

Global Trade and Customs Journal

Editorial Board

Edwin Vermulst, VVGB Advocaten, Brussels, Belgium, Immediate Past General Editor
Lourdes Catrain, Hogan Lovells, Brussels, Belgium
Patricio Diaz Gavier, Sidley Austin LLP, Brussels, Belgium
Laura Fraedrich, Kirkland & Ellis, Washington, DC
Gary Horlick, Law Offices of Gary N. Horlick, Washington, DC
Jesse G. Kreier, Counsellor and Chief Legal Officer, Rules Division, World Trade Organization
Michael Lux, Graf von Westphalen, Brussels, Belgium
Timothy Lyons QC, London
Kunio Mikuriya, Secretary General, World Customs Organization
James J. Nedumpara, Jindal Global Law School, India
Fernando Piérola, ACWL, Geneva, Switzerland
Davide Rovetta, Grayston & Company, Brussels, Belgium
Cliff Sosnow, Fasken Martineau, Ottawa, Canada
Paolo R. Vergano, FratiniVergano, Brussels, Belgium
Dr. Carsten Weerth, Main Customs Office Bremen; Lecturer for International Trade Law, Jacobs University Bremen
Samuel X. Zhang, SZ Legal, Hong Kong

Publisher

Kluwer Law International
P.O. Box 316
2400 AH Alphen aan den Rijn
The Netherlands

General Editor

Jeffrey L. Snyder, Crowell & Moring, Washington, DC

Corporate Counsel and Book Review Editor

Dr Michael Koebele, Senior Attorney EMEA, Goodyear
Dunlop Tires, Belgium

Interview Editor

John B. Brew, Crowell & Moring, Washington, D.C.

Distribution

In North, Central and South America,
sold and distributed by Aspen Publishers Inc.
7101 McKinney Circle
Frederick MD 21704
United States of America

In all other countries, sold and distributed by

Turpin Distribution
Stratton Business Park
Pegasus Drive, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom

Subscriptions

Global Trade and Customs Journal is published monthly.
Subscription prices for 2014 [Volume 9, Numbers 1
through 12] including postage and handling:
Print subscription prices: EUR 603/USD 804/GBP 443
Online subscription prices: EUR 559/USD 744/GBP 411
(covers two concurrent users)

This journal is also available online at
www.kluwerlawonline.com. Sample copies and other
information are available at www.kluwerlaw.com.
For further information please contact our sales
department at +31 172 641562 or at
sales@kluwerlaw.com.

Advertisements

For advertisement rates please contact
Marketing Department
Kluwer Law International
PO box 16
2400 Alphen aan den Rijn
The Netherlands
Tel: (int.) + 31 172 641 548

Copyright

© 2014 Kluwer Law International

ISSN: 1569-755X

All rights reserved. No part of this publication may be
reproduced, stored in a retrieval system, or transmitted in
any form or by any means, mechanical, photocopying,
recording or otherwise, without prior written permission of
the publishers.

Permission to use this content must be obtained from the
copyright owner. Please apply to: Permissions Department,
Wolters Kluwer Legal, 76 Ninth Avenue, 7th floor,
New York, NY 10011, United States of America.
E-mail: permissions@kluwerlaw.com.

Visit our website at www.kluwerlaw.com

Gone with the Wind II: The Ralls Decision and Lessons for Foreign Investors

Jeremy Zucker & Hrishikesh Hari*

A recent decision of the US District Court for the District of Columbia (District Court) merits consideration by both foreign investors and the US national security community. The case involved a dispute between a foreign investor, Ralls Corporation (Ralls), and the US Government. In July 2012, the Committee on Foreign Investment in the United States (CFIUS) found that Ralls' acquisition of several windfarm projects located near a US Naval facility in Oregon posed a national security risk to the United States. As we discussed at length in a prior article in this Journal, the President then issued a historic order—just the second of its kind—mandating the unwinding of a completed transaction pursuant to a national security review.¹ Ralls then took CFIUS and the President to court, marking the first time an aggrieved foreign investor had done so.

