CORPORATE COUNSEL'S INTERNATIONAL ADVISER

MAY 2012 | NUMBER 324

IN THIS ISSUE:

LETTER FROM THE EDITOR

Dear Subscribers,

In this issue we are pleased to present "Restitution Despite The Revenue Rule: An Opportunity For Foreign States To Recover Through U.S. Courts The Taxes They May Not Pursue Directly" by Boaz S. Morag and Kamal Sidhu of Cleary Gottlieb Steen & Hamilton, LLP.

For decades, if not centuries, foreign sovereigns seeking to pursue claims or collection of existing judgments for unpaid taxes and other lost revenue in United States courts have been thwarted by the "Revenue Rule", write the authors. This common law principle precludes enforcement by one nation of the tax or revenue claims of another nation. However, a decision in 2011 by the Second Circuit, *United States v. Bengis*, represents the first time that a U.S. court has directed the entry of a money judgment providing for the remedy of restitution of revenue lost by a foreign state. In this article the authors provide background and analysis of the Revenue Rule and what the future may bring given this decision.

Very truly yours,
Lisa K. Gregory
Principal Attorney Editor

RESTITUTION DESPITE THE REVENUE RULE: AN OPPORTUNITY FOR FOREIGN STATES TO RECOVER THROUGH U.S. COURTS THE TAXES THEY MAY NOT PURSUE DIRECTLY

by Boaz S. Morag and Kamal Sidhu[1]

For decades, if not centuries, foreign sovereigns seeking to pursue claims or collection of existing judgments for unpaid taxes and other lost revenue in United States courts have been thwarted by the "Revenue Rule." This common law principle precludes enforcement by one nation of the tax or revenue claims of another nation. As most recently articulated by the Court of Appeals for the Second Circuit, the Revenue Rule is designed to address the concerns "that policy complications and embarrassment may follow when one nation's courts analyze the validity of another nation's tax laws; and . . . that the executive branch, not the judicial branch, should decide when our nation will aid others in enforcing their tax laws."[2] According to the United States Government, the purposes of the Revenue Rule "are to prevent a foreign government from asserting its sovereignty in this country and to relieve courts of the need to make sensitive policy judgments on which foreign tax claims should be enforced and which should not."[3]

Over the last few years, the Revenue Rule has been invoked by U.S. courts to dismiss the claims brought by Canada and numerous European and Latin American countries against U.S. tobacco companies for money damages on account of lost tax revenues and enforcement costs resulting from cigarette smuggling schemes. In these cases, foreign governments alleged that U.S. tobacco companies engaged in conspiracies to smuggle cigarettes into those countries for sale on the black market and thus deprived the importing countries of tax revenue. But the Revenue Rule barred all attempts by those governments to recover the lost revenue in U.S. courts through claims under the Racketeer Influenced and Corrupt Organizations Act (RICO).[4] The Revenue Rule has also prevented Indonesia from having its tax claims allowed against a Chapter 11 debtor in a U.S. bankruptcy proceeding. Finding "that the Revenue Rule is firmly entrenched," the bankruptcy court held that Rule prohibited Indonesia's attempt to recover sales and income taxes owed to it by one of the debtor's Indonesian subsidiaries through the debtor's bankruptcy proceeding.[5]

The doctrine is perceived to be so absolute that a major U.S. bank was "confident" in advising its shareholders and regulators that thanks to the "well-established Revenue Rule," were any judgment rendered against it by a Russian court in a $22.5 billion action by the Russian Federal Customs Service based on the underpayment of value added taxes, such a judgment "would not be enforceable in countries where [the bank] has significant assets."[6] In that case, the Russian Federal Customs Service sued Bank of New York Mellon claiming that the bank fraudulently transferred money out of Russia, one alleged consequence of which was the Russian government's loss of a significant sum of revenue.[7]

Despite its position that it is for the Executive Branch, not U.S. courts, to make "sensitive policy judgments" on foreign tax claims, the Executive Branch has no established practice of either negotiating bilateral treaties that include a commitment to enforce such claims,[8] or of supporting the use of U.S. courts by foreign states to pursue them. Indeed, research has not

CORPORATE COUNSEL'S INTERNATIONAL ADVISER (ISSN 0898-9907) is published monthly by Thomson Reuters, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526. POSTMASTER: send address changes to CORPORATE COUNSEL'S INTERNATIONAL ADVISOR, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526.

turned up any instance of the United States urging or even acquiescing in a U.S. court hearing such lost revenue claims. To the contrary, the United States has taken the position that foreign sovereigns' lost tax revenue claims against U.S. tobacco companies were barred by the Revenue Rule.[9]

Against this background, a decision in 2011 by the Second Circuit, *United States v. Bengis*, represents the first time that a U.S. court has directed the entry of a money judgment providing for the remedy of restitution of revenue lost by a foreign state.[10] By ordering restitution to the Republic of South Africa as the "victim" of an overfishing scheme that deprived South Africa of revenue, the decision opens the door to selective circumvention of the Revenue Rule at the behest of the United States for the benefit of foreign sovereigns.

