



## **International Investment & Development In Focus**

### **Welcome Back from the Committee Co-Chairs**

**Mélida Hodgson and Daniel Marín Moreno**

Welcome to this winter issue of our Committee's newsletter, *IID In Focus* – the first of 2009! This issue includes two interesting pieces: In our feature article, David Lockhart reviews the guidance recently issued by the Committee on Foreign Investment in the United States to U.S. businesses and foreign persons who are parties to covered transactions under the Foreign Investment and National Security Act. The second article, written by Joshua Fellenbaum and Christopher Klein, analyzes the potential for foreign investors to bring investor-state arbitration claims, pursuant to applicable bilateral investment treaties, for discrimination arising out of the current global economic crisis. We are confident you will enjoy them.

2009 comes full of activity for our Committee. The Spring Meeting is almost here! We will meet from April 14 to April 17 at the Fairmont Hotel in Washington, D.C. The Committee is co-sponsoring no less than eight exciting programs, including a multi-session series on the financial crisis and programs on antitrust in Asia; the rule of law in Iraq; cross-border acquisitions due-diligence; foreign investment restriction laws in Germany,

Canada, the United States, and China; environmental protection and regulatory takings; and energy and infrastructure investments in the developing world. We are further holding a committee dinner on Wednesday, April 15, at the Kennedy Center, where we will also meet all the other committees; and a committee lunch on Friday, April 17, at the Fairmont. We hope to see you all there!

Our Committee is also involved in a number of other exciting activities, including collaboration with the World Bank for a new study on foreign investments across the world. We will keep you posted.

Become involved! There are plenty of opportunities to participate in the Committee's activities, including publications, panels, conferences, and many other projects. You are also welcome to join our steering group and be in the frontline on the committee tasks and initiatives.

We are always happy to receive your comments or questions.

### **CFIUS: Expanded National Security Reviews for Foreign Investment in the United States**

**David Lockhart\***

The Committee on Foreign Investment in the United States ("CFIUS" or "Committee") reviews transactions that result in control of U.S. businesses passing to foreign persons, to determine their effects on the national security of the United States. CFIUS has long had authority to recommend that a transaction be modified, suspended, or prohibited.

CFIUS's authority and recently expanded scope was given a statutory basis in October 2007, when

the Foreign Investment and National Security Act ("FINSA")<sup>1</sup> became law. In recent years the factors considered by CFIUS have changed, from solely national security concerns to issues relating to homeland security and its application to critical infrastructure. The CFIUS review also now encompasses assessments of the impacts on critical technologies, the long-term U.S. requirements for sources of energy and other critical resources, and the subject country's relationship with the United

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**Investor-State Arbitration, BITs, and Global Financial Crisis****Joshua Fellenbaum, Esq.,\* and Christopher Klein, Esq.\*\***

A version of this article was originally published in the December-2008 issue of Global Arbitration Review.

\* \* \*

The global economy has struck a significant downturn, which, as this article posits, could have direct effects on investor-state arbitration claims. The International Monetary Fund's ("IMF") October-2008 assessment, *World Economic Outlook Report*, called this economic crisis "the most dangerous financial shock in mature financial markets since the 1930s."<sup>1</sup>

In response, U.S. and European authorities have pursued exceptional fiscal and monetary policies to ameliorate instability in the financial markets, including huge capital injections, amplified deposit-insurance coverage, and interest rate adjustments. Despite these efforts, a number of U.S., European, and Icelandic banks have been resolved through "closure, nationalization, or merger with public support."<sup>2</sup>

This direct host-state intervention has prompted some initial accusations of discrimination against foreign investors, which could open the door for a spike in investor-state arbitration claims. This article analyses the potential for foreign investors to bring such claims arising out of the global economic crisis pursuant to relevant bilateral investment treaties ("BITs") by examining national scenarios.