After an initial hearing, in February 2013 the District Court dismissed all but one of Ralls' claims, granting an additional hearing only to determine whether Ralls' due process claim merited further consideration.² On October 9, 2013, the District Court rejected Ralls' due process argument as well, finding national security interests outweighed Ralls' interest in learning the specific grounds for President Obama's divestment order.³ For prospective foreign investors, this ruling offers an important lesson, underscoring the importance of seeking prior approval from CFIUS before entering into a "covered transaction."⁴

I BACKGROUND

The CFIUS is an inter-agency committee that reviews transactions to determine their impact on national security. The CFIUS review process begins either when one or both parties to a "covered transaction" file a voluntary notice with CFIUS or when CFIUS unilaterally initiates review of a covered transaction. A "covered transaction" is defined as "any merger, acquisition, or takeover... by or with any foreign person which could result in foreign control of any person engaged in interstate commerce in

the United States."⁵ Upon receipt of a complete notice of a covered transaction, CFIUS commences a 30-day review and is authorized to conduct an additional 45-day investigation if it determines further investigation is warranted due to national security concerns.⁶ The CFIUS may also negotiate an agreement with any party to a covered transaction to mitigate a national security threat that arises out of a covered transaction.⁷ Once CFIUS completes its review and at any time during a subsequent investigation, CFIUS may conclude that national security concerns raised by a transaction have been addressed. If

Notes

* Jeremy Zucker is a Partner and Hrishikesh Hari is an Associate in the International Trade and Government Regulation practice at the law firm of Dechert LLP in Washington, DC.

¹ *Gone with the Wind: The Ralls Transaction and Implications for Foreign Investment in the United States*, 8 *Global Trade and Customs Journal* 7/8 (2013) (noting that the only other such order was issued by President George H. W. Bush in 1990 and that CFIUS has effectively blocked or required the unwinding of many other transactions without a formal order. For example, of the 269 notifications received by CFIUS from 2009–2011, 25 transactions were withdrawn during CFIUS' review or investigation period.)

² See *Amended Memorandum Opinion in Ralls Corp. v. Barack H. Obama, et al.*, Case No. 12-cv-01513 (D.D.C. February 26, 2013) (hereinafter 'Ralls Decision I').

³ See *Amended Memorandum Opinion in Ralls Corporation v. Committee on Foreign Investment in the United States, et al.*, Civil Action No. 12–1513 (D.D.C. October 9, 2013) (hereinafter 'Ralls Decision II').

⁴ A "covered transaction" is defined as any merger, acquisition, or takeover . . . by or with any foreign person which could result in foreign control of any person engaged in interstate commerce in the United States." Defense Production Act of 1950 app. §2170, 50 U.S.C. app. § 2170 (1950) (as amended). The CFIUS is organized under section 721 of the Defense Production Act of 1950, as amended by the Foreign Investment and National Security Act of 2007 (FINSIA) (section 721) and as implemented by Executive Order 11858, as amended, and regulations at 31 C.F.R. Part 800.

⁵ *Ibid.*, § 2170 (a)(5).

⁶ *Ibid.*, § 2170 (b)(1)(E). Further investigation is mandatory if the initial review results in a determination that: (1) the transaction is a "foreign government controlled transaction[;]" or (2) the transaction "would result in control of any critical infrastructure of or within the United States by or on behalf of any foreign person[.]" *Ibid.*, § 2170(b)(2).