THE WELL-ESTABLISHED REVENUE RULE

The Revenue Rule was first announced in 1729, when an English court refused to enforce a bond executed in Scotland (a separate sovereign for tax purposes) for Scottish duties on tobacco.[11] Thereafter, throughout the eighteenth century, English courts invoked the Revenue Rule to protect British trade from foreign customs and tax laws by not enforcing the collection of foreign taxes in England.[12] Since then, English courts have extended the Revenue Rule to prevent the enforcement of foreign penal laws and, as one English jurist has put it, any laws which are an "exercise by the sovereign government of its sovereign authority over property within its territory or over its subjects wherever they may be."[13] Other common law jurisdictions, such as Canada and Ireland, have also adopted the Revenue Rule.[14]

In 1806, a state court in New York became the first court in the United States to recognize and apply the doctrine, in holding that a promissory note issued in France could be enforced in New York in spite of the absence of a tax stamp required by French law. "As we do not sit here to enforce the revenue laws of other countries," the court said, "it is perfectly immaterial, in a suit before us, whether or not the note was stamped according to the laws of France."[15] Most early Revenue Rule decisions in the United States barred the enforcement of one state's taxes in the courts of a sister state. *Moore v. Mitchell*[16] is the most famous in this line of cases owing to the concurring opinion of Judge Learned Hand, in which he articulated what thereafter became most widely cited rationale for the Revenue Rule in the United States, namely the separation of powers:

> To pass upon the provisions for the public order of another state is, or at any rate should be, beyond the powers of a court; it involves the relations between the states themselves, with which courts are incompetent to deal, and which are [e]ntrusted to other authorities. It may commit the domestic state to a position which would seriously embarrass its neighbor. Revenue laws fall within the same reasoning; they affect a state in matters as vital to its existence as its criminal laws. No court ought to undertake an inquiry which it cannot prosecute without determining whether those laws are consonant with its own notions of what is proper.[17]

Pasquantino

Although it was well-settled that foreign sovereigns may not directly or indirectly pursue civil suits in the United States to collect on their tax claims or judgments, by 2005 a circuit split in the federal courts of appeals had developed over whether the Revenue Rule also precluded criminal prosecutions brought by the United States itself over schemes that harm foreign states. These cases addressed whether a defendant could be put in jail in this country and/or pay a fine to the United States Treasury for violating U.S. criminal laws whose factual predicate involved cheating a foreign state out of taxes or other revenue. The issue that divided the Courts of Appeal was whether such prosecutions ran afoul of the Revenue Rule, because in order to find a violation of federal law, the U.S. court had to recognize and find a violation of a foreign revenue law.

The question came up in the First, Second and Fourth Circuits in prosecutions under the federal wire fraud statute, which prohibits using interstate communications to effect "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises."[18] In *United States v. Trapilo*, the Second Circuit held that the U.S. Government may prosecute defendants under the wire fraud statute in connection with a smuggling operation even when the scheme defrauds a foreign nation of its tax revenue.[19] The Second Circuit adhered to this principle in *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, distinguishing between civil suits brought by a foreign sovereign, which are barred by the Revenue Rule, and criminal prosecutions brought by the United States, which the rule does not bar. In criminal prosecutions, the court reasoned, the litigation is inherently subject to the oversight of the Executive Branch and, thus, the foreign relations interests of the United States are presumably taken into consideration.[20]

By contrast, the First Circuit in *United States v. Boots* held that defrauding a foreign nation of its tax revenue could not be prosecuted by the United States under the wire fraud statute, because even though the case did not directly involve enforcement of a foreign tax judgment, "[w]here a domestic court is effectively passing on the validity and operation of the revenue laws of a foreign country, the important concerns underlying the Revenue Rule are implicated."[21]

In *Pasquantino v. United States*, when the defendants challenged their conviction under the wire fraud statute for scheming to evade Canadian import taxes on liquor, a panel of the Fourth Circuit Court of Appeals reversed their convictions on account of the Revenue Rule.[22] But, upon rehearing en banc, the full court affirmed the convictions holding that the Revenue Rule did not preclude the prosecution.[23] The Supreme Court granted certiorari to resolve the circuit split.