Global financial markets plummeted into turmoil following the bankruptcy of Lehman Brothers in mid September.<sup>3</sup> In the days after Lehman's collapse, the IMF reported that "market pressure drove the merger of another US investment bank (Merrill Lynch & Co) with a large commercial bank and the effective acquisition by the Federal Reserve of the world's largest insurance company, AIG."<sup>4</sup>

To cope, some host states set forth government-supported initiatives protecting not only domestic banks, but also foreign subsidiaries. For example, the Netherlands now insures new debt to Dutch banks, including foreign subsidiaries with significant operations in the Netherlands; Denmark in-

sure new and existing debt to all solvent banks, including foreign branches of Danish banks; Italy insures some new debt for Italian banks and Italian branches of foreign banks with adequate capital; and Australia insures new and existing wholesale funding for all banks incorporated in Australia and foreign subsidiary banks operating in the country.

On the other hand, there are a number of instances where host states have proposed or instituted measures that only protect domestic banks, therefore potentially violating non-discriminatory guarantees found in relevant BITs. For instance, the Icelandic government proposed legislation to guarantee only the deposits in banks held by Icelandic companies or nationals. (This particular legislation, in fact, was not passed.) Additionally, the Irish Government initially set forth legislation to guarantee only new and existing debt of Irish banks.

**Different Rescue Packages**

In some cases, host states' rescue packages have been highly protectionist and raise the potential for discrimination against foreign investors. Since BITs seek to protect against precisely such discriminatory treatment – and often provide dispute resolution through arbitration – foreign investors should consider them a possible source for bringing a claim.

The first step in seeking arbitral recourse at the International Centre for Settlement of Investment Disputes ("ICSID") is to verify that there indeed is an enforceable BIT between the alleged discriminating host state and the state of which the affected investors are nationals. Next, it is imperative that the language of the relevant BIT is closely scrutinized, mainly because some BITs offer protections not found in others, which will be discussed below.

While parsing the language of the appropriate BIT, attention should be focused on clauses that protect against discrimination, such as national treatment provisions. Most BITs contain some form of a national treatment clause, which essentially provides that a host state will treat the investments of investors from the other state no less favorably

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than those of its own nationals. However, BITs may contain exceptions to national treatment for certain sectors and investors; Thus, a national treatment claim will more likely be successful if no exception applies. In addition, because they provide an alternative pleading to national treatment, BIT provisions on fair and equitable treatment and provisions that prohibit discriminatory measures should be consulted as a basis for a claim. Finally, foreign investors must recognize the defenses that a host state may possess against such a claim, such as invoking the principal of necessity or exceptions based on national law. For example, article 2.2 of the Iceland-China BIT provides that neither state shall impose discriminatory measures, provided that this can be achieved “without prejudice to its [China or Iceland] laws and regulations.”<sup>5</sup>

The following brief case studies apply the process described above to some concrete examples from the recent past:

#### Ireland

Ireland has adopted legislation that would give state guarantees on deposits at its largest banks while failing to offer foreign banks operating within the country the same guarantees. This action (arguably) discriminates against foreign banks and their investors. Concerns about competition prompted the European Commission to make some subsequent changes to those initial measures, including that they also protect a number of specified foreign banks. Although the amended measures provide protection for some banks, they may not cover all foreign banks, and therefore discriminatory claims may still potentially be brought under the relevant BIT.

A foreign investor may find potential redress for Ireland’s actions if it is a national of the Czech Republic, which is the only country to have entered into a BIT with Ireland. Article 3.1 of the Czech Republic-Ireland BIT provides for national treatment, stating that “[e]ach Contracting Party shall in its territory accord to investments and returns of investors of the other Contracting Party treatment which is fair and equitable and not less favourable than that which it accords investments and returns

in of its own investors.”<sup>6</sup> Unlike some BITs from other nations, such as the United States’, no exception to national treatment is provided for the Irish banking industry.

Furthermore, a foreign investor may find potential redress in article 2.1, which states that “[e]ach Contracting Party shall *encourage and create favourable conditions* for investors of the other Contracting Party to make investments in its territory and shall admit such investments in accordance with its laws and regulations.”<sup>7</sup> Arguably, by only insuring the deposits of its domestic banks and a number of foreign banks, Ireland does not create favorable conditions for foreign investors.