⁷ *Ibid.*, § 2170(l)(1)(A).

such concerns remain unaddressed at the conclusion of an investigation, CFIUS refers the transaction to the President for a decision. The President enjoys broad discretion in taking actions deemed appropriate to suspend, prohibit, or unwind a covered transaction when acting based on credible evidence, but must announce a decision within fifteen days.⁸ According to the governing statute and regulations, “[t]he actions of the President . . . and the findings of the President . . . shall not be subject to judicial review.”⁹

Ralls is a Delaware corporation owned by two Chinese nationals.¹⁰ In March 2012, Ralls purchased membership interests in several windfarm projects located in close proximity to a restricted airspace and bombing zone maintained by the US Navy in Oregon. The Navy requested Ralls move a windfarm to reduce airspace conflicts with low-level military aircraft training. Ralls agreed to move the windfarm and with the Navy’s support obtained the necessary local permits and began construction in April 2012. Ralls, however, did not avail itself of CFIUS’ review process prior to consummating the acquisition.

Mid-2012, CFIUS learned of Ralls’ project and invited Ralls to submit a voluntary notification of a covered transaction (or, inferentially, risk CFIUS unilaterally initiating a review).¹¹ Ralls filed a voluntary notice in June, and in the ensuing weeks CFIUS asked a number of follow-up questions. In July and August 2012, CFIUS issued two orders establishing “interim mitigation measures” due to national security concerns perceived to be posed by the Ralls transaction.¹² The CFIUS then determined that further investigation was warranted; at the end of the investigation period, CFIUS transmitted a report to the President. In September 2012, the President issued an order mandating the unwinding of the Ralls transaction, stating there is credible evidence that the Ralls transaction “threatens to impair the national security of the United States.”¹³ In response to the President’s order, Ralls filed a complaint in federal court challenging both CFIUS orders as well as the President’s order.

2 THE COURT CHALLENGE

In February 2013, the court dismissed all but one of Ralls’ claims against the President and CFIUS. The finality provision protecting the President’s order from judicial review formed the basis for the dismissal of Ralls’ substantive claims.¹⁴ The District Court permitted additional briefing regarding Ralls’ argument that the President’s order violated the due process clause of the Fifth Amendment to the United States Constitution.¹⁵

To succeed with the due process claim, Ralls needed to show both that the Government deprived Ralls of a protected interest, and that the Government did not afford Ralls constitutionally sufficient procedure. The District Court held that Ralls did not have a protected property interest.¹⁶ The court reasoned that Ralls’ acquisition occurred subject to a “known risk of a Presidential veto” because “Ralls waived the opportunity – provided by the very statute that it claims lacks the necessary process – to obtain a determination from CFIUS and the President before it entered into the transaction.”¹⁷ “Ralls cannot predicate a due process claim now on the state law rights it acquired when it went ahead and assumed that risk.”¹⁸ As such, the District Court found it inappropriate to apply the same due process analysis that would apply if the Ralls transaction had taken place without the opportunity for prior approval from CFIUS.

Further, the court found Ralls received sufficient process.¹⁹ The court reasoned Ralls’ process consisted of a voluntary notification to CFIUS in June 2012, subsequent discussion with CFIUS on follow-up questions, the opportunity to meet with CFIUS before CFIUS issued orders establishing interim mitigation measures, and the opportunity to voluntarily divest before a Presidential order was issued.²⁰

Ralls further protested the sufficiency of the process because it was not informed of the basis for the President’s concerns regarding the threat to national security posed by the transaction. Ralls’ due process claim centered on whether CFIUS and/or the President are required to give

Notes

⁸ *Ibid.*, § 2170(d)(1).

⁹ *Ibid.*, § 2170(e).

¹⁰ *Ralls Corp. v. Barack H. Obama et al.*, U.S. District Ct. for the District of Columbia (Case No. 1:12-cv-01513-ABJ), Amended Complaint for Declaratory and Injunctive Relief, October 1, 2012 (hereinafter ‘Amended Complaint’).

¹¹ Ralls Decision II, *supra* n. 3, at 6.

¹² *Ibid.*

¹³ *Ibid.*, at 7.

¹⁴ Ralls Decision I, *supra* n. 2.

¹⁵ U.S. CONST. amend. V (stating “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law[.]”).