Accepting the Second Circuit's rationale, the Supreme Court held that the Revenue Rule did not preclude prosecution of defendants under the wire fraud statute, notwithstanding the necessity of pleading and proving a scheme to defraud the Canadian government of tax revenue.[24] In seeking reversal of their conviction, the *Pasquantino* defendants argued that the fact that their conviction was subject to the provisions of the Mandatory Victims Restitution Act (MVRA), under which Canada would be compensated monetarily for its lost tax revenue, was further proof that the Revenue Rule barred this prosecution. Responding to this argument, the five-justice majority observed:

> [A]ny conflict between mandatory restitution and the revenue rule would not change our holding today. *If awarding restitution to foreign sovereigns were contrary to the revenue rule, the proper resolution would be to construe the Mandatory Victims Restitution Act not to allow such awards, rather than to assume that the later enacted restitution statute impliedly repealed [the wire fraud statute] as applied to frauds against foreign sovereigns.*[25]

Interestingly, in *Pasquantino*, the United States itself seemed uncertain about the propriety of restitution as a remedy when the "victim" was a foreign sovereign. In its brief before the Supreme Court, the Government pointed out that it had not sought restitution before the district court in *Pasquantino* "on the theory that it was not appropriate . . . since the victim is a foreign government and the loss derives from tax laws of the foreign government."[26] The Government further argued that even if there were an incompatibility between restitution to a foreign government and the Revenue Rule, the proper solution—as Supreme Court's majority opinion accepted— would be to deny restitution to Canada, not to preclude the criminal prosecution entirely.[27]

The *Pasquantino* dissent, by contrast, rejected the notion of recognizing an exception to the mandatory restitution statute in the case of foreign sovereign victims. Authored by Justice Ginsburg, and joined on this point by Justices Breyer, Scalia, and Souter, the dissent observed that "the very fact the Government effectively invited the District Court to overlook the mandatory restitution statute out of concern for the revenue rule . . . further demonstrates that the Government's expansive reading of § 1343 [the wire fraud statute] warrants this Court's disapprobation."[28] Because restitution is mandatory in all wire fraud prosecutions that result in a conviction, and such restitution would violate the Revenue Rule, which was in existence when Congress enacted the wire fraud statute in 1952, this was further evidence to the dissenting justices that Congress had not intended to permit criminal prosecutions when foreign taxes were the object of the scheme to defraud.

Pasquantino thus both clarified and confused the applicability of the Revenue Rule as it relates to schemes that deprive foreign states of taxes or other revenue. On the question of whether the rule prohibits criminal prosecutions by the United States predicated on the establishment of a violation of foreign tax laws—the question that had previously split the Courts of Appeals—the Supreme Court, by a five-to-four majority, answered that it does not. Less clear was whether the United States could seek restitution as a remedy for a foreign state's lost tax revenue. The four dissenting justices adhered to the view that awarding restitution to a foreign sovereign would be contrary to the Revenue Rule and therefore precluded both the prosecution and necessarily any remedy of restitution. The five justices in the majority acknowledged the possibility that "*awarding restitution to foreign sovereigns were contrary to the revenue rule*," in which case, they opined, the defendant may be convicted but the foreign state should be denied restitution. Not one of the justices affirmatively determined that awarding a foreign state restitution would be compatible with the Revenue Rule.

Bengis

Whether awarding restitution to a foreign sovereign is in fact foreclosed by the Revenue Rule was squarely presented, yet not analyzed, in the *Bengis* case decided by the Second Circuit in 2011. Over several years, Arnold and David Bengis and Jeffrey Noll engaged in a scheme to harvest quantities of rock lobsters in South African waters that exceeded the quotas under a South African conservation and fishing law. They then exported many of those lobsters for sale in the United States in violation of the Lacey Act, which outlaws the transport or trade of any wildlife or fish "sold in violation of any law or regulation of any State or in violation of any foreign law."[29] The defendants' fishing company paid $5.77 million in fines and forfeitures to the South African authorities to settle criminal charges in that country. The United States Government then prosecuted the three men in this country for violating the Lacey Act and conspiring to violate the Lacey Act and to commit smuggling under 18 U.S.C § 371, the federal criminal conspiracy statute. The defendants pled guilty to the charges.