#### United States

Following recent adjustments, the United States’ \$700-billion bail-out package will now be used to inject credit into foundering banks, which means that the U.S. Government will buy shares in U.S. financial institutions, rather than buying toxic assets. However, even if those injections go only to domestic banks, foreign subsidiaries would most likely not have a claim of a national treatment violation or any other form of discrimination under a U.S. BIT. This is because, although many of the United States’ BITs provide for national treatment, these BITs provide a list of exceptions to the scope of such treatment. For example, both annexes of the respective U.S.-Bahrain and U.S.-Bolivia BITs assert that the United States may “adopt or maintain exceptions” to national treatment obligations in various sectors, which include banking and securities.<sup>8</sup>

#### Iceland

The economic crisis has led Iceland to nationalize three of its largest banks and to propose a number of other potentially discriminatory measures. Landsbanki, one of Iceland’s most prominent banks, owned Icesave, an online savings service with over 300,000 depositors in the United Kingdom. When Landsbanki was nationalised in October, U.K. chancellor Alistair Darling reported that Iceland had “no intention of paying UK savers’ money back.”<sup>9</sup> The United Kingdom does not have

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a BIT with Iceland, but other treaties and international courts may be used to arbitrate or litigate a potential U.K. claim.

U.K. investors may have no direct BIT with Iceland to rely on, but Iceland has signed BITs with seven other nations. Of those, six have come into force:

- Chile;
- China;
- Latvia;
- Lithuania;
- Mexico; and
- Vietnam.

Therefore, an investor from one of these countries should consult the language of the relevant BIT for possible non-discrimination protection against Iceland. It should be noted that the language of these BITs may vary and provide for protection from claims of discrimination in certain circumstances. For example, one important aspect of the Iceland-China BIT is article 3.3, which states, "either Contracting Party shall, to the extent possible, accord treatment in accordance with the stipulations of its laws and regulations to the investments of investors of the other Contracting Party the same as that accorded to its own investors."<sup>10</sup> Therefore, Iceland could possibly rely on this article to escape certain BIT obligations with China based on its dire economic situation.

**Host-State Defenses**

When reacting to the financial crisis, host states would do well to heed the lessons from Argentina's most recent economic crisis and its palpable effect on international investment arbitration.

The Argentina crisis that unfolded less than a decade ago has left an indelible mark that is still impacting the area of investor-state arbitration. For instance, in *Metalpar S.A. & Buen Aire S.A. v. Argentine Republic*,<sup>11</sup> the tribunal determined that Argentina's steps did not violate the Chile-Argentina BIT, despite the fact that the investors had suffered unfair treatment by Argentina. In *Continental Casualty Company v. Argentine Republic*,<sup>12</sup> the tribunal relied on article XI of the U.S.-Argentina BIT, which states that "[t]his Treaty shall not pre-

clude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or the restoration of international peace or security, or the protection of its own essential security interests."<sup>13</sup> The tribunal noted that "under Art. XI, such measures would lie outside the scope of the Treaty so that the party taking it would not be in breach of the relevant BIT provision" and that a "severe economic crisis may thus qualify under Art. XI as affecting an essential security interest." Similarly, in *LG&E v. Argentine Republic*,<sup>14</sup> the tribunal held that certain periods of the financial crises met the requirements under customary international law for a "state of necessity."

It is important to note, however, that other tribunals have reached different conclusions. In *CMS v. Argentina*<sup>15</sup> and *Sempra v. Argentina*,<sup>16</sup> these tribunals decided that certain aspects of the economic crisis did not meet the standards of the "necessity" defense under international customary law or under article XI. A similar result occurred in *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*.<sup>17</sup>

**Conclusion**

The current financial uncertainties are far from over. The IMF's October-2008 *World Economic Outlook Report* forecasts that "[t]he advanced economies would be in or close to recession in the second half of 2008 and early 2009, and the anticipated recovery later in 2009 will be exceptionally gradual by past standards."<sup>18</sup> Meanwhile, "Growth in most emerging and developing economies would decelerate below trend."<sup>19</sup> As a result, host states will likely pursue further protectionist measures that attempt to stymie the effects of the global economic crisis, potentially violating non-discriminatory guarantees found in the relevant BITs. Thus, potential investor-state arbitration claims may result.