¹⁶ Ralls Decision II, *supra* n. 3, at 12.

¹⁷ *Ibid.*, at 19.

¹⁸ *Ibid.*, at 14.

¹⁹ *Ibid.*

²⁰ *Ibid.*, at 20–21.

companies an opportunity to review, respond to, and/or rebut any evidence upon which an order blocking a transaction or requiring divestiture is based. A key difficulty in providing such an opportunity in this particular context is that, according to the Government, CFIUS (and the President) acted based on classified information. The court balanced Ralls' request with the Government's interest in protecting national security and ultimately ruled in favor of the Government, again reiterating that the Defense Production Act of 1950 "expressly bars the courts from reviewing the actions and finding of the President, which can be based on any factor that he deems appropriate."²¹

According to the court, "the probable added value of providing Ralls with the reasons for the President's proposed determination would be minimal in this case. Ralls was afforded an opportunity to present all of the reasons why it believed its involvement in the Project Companies did not pose a threat to national security at a meeting with representatives from CFIUS."²² The court then held that Ralls received "all of the fundamental requirements of due process: notice of the impending action and an opportunity to be heard, appropriate to the nature of its case."²³

3 ANALYSIS AND REFLECTION

The District Court went to great lengths to note the importance of seeking prior approval from CFIUS before consummating a covered transaction, stating the provisions are "designed to create a powerful incentive for foreign-owned companies to file the voluntary notice before entering into a transaction."²⁴ The court cited testimony from government officials driving home this point:

[H]aving sat on boards of directors both at home and abroad, I cannot imagine in the post-Sarbanes-Oxley world . . . how any director could give the go-ahead on a transaction [that had not been completed], because the President's authority to unwind that transaction is

without limit if the person has not received approval of the process . . . [T]hat very powerful nonjudicially reviewable authority of the President to stop or unwind that transactions acts as a real leavener on the process . . .²⁵

There is no right to buy. You do not have to file, but by not filing, you do not immunize yourself from a finding that the transaction could be canceled on security grounds.²⁶

The message from the District Court to Ralls and prospective foreign investors contemplating "covered transactions" is clear: seek pre-transaction approval from CFIUS. The courts are not a viable alternative forum to seek relief if a foreign investor elects to waive this option.

Ralls' experience highlights a number of important considerations for foreign investors:²⁷

- regulatory approval by various branches of the US Government outside of the formal CFIUS approval process is not a safe harbor;
- recent CFIUS actions indicate a concern regarding so-called persistent co-location, or the proximity of targets of foreign investment to sensitive US Government facilities; and
- alternative approaches to investing in the United States (such as greenfield investments) that are not deemed "covered transactions" and therefore are not within the jurisdiction of CFIUS might merit additional consideration.

While based on statutory and constitutional authority, both the February and October District Court decisions are in keeping with a tradition of judicial deference to discretionary decisions made by the President in the realm of foreign policy and national security. Even though Ralls' challenge to CFIUS did not succeed, prospective foreign investors may benefit from the company's painful experience. The Ralls appeal generated a unique public record, providing insights that may assist with future CFIUS risk assessments.

Notes

²¹ *Ibid.*, at 23.

²² *Ibid.*

²³ *Ibid.*, at 29.

²⁴ *Ibid.*, at 12.

²⁵ *Ibid.*, at 13 (citing *A Review of the CFIUS Process for Implementing the Exon-Florio Amendment: Hearings Before the Comm. On Banking, Housing, and Urban Affairs*, 109th Cong. 114 (2004) (testimony of Robert M. Kimmit, Deputy Secretary, U.S. Dep't of Treasury)).

²⁶ *Ibid.*, (citing *Committee on Foreign Investment in the United States (CFIUS), One Year After Dubai Ports World: Hearing before H. Comm. On Fin. Servs.*, 110 Cong. 26 (2007) (statement of Rep. Barney Frank, Chairman, H. Comm. on Fin. Servs.)).