The United States—contrary to the position it took before the district court in *Pasquantino*—sought the imposition of a restitution order against the *Bengis* defendants in excess of $39.7 million after deducting the value of the settlement their company had already reached with South Africa.[30] The United States relied on the Victims and Witness Protection Act (VWPA) and the MVRA. Under the VWPA, a federal court has the discretion to order restitution to the victims of an offense under Title 18 of the U.S. Code.[31] The court is to consider the amount of loss sustained by each victim, the financial resources of the defendant and the burden that calculating restitution may place on the sentencing process.[32] By contrast, the MVRA requires that restitution be ordered in the case of convictions for certain crimes, including crimes of violence and offenses against property under Title 18 "including any offense committed by fraud or deceit," in which identifiable victims have suffered physical injury or pecuniary loss.[33] Both statutes define a "victim" as a person who is "directly and proximately harmed" as a result of the offense.[34]

The district court adopted the recommendation of the magistrate judge and denied the Government's application for restitution under both the MVRA and the VWPA because it held that South Africa was not a "victim" for the purposes of either of these acts and had no property interest in the lobsters or the revenue it lost from the defendants' breach of South African conservation laws. Notably absent from the magistrate judge's reports and recommendations and from the district court's brief orders adopting them is any reference to the Revenue Rule.[35]

The Government appealed the denial of restitution and, in January 2011, the Court of Appeals reversed, holding that South Africa was eligible for restitution under both the MVRA and VWPA. In a unanimous opinion, Judge Hall concluded that South Africa could be considered a "victim" for the purposes of the two restitution statutes and that it had a property interest not in the lobsters within its territorial waters, but rather in the revenue it lost because under South African law, lobsters harvested in excess of the quota are subject to seizure and sale by the South African government. The appeal court remanded the case to the district court to calculate the amount of that lost tax revenue, estimated by an expert retained by South Africa and proffered by the United States as in excess of $60 million based on the market value of the over-harvested lobsters.[36]

Although *Bengis* presented an occasion to rule on the compatibility of restitution with the Revenue Rule, the appellate court also ignored the issue entirely, as did the parties' briefs before it.[37] This is particularly surprising because the panel prominently cited *Pasquantino* for its holding that a foreign sovereign's interest in collecting revenue is a legitimate property interest, but neglected considering the suggestion by the *Pasquantino* majority, and determination by the dissent, that awarding restitution to a foreign state would be contrary to the Revenue Rule.[38]

Whether the award of restitution to South Africa in Bengis is compatible with the Revenue Rule is a question worthy of exploration. In its brief before the Supreme Court in Pasquantino, the United States questioned whether "restitution to a foreign government should be regarded as an indirect substitute for a suit by the foreign government itself seeking to recoup tax losses," because restitution is a sanction that only the U.S. Government has the authority to authorize, initiate and enforce. The implication of the U.S Government's position was that the involvement of the Executive Branch in the process of seeking restitution addresses the separation of powers concerns animating the Revenue Rule.[39] However, although a criminal prosecution and the restitution that follows may be the sole prerogative of the U.S. Government, to the extent that restitution is calculated based on a foreign country's lost tax revenue, it is effectively an "indirect attempt to have a United States court enforce [foreign] revenue laws,"[40] which according to the United States' position would violate the Revenue Rule (at least when sought by the foreign state). Moreover, restitution has been characterized by some courts as a civil remedy attendant to a criminal prosecution.[41] A restitution order may also be enforced by the "victim" as a civil judgment and registered in each district in the United States.[42] Thus, whether a restitution order in favor of a foreign state attendant to a criminal conviction may be distinguished for purposes of the Revenue Rule from a civil money judgment obtained by that foreign state is a debatable question, but not one that was considered in *Bengis*.[43]

WHITHER THE REVENUE RULE?

Bengis thus opens the door to recovery by foreign states under the restitution statutes of the lost taxes and other revenues whose recovery until now been precluded by the Revenue Rule. From the perspective of a foreign state looking to recoup lost revenue from a person or entity subject to the jurisdiction of the United States, the question after *Bengis* is whether the putative defendant's violation of foreign tax or revenue laws can reasonably also constitute an offense under United States law and whether the United would be willing to initiate a prosecution in this country and seek restitution payable to the foreign state.