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**Endnotes**

<sup>1</sup> INT'L MONETARY FUND, WORLD ECONOMIC OUTLOOK REPORT 1 (Oct. 2008), available at <http://www.imf.org/external/pubs/ft/weo/2008/02/pdf/text.pdf> [hereinafter IMF OUTLOOK REPORT].

<sup>2</sup> *Id.* at 8.

<sup>3</sup> *Id.* at 7.

<sup>4</sup> *Id.*

<sup>5</sup> Agreement Between the Government of the People's Republic of China and the Government of Iceland Concerning the Promotion and Reciprocal Protection of Investments art. 2.2, Mar. 31, 1994, available at [http://www.unctad.org/sections/dite/ia/docs/bits/china\\_iceland.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/china_iceland.pdf) [hereinafter PRC-Iceland BIT].

<sup>6</sup> Agreement Between the Czech Republic and Ireland for the Promotion and Reciprocal Protection of Investments art. 3.1, June 28, 1996, available at [http://www.unctad.org/sections/dite/ia/docs/bits/czech\\_ireland.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/czech_ireland.pdf).

<sup>7</sup> *Id.* (emphasis added).

<sup>8</sup> See Treaty Between the Government of the United States of America and the Government of the State of Bahrain Concerning the Encouragement and Reciprocal Protection of Investment annex, Sept. 29, 1999, available at [http://www.unctad.org/sections/dite/ia/docs/bits/us\\_bahrain.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/us_bahrain.pdf). See also Treaty Between the Gov-

ernment of the United States of America and the Government of the Republic of Bolivia Concerning the Encouragement and Reciprocal Protection of Investment annex, Apr. 17, 1998, available at [http://www.unctad.org/sections/dite/ia/docs/bits/us\\_bolivia.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/us_bolivia.pdf).

<sup>9</sup> Chris Marshall & Iain Martin, *UK Government Launching Legal Action Against Iceland*, CityWire, Oct. 8, 2008, <http://www.citywire.co.uk/personal/-/news/markets-companies-and-funds/content.aspx?ID=316803>.

<sup>10</sup> PRC-Iceland BIT art. 3.3, *supra* note 5.

<sup>11</sup> Metalpar S.A. & Buen Aire S.A. v. Argentine Repub. (ICSID No. ARB/03/5) (June 6, 2008).

<sup>12</sup> Continental Casualty Co. v. Argentine Repub. (ICSID No. ARB/03/9) (Sept. 5, 2008).

<sup>13</sup> Treaty Between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment art. XI, Nov. 14, 1991, 31 I.L.M. 124 (1992).

<sup>14</sup> LG&E Energy Co., LG&E Capital Corp. & LG&E Int'l Inc. v. Argentine Repub. (ICSID No. ARB/02/1) (July 25, 2007).

<sup>15</sup> CMS Gas Transmission Co. v. Argentine Repub. (ICSID No. ARB/01/8) (May 12, 2005).

<sup>16</sup> Sempra Energy Int'l v. Argentine Repub. (ICSID No. ARB/02/16) (Sept. 28, 2007).

<sup>17</sup> Enron Corp. & Ponderosa Assets, L.P. v. Argentine Repub. (ICSID No. ARB/01/3) (May 22, 2007).

<sup>18</sup> IMF OUTLOOK REPORT, *supra* note 2, at xvi.

<sup>19</sup> *Id.*

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States, specifically on cooperating in counter-terrorism efforts and adherence to nonproliferation control regimes. In addition, the Committee is now directed to investigate every foreign government-controlled transaction, unless it specifically determines that the transaction will not impair U.S. national security.