²⁷ Gone with the Wind: The Ralls Transaction and Implications for Foreign Investment in the United States, *supra* n. 1, at 186–190 (providing additional detail on the considerations summarized herein).

Author Guide

[A] Aim of the Journal

Global Trade and Customs Journal provides readers with new ideas, fresh insights, and expert views on critical practical issues affecting international trade, including export controls, trade remedies, and customs compliance, with a growing focus on international investment regulation. Written for practitioners by practitioners, the journal offers practical analysis, reliable guidance, and experienced advice to support professionals in protecting their clients' or organization's compliance interests.

[B] Contact Details

Manuscripts should be submitted to the General Editor, Jeff Snyder.

E-mail: jsnyder@crowell.com

[C] Submission Guidelines

- [1] Manuscripts should be submitted electronically, in Word format, via e-mail.
- [2] Submitted manuscripts are understood to be final versions. They must not have been published or submitted for publication elsewhere.
- [3] Articles should not exceed 7,500 words.
- [4] Only articles in English will be considered for publication. Manuscripts should be written in standard English, while using 'ize' and 'ization' instead of 'ise' and 'isation'. Preferred reference source is the Oxford English Dictionary. However, in case of quotations the original spelling should be maintained. In case the complete article is written by an American author, US spelling may also be used.
- [5] The article should contain an abstract, a short summary of about 100 words. This abstract will also be added to the free search zone of the Kluwer Online database.
- [6] A brief biographical note, including both the current affiliation as well as the e-mail address of the author(s), should be provided in the first footnote of the manuscript.
- [7] An article title should be concise, preferably with a maximum of 70 characters.
- [8] Special attention should be paid to quotations, footnotes, and references. All citations and quotations must be verified before submission of the manuscript. The accuracy of the contribution is the responsibility of the author. The journal has adopted the Association of Legal Writing Directors (ALWD) legal citation style to ensure uniformity. Citations should not appear in the text but in the footnotes. Footnotes should be numbered consecutively, using the footnote function in Word so that if any footnotes are added or deleted the others are automatically renumbered.
- [9] Tables should be self-explanatory and their content should not be repeated in the text. Do not tabulate unnecessarily. Tables should be numbered and should include concise titles.
- [10] Heading levels should be clearly indicated.

For further information on style, see the House Style Guide on the website: www.kluwerlaw.com/ContactUs/

[D] Review Process

- [1] Before submitting to the publisher, manuscripts will be reviewed by the General Editor and may be returned to author for revision.
- [2] The journal's policy is to provide an initial assessment of the submission within thirty days of receiving the posted submission. In cases where the article is externally referred for review, this period may be extended.
- [3] The editor reserves the right to make alterations as to style, punctuation, grammar etc.
- [4] The author will also receive PDF proofs of the article, and any corrections should be returned within the scheduled dates.

[E] Copyright

- [1] Publication in the journal is subject to authors signing a 'Consent to Publish and Transfer of Copyright' form.
- [2] The following rights remain reserved to the author: the right to make copies and distribute copies (including via e-mail) of the contribution for own personal use, including for own classroom teaching use and to research colleagues, for personal use by such colleagues, and the right to present the contribution at meetings or conferences and to distribute copies of the contribution to the delegates attending the meeting; the right to post the contribution on the author's personal or institutional web site or server, provided acknowledgement is given to the original source of publication; for the author's employer, if the contribution is a 'work for hire', made within the scope of the author's employment, the right to use all or part of the contribution for other intra-company use (e.g. training), including by posting the contribution on secure, internal corporate intranets; and the right to use the contribution for his/her further career by including the contribution in other publications such as a dissertation and/or a collection of articles provided acknowledgement is given to the original source of publication.
- [3] The author shall receive for the rights granted a free copy of the issue of the journal in which the article is published, plus a PDF file of his/her article.