After *Bengis*, restitution may be awarded, and in certain cases must be awarded, if a foreign government loses revenue attributable to conduct that the United States elects to charge as a violation of federal criminal statutes. This is essentially what happened in *Bengis*: the defendants violated a South African conservation law. By exporting lobsters harvested in excess of the South African law's limits and marketing them in this country, the defendants violated the Lacey Act, which criminalizes the sale of fish caught in violation of foreign law.[44] The Lacey Act violation would not itself have triggered mandatory restitution, but because the defendants were also charged with, and pled guilty to, conspiracy under 18 U.S.C.A. § 371, the conviction on conspiracy count rendered them subject to the MVRA. And *Bengis* approved calculating restitution by reference to the revenue lost by the foreign state in directing that on remand, the trial court should award South Africa the market value of the over-caught lobsters, which is the revenue South Africa would have earned had it foiled the Bengis plot and seized and sold the portion of their lobster catch that exceeded the quota. So calculated, the resulting restitution award would equal South Africa's lost revenue.[45]

Given the expansive scope of the federal mail and wire fraud statutes and the conspiracy statute, as well as the increasing number of U.S. criminal statutes that incorporate violations of foreign law, the ripples of *Bengis* could reach far and wide. For example, the current version of the federal money laundering statute criminalizes the violation of foreign laws.[46] Consider a U.S. financial institution that transmits money to the United States, the proceeds of which a foreign court found to be the fruit of a fraudulent scheme against one of that country's banks. That transmission of funds could be considered "unlawful activity" under § 1956(c)(7)(B)(iii) of the federal money laundering statute and the U.S. Government could prosecute it as such. If transaction deprived the foreign state of any tax revenue and the U.S. government added a federal conspiracy charge to its prosecution of the U.S. bank, the door would be open to repatriation of the foreign government's lost revenue through mandatory application of the MVRA. The Executive Branch could also facilitate restitution to foreign governments through the use of deferred or non-prosecution agreements (DPAs/NPAs) under which, in exchange for an agreement not to pursue criminal charges, the Government requires defendants or putative defendants to agree to make restitution payments to foreign governments for tax revenue lost as a result of conduct that arguably violated U.S. law as well as the laws of a foreign state. Restitution provisions are increasingly common features of DPAs/NPAs, with the United States entering into at least 10 such agreements in from 2009-2011 requiring parties to make restitution payments to alleged victims of illicit acts (though in none of these cases were the victims identified to receive restitution payments foreign governments).[47] Armed with the possibility of pursuing even more severe sanctions, the United States Government certainly enjoys the prosecutorial leverage to obtain corporate plea agreements providing for a conviction of a minor offense, or no conviction at all under a DPA or NPA, conditioned upon the payment of a negotiated amount in restitution to a foreign state.

Prior to *Bengis*, the United States had never sought restitution in favor of a foreign state nor had it supported any foreign state's efforts to sue in its own name to recover lost revenue. It now appears likely that the decision whether to pursue and prosecute schemes that deprive foreign governments of revenue will be influenced and possibly driven by the goal of effecting restitution to those sovereign "victims." In *Bengis*, the United States conceded that decisions to pursue restitution in favor of foreign states may be based on whether restitution would further United States foreign policy interests. Assisting foreign states to recover lost revenue through restitution may incentivize foreign countries to cooperate with the United States in international tax, environmental and other investigations and prosecutions[48] and may even be part of a quid pro quo arrangement with a foreign government. For its part, South Africa "cooperated" with the United States' investigation of the matter after South Africa determined that the individual *Bengis* defendants' assets in South Africa were minimal and that any monetary recovery would have to come from a proceeding in the United States.[49]

The *Bengis* decision thus injects a new calculus into the Executive Branch's exercise of discretion whether to assist certain foreign states and not others and to pursue prosecution of and restitution for certain claims and not others. This ad hoc approach to involving U.S. courts in the affairs of foreign states is reminiscent of the practice of Department of State regarding foreign sovereign immunity from suit prior to 1977. Before the enactment of the Foreign Sovereign Immunities Act of 1976 ("FSIA"), the U.S. Department of State issued, and courts abided by, "suggestions of immunity" that the State Department chose to file with respect to foreign states sued here.[50] One of the consequences of this system was the resulting diplomatic pressure the State Department faced from foreign governments seeking immunity from lawsuits against them in U.S. courts.[51] The FSIA eliminated the role of the Executive Branch in making sovereign immunity determinations by adopting standards for the judiciary to apply in determining whether a foreign state was immune from suit in this country. It has yet to be seen whether, South Africa having been awarded restitution in *Bengis*, the Executive Branch will be subjected to significant diplomatic pressure from other foreign states to pursue restitution claims to compensate them for their lost tax revenue, or whether the Executive Branch will seek to use the prospect of restitution as a tool to further the United States' relations with foreign states.