The Committee also considers other factors that the President or Committee determine to be appropriate.

**History and Original Role of CFIUS**

CFIUS is chaired by the Secretary of the Treasury, and the Department of the Treasury's Office of International Affairs acts as the secretariat, which includes responsibility for coordinating reviews of transactions. It was formed by executive order of President Ford in 1975, issued under the Defense Production Act of 1950, with its original role being to provide information on foreign investments into the United States and to review those that might have major implications for U.S. national interests. In 1988, in response to concerns of Congress and the public about the impacts of increased foreign investment in U.S. companies on America's economy and on defense industries, the Exon-Florio Amendment<sup>2</sup> was inserted in the Omnibus Trade and Competitiveness Act. The amendment authorized the President to block a foreign acquisition if there is "credible evidence" that it will impair the national security and no other law authorizes the required protection. President Reagan delegated this authority to CFIUS.<sup>3</sup>

In earlier years, the Committee focused more on assessment of risks posed by foreign control to the capability of domestic industries to meet national defense requirements, the control of these industries by foreigners, sales of military equipment or technology to countries that support terrorism, missile proliferation, and proliferation of chemical, biological or nuclear weapons. However, foreign investment in U.S. businesses came sharply into focus as Congressional concerns about the adequacy of the CFIUS process grew following the 9/11 attacks and several high-profile transactions in 2005 and 2006 caused public and political controversy. Many of the changes to CFIUS codify prac-

tices developed in recent years.

The intention behind CFIUS is not to alter the United States' generally open foreign investment climate nor to inhibit investment in industries that have no bearing on national security. However, CFIUS has operated under the authority, and has tended to reflect the attitudes and policies, of the President.

**Foreign Investment and National Security Act of 2007 and the FINSA Regulations of 2008**

FINSA became law on October 24, 2007, and the FINSA Regulations came into force on December 22, 2008. FINSA established CFIUS on a statutory basis for the first time and, as mentioned, codified the expanded factors the Committee considers when reviewing transactions, as well as establishing in law the practice of negotiating mitigation agreements with parties to transactions. It added more government agencies to its membership (and more were added by executive order in January 2008; over a dozen are now involved), and enhanced Congressional oversight of the process by requiring certified annual reports and reports of each review and investigation to be provided to Congress.

The 2008 Regulations make substantive changes to the 1991 Regulations, chiefly by clarifying and expanding key definitions and concepts, as well as administrative changes, although the core processes and timelines are not changed: Filing with CFIUS remains voluntary, but the information required to be submitted is significantly expanded; the informal practice of notifying CFIUS before making a filing is explicitly encouraged; a lead agency must be designated for each covered transaction; and sign-off must be at the level of deputy head of the lead agency or higher.

"National security" remains undefined. Hence the Committee's flexibility and discretion in reviewing national security-related issues is maintained.

**Procedure and Timeline under CFIUS**

*Notification.* The parties to a "covered transaction" voluntarily file notice stating that a U.S. corporation

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will become subject to foreign control, or CFIUS itself may unilaterally initiate a review. A “covered transaction” is any merger, acquisition or takeover by or with any foreign person that could result in foreign control of any person engaged in interstate commerce in the United States.<sup>4</sup> While the information to be filed is extensive and burdensome, the benefit of filing is to obtain “safe harbor” against future blocking or unwinding action.

**30-Day National Security Review.** CFIUS must conduct a review of the covered transaction “to determine the effects of the transaction on the national security of the United States,”<sup>5</sup> taking into consideration the enumerated factors. In essence, an assessment is made of (i) any vulnerabilities exposed by the transaction, focusing on the assets being acquired; (ii) the existence of any threat that these vulnerabilities may be exploited by someone with bad intentions coupled with the capability to do harm; and (iii) the likely consequences of successful exploitation of the target. During this period, the Director of National Intelligence is required to conduct a thorough analysis of potential national security concerns, ensuring that the intelligence agencies remain engaged. Reviews by CFIUS of the vast majority of covered transactions end here.

