-

tic helmets to Chile, Kuwait, the Sultanate of Oman, Trinidad and Tobago, and Saudi Arabia without the required licenses. PPI was also charged with failure to comply with the recordkeeping requirements of the EAR with regard to the prohibited transactions.

### **Office of Foreign Asset Control (“OFAC”) Violations**

■ On April 4, 2008, OFAC announced that Mahdavi’s A&A Rug Company remitted \$9,240 to settle violations of the Iranian Transactions Regulations on July 17, 2003. OFAC alleged that Mahdavi

imported Iranian goods and did not voluntarily disclose this matter to OFAC.

■ On April 4, 2008, OFAC announced that Morgan Stanley remitted \$3,162 to settle allegations of violations of the Narcotics

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Trafficking Sanctions Regulations. On Oct. 11, 2007 Morgan Stanley allegedly issued instructions to a bank for a wire transfer from an SDNT's securities account without an OFAC license, and failed to block the securities account at the time of the SDNT's designation on March 28, 2007.

- On April 4, 2008, OFAC announced that United Advantage Federal Credit Union ("Advantage"), successor to Northwest Federal Credit Union, remitted \$2,970 to settle allegations of violations of Cuban Asset Control Regulations in 2003. (OFAC alleged that processed funds destined for Cuba without a license.) Advantage did not voluntarily disclose the matter to OFAC.
- On April 4, 2008, OFAC announced Good Hope International ("GHI"), of Lenexa, Kansas, remitted \$900 to settle allegations that GHI used the services of an Iranian vessel to transport goods from India to Holland without a license.
- On March 14, 2008, OFAC announced that Citigroup Bank remitted \$16,250 to settle allegations that Citigroup acted without a license or outside the scope of a license by creating a banker's acceptance of goods shipped by a Cuban carrier. Citibank voluntarily disclosed this matter to OFAC.
- On March 14, 2008, OFAC announced that it assessed a \$2,465 civil penalty to America Servi Express, Inc. for violating the Narcotics Trafficking Sanctions Regulations by initiating a wire transfer to a U.S. life insurance company in payment of a premium on a policy issued on the life of a Specially Designated narcotics trafficker.
- On Feb. 22, 2008, OFAC announced that LaSalle Bank Midwest, N.A., on behalf of Standard Federal Bank, remitted \$5,500 to settle allegations that Standard Federal violated OFAC regulations by initiating a funds transfer for a bank owned or controlled by the Government of Iran.
- On Feb. 22, 2008, OFAC announced that BankAtlantic remitted \$7,500 to settle allegations of violations of the Cuban Asset Control Regulations based on a failure to block a payment in which the Cuban Government had an interest. The bank cooperated in OFAC's investigation and voluntarily disclosed the matter to OFAC.
- On Feb. 22, 2008, OFAC announced that Key Bank National Association remitted \$200,000 to settle allegations that Key Bank operated accounts for an entity and person located in Iran. Key Bank did not voluntarily disclose this matter to OFAC.
- On Feb. 22, 2008, OFAC announced that Buehler Ltd. remitted \$20,000 to settle allegations that it violated OFAC regulations by exporting technological equipment to Iran. Buehler cooperated with OFAC in its investigation, but did not voluntarily disclose this matter to OFAC.
- On Feb. 22, 2008, OFAC announced that RMO, Inc. was assessed a \$941 civil penalty based on allegations that RMO dealt in property relating to Cuba or Cuban persons by initiating a funds transfer for travel to Cuba. RMO did not voluntarily disclose this matter to OFAC.

– Leigh T. Hansson and  
Steven D. Tibbets

## CONTRIBUTORS TO THIS ISSUE

**Paul M. Dillon**  
London  
+011 (44) 20 7772 5899  
pdillon@reedsmith.com

**Leigh T. Hansson**  
Washington, D.C.  
+001 202 414 9394  
lhansson@reedsmith.com

**Gregory S. Jacobs**  
Washington, D.C.  
+001 202 414 9480  
gjacobs@reedsmith.com

**Jason P. Matechak**  
Washington, D.C.  
+001 202 414 9224  
jmatechak@reedsmith.com

**Jason I. Poblete**  
Washington, D.C.  
+001 202 414 9205  
jpoblete@reedsmith.com

**Anne M. Richardson**  
Washington, D.C.  
+001 202 414 9257  
arichardson@reedsmith.com

**Steven D. Tibbets**  
Washington, D.C.  
+001 202 414 9242  
stibbets@reedsmith.com

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The editor of *Export, Customs & Trade Sentinel* is Leigh Hansson, a partner in the Washington, D.C. office.

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