**45-Day Investigation.** Following the review, CFIUS must immediately investigate the effects of the transaction on the national security if the lead agency and CFIUS concur that it should investigate, or it is determined that the proposed transaction (i) threatens to impair U.S. national security and the threat has not been mitigated during the review; (ii) is foreign government-controlled (unless the Secretary of the Treasury and the head of the lead agency jointly determine that there is no impairment); or (iii) would result in foreign control of critical infrastructure and could impair national security, unless mitigated during the review. CFIUS is authorized to take any necessary actions to protect the national security.

**Decision Within 15 Days of Completion of Investigation.** The President must decide whether to suspend or prohibit the transaction (which includes the power to order divestment) – but only if there is “credible evidence” that the foreign acquirer might

take action to impair the national security and there is no other law giving the President the authority to take such steps. The President’s decision is not subject to judicial review.

#### Mitigation Agreements

In the last decade, CFIUS developed a practice of negotiating (or imposing) agreements or conditions on parties to a covered transaction in order to mitigate perceived threats to the national security not addressed under other laws, so as to allow the transaction to proceed. While FINSA provides a statutory basis for the practice, the January-2008 Executive Order imposed a measure of control over mitigation agreements: It requires the lead agency to identify for the Committee the risk posed by the transaction based on factors including the threat, vulnerabilities, and potential consequences; and to set out the mitigation measures it believes are reasonably necessary to mitigate the risk.

The approach of CFIUS and the lead agency to mitigation agreements is dictated by the particular circumstances of the transaction. The agreements range from commitment letters on specific issues of concern to formal national security agreements with binding commitments and liquidated damages for breach.

Agreements often include provisions requiring cooperation in the development and execution of a security plan; background checks on, or limiting involvement in certain sensitive tasks of, foreign personnel; notice of changes to key management positions; certification of export control compliance; customer lists; notifications of security incidents (such as cyber attacks); compliance with international, industry, or federal standards; and rights to visit the site and access books and records. Homeland Security is the lead agency most often a party to them. Efforts to monitor compliance with mitigation agreements once concluded have correspondingly increased.

In 2006, sixteen mitigation agreements were entered into. The fourteen agreements in 2007 involved transactions in the manufacturing, energy, transportation-operations services, and informa-

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tion-technology sectors. Three were full national security agreements.

FINSA directs CFIUS to establish interim protections to address concerns and track actions taken by a party that withdraws a notice of a covered transaction.

#### CFIUS Guidance, December 8, 2008

CFIUS, for the first time, recently published guidance<sup>6</sup> to U.S. businesses and foreign persons that are parties to covered transactions, as required by FINSA. The guidance notes that the types of transactions it has reviewed that have presented national security considerations relate to either or both the nature of the business or identity of the foreign person.

*Nature of the Business.* Many transactions involve foreign-controlled businesses that contract with the U.S. Government and have access to classified information. Others are transactions involving the energy sector at various stages of the value chain (i.e., exploitation, transportation, conversion to power, and supply of power to the U.S. Government and civilian customers); the transportation system, including shipping and aviation; critical infrastructure, including major energy assets (these are decided on a “case-by-case basis depending on the importance of the particular assets”<sup>7</sup>), production of advanced technologies with military applications; production goods subject to export controls; or transactions that could significantly affect the U.S. financial system.

*Identity of the Foreign Person.* Considerations have involved the record of the country on non-proliferation and national security-related matters, such as combating terrorism; track record or intentions of the foreign person and its personnel; where the transaction is foreign government-controlled; whether the person has the capability to use its control to take action to impair security and whether it may seek to do so; the extent to which investment decisions are based on commercial grounds and are independent from the controlling government; the degree of transparency and disclosure of investment objectives; institutional arrangements and financial information; and the degree of regulatory compliance in countries in

which they invest.

CFIUS notes that it has reviewed “numerous foreign government-controlled transactions, determining that there were no unresolved national security concerns”<sup>8</sup> (either the transaction was restructured or some form of mitigation agreement was required). The guidance reiterates the United States’ longstanding commitment to welcoming foreign investment.

#### Penalties

In addition to suspending or blocking a transaction (or unwinding a consummated transaction), fines of up to \$250,000 for filing false information or violating a mitigation agreement are provided for in the regulations. There are also penalties for withdrawing a voluntarily filed notice without CFIUS consent.

#### Key CFIUS Concepts

*Control.* No question of CFIUS review arises unless there is foreign control of a U.S. business. The test of control is whether the acquirer has the power, direct or indirect, and whether or not exercised, to direct or decide important matters affecting an entity. Examples are transfer of principal assets, reorganization, closing of facilities, and termination of contracts. While the FINSA regulations potentially cast a wider net than the previous regulations, through an expanded list of important matters, the analysis of control remains a functional one.

Where more than one foreign person has an interest, CFIUS considers whether they are related or have commitments to act in concert or whether both are controlled by a foreign government.

Transactions which *could* result in control of a U.S. person, irrespective of the actual arrangements for control in place, are caught – for example, in the case of a foreign person having power to appoint the board but deciding for the moment to leave the U.S. directors in place.

The FINSA regulations also expand the list of minority shareholder protections that are not deemed

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to confer control, recognizing that negative rights protect minority shareholders' investment while not necessarily giving power to make strategic decisions. However, the Committee is not precluded from finding that the existence of these rights in combination with others does confer control. Voting securities amounting to less than 10% held solely for the purpose of investment are not covered if the person has no intention of directing business decisions.

The regulations reverse the previous presumption in relation to 50/50 joint ventures so that each party is now deemed to have control.

*U.S. Business.* The acquisition must be of part of an entity or assets to constitute a business. A foreign corporation making a greenfield investment in the United States (e.g., arranging for financing and construction of a plant to make a new product, buying supplies and inputs, hiring personnel, purchasing technology, and purchasing shares in a newly incorporated subsidiary) will not have acquired the "business" of a United States person and the investment is not subject to CFIUS review.

*Critical Infrastructure.* Critical infrastructure comprises systems and assets, physical or virtual, so vital to the United States that incapacity or destruction would have a debilitating effect on national security. National security is to "be construed so as to include those issues relating to homeland security, including its application to critical infrastructure."<sup>9</sup> The Homeland Security Act of 2002<sup>10</sup> sets out the primary mission of the Department as being to prevent terrorist attacks in the United States and reduce U.S. vulnerability, and to minimize the damage and to assist in recovery, from terrorist attacks. It defines critical infrastructure in much the same way as FINSA, except that it refers also to "impact on security, national economic security, national public health or safety, or any combination of those matters."<sup>11</sup>

CFIUS will not deem classes of assets or systems to be or not to be critical infrastructure. There is no elucidation in the regulations of the term "major energy assets."

*Critical Technologies.* Critical technologies are items essential to national defense or controlled

under multilateral regimes for security or prevention of proliferation reasons, as well as those that are controlled for reasons of "surreptitious listening."

**Annual Report to Congress**

The public version of CFIUS's now required Annual Report to Congress was released in December 2008.<sup>12</sup> It contains the following information for 2007: Of all notices of transactions filed with CFIUS, 138 were deemed to be covered transactions. Of these, ten were withdrawn during review, and five of six transactions that were investigated were withdrawn during the investigation. Of these fifteen, thirteen provided new notifications that were concluded by CFIUS without action within the thirty-day review period, and the other two abandoned the transaction. For the one remaining transaction under investigation, structural changes were made, resulting in the foreign person no longer gaining control. Transactions subject to review in 2008 are thought to number around 165.

Almost half of the notices filed in the 2005-2007 period involved U.S. businesses in the manufacturing sector (of which the bulk were computer and electronic products and transportation equipment), and over one-third in the information sector (of which almost half were professional, scientific, and technical services). Mining, utilities, and construction accounted for 9% (amounting to twenty-seven notices, of which fifteen related to electric power generation, transmission, and distribution).

**Filing Considerations**

The FINSA regulations require significantly more information be filed than the previous regulations. The Treasury Department estimates that about one hundred hours are required to prepare a filing. Where parties to a transaction are unsure whether or not it is covered by CFIUS, CFIUS encourages discussion with the Committee to assist in determining whether to file.

No information or documents filed with CFIUS may be made public, except as relevant for administra-

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**"The regulations reverse the previous presumption in relation to 50/50 joint ventures so that each party is now deemed to have control."**

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tive or judicial proceedings.

Ultimately, the judgment as to whether a transaction threatens U.S. national security rests within the President's discretion. Persons considering transactions must exercise considerable judgment and discretion in determining whether to give notice.

\* \* \*

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**Endnotes**

<sup>1</sup> Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, 121 Stat. 246 (codified at 50 U.S.C. App. § 2170).

<sup>2</sup> Exxon-Florio Amendment, 50 U.S.C. App. § 2170 (amending section 721 of the Defense Production Act of 1950), enacted by Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107.

<sup>3</sup> 50 U.S.C. App. § 2170(d)(4)(A).

<sup>4</sup> 50 U.S.C. App. § 2170(a)(3).

<sup>5</sup> 50 U.S.C. App. § 2170(b)(1)(A)(i).

<sup>6</sup> See Guidance Concerning the National Security Review, 73 Fed. Reg. 74567-02 (Dec. 8, 2008), available at [http://www.treas.gov/offices/international-affairs/cfius/docs/GuidanceFinal\\_12012008.pdf](http://www.treas.gov/offices/international-affairs/cfius/docs/GuidanceFinal_12012008.pdf).

<sup>7</sup> EDWARD L. RUBINOFF & TATMAN R. SAVIO, INTERNATIONAL TRADE ALERT: TREASURY ISSUES GUIDANCE ON TRANSACTIONS PRESENTING CFIUS NATIONAL SECURITY CONSIDERATIONS 2 (Akin Gump Strauss Hauer & Feld LLP 2008), available at <http://www.akingump.com/CommunicationCenter/newsalertdetail.aspx?pub=2038>.

<sup>8</sup> Guidance Concerning the National Security Review, 73 Fed. Reg. 74567-02, 74571.

<sup>9</sup> 50 U.S.C. App. § 2170(a)(5).

<sup>10</sup> Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified at various sections of U.S.C.).

<sup>11</sup> 42 U.S.C. § 5195c(e).

<sup>12</sup> CFIUS, ANNUAL REPORT TO CONGRESS (public version 2008), available at [http://www.treas.gov/offices/international-affairs/cfius/docs/FINSA\\_Annual-Report.pdf](http://www.treas.gov/offices/international-affairs/cfius/docs/FINSA_Annual-Report.pdf).

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**“Ultimately, the judgment as to whether a transaction threatens U.S. national security rests within the President’s discretion.”**

## International Investment & Development In Focus

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The **International Investment & Development Committee** addresses issues facing the practitioner counseling clients making cross-border investments, including in emerging economies. These issues include 1) host country programs and reforms intended to promote investments from abroad, including privatization and public-private partnering initiatives and financial market reforms; 2) U.S., bilateral, multilateral, and export credit agency programs to aid these efforts; 3) problems raised by restrictive legal and regulatory requirements governing the making, maintenance, and divestment of investments; 4) unique issues relating to investments in particular sectors, such as those relating to infrastructure and project finance, insurance, and financial services; 5) developing legal and investment structures; and 6) the impact on international investment of developing international norms and standards, such as those relating to advancement and protection of individual legal rights, environmental protection, and the developing international criminal law. The Committee's home on the Internet can be found at <http://www.abanet.org/dch/committee.cfm?com=IC752000>.

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*International Investment & Development In Focus* is a newsletter published biannually by the International Investment & Development Committee of the American Bar Association Section of International Law. *International Investment & Development In Focus* provides updates on current development pertaining to international investment and development, Committee news, and other information of professional interest to members of the Committee.

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