ENDNOTES:

[1]Boaz S. Morag is a Counsel and Kamal Sidhu is an Associate at the law firm Cleary Gottlieb Steen & Hamilton LLP.

[2]*European Community v. RJR Nabisco, Inc.,* 424 F.3d 175 (2d Cir. 2005).

[3]Brief for the United States at 7, *Pasquantino v. U.S.,* 544 U.S. 349, 125 S. Ct. 1766, 161 L. Ed. 2d 619, 4 A.L.R. Fed. 2d 747 (2005).

[4]*Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 106 (2d Cir. 2001); *European Cmty.*, 424 F.3d at 177; *Republic of Honduras v. Philip Morris Companies, Inc.,* 341 F.3d 1253, 1255 (11th Cir. 2003).

[5]*In re BearingPoint, Inc.,* 64 Collier Bankr. Cas. 2d (MB) 953, 2010 WL 4622458 (Bankr. S.D. N.Y. 2010).

[6]News Release, *The Bank of New York Mellon Submits Evidence from U.S. Department of Justice That Invalidates Central Claim Made by U.S. Plaintiff's Lawyer*

in Russian Court Case (Oct. 6, 2008), http://bnymellon.mediaroom.com/index.php?s=43__=450.

[7]The dispute was settled prior to the entry of any judgment. News Release, *Joint Press Release of the Federal Customs Service of the Russian Federation and the Bank of New York Mellon Corporation: Litigation Settlement* (Oct. 22, 2009), http://www.bnymellon.com/pressreleases/2009/pdf/pr102209.pdf.

[8]The United States entered into only five bilateral treaties (with Canada, Denmark, France, the Netherlands, and Sweden) which provide for general assistance in collecting tax judgment against citizens of the contracting nations. Brenda Mallinak, *The Revenue Rule: A Common Law Doctrine for the Twenty-First Century*, 16 DUKE J. COMP. & INT'L L. 79, 94 (2006).

[9]Brief for the United States, *supra* note 2, at 15 n.4.

[10]*U.S. v. Bengis,* 631 F.3d 33, 36-37 (2d Cir. 2011), cert. denied, 131 S. Ct. 2911, 179 L. Ed. 2d 1262 (2011).

[11]*Att'y Gen. v. Lutwydge*, (1729) 145 Eng. Rep. 674 (Ex. Div.).

[12]*See* Mallinak, *supra* note 7, at 80-83.

[13]*Att'y Gen. of New Zealand v. Ortiz* (1984) A.C. 1, 21 (H.L.) (Denning, L.J.) (holding that the Revenue Rule precluded the prosecution of defendant under New Zealand's national treasure anti-export law for smuggling a Maori artifact into the United Kingdom).

[14]*See* Mallinak, *supra* note 7, at 88-92.

[15]*Ludlow v. Van Rensselaer,* 1 Johns. 94, 95 1806 WL 838 (N.Y. Sup 1806).

[16]*Moore v. Mitchell*, 30 F.2d 600, 65 A.L.R. 1354 (C.C.A. 2d Cir. 1929), aff'd, 281 U.S. 18, 50 S. Ct. 175, 74 L. Ed. 673 (1930).

[17]*Id*. at 604 (Hand, Cir. J., concurring). In 1935, the United States Supreme Court ruled that the full faith and credit clause of the U.S. Constitution makes the Revenue Rule inapplicable in an interstate context. *Milwaukee Cnty. v. M.E. White Co.*, 296 U.S. 268 (1935).

[18]18 U.S.C.A. § 1343.

[19]*U.S. v. Trapilo,* 130 F.3d 547 (2d Cir. 1997).

[20]268 F.3d at 123 & 123 n.24. *See also Fountain v. U.S.,* 357 F.3d 250, 260 (2d Cir. 2004) (holding that the Revenue Rule does not bar prosecutions under the mail and wire fraud statutes for defrauding foreign countries of tax revenue).

[21]80 F.3d 580, 587 (1st Cir. 1996).

[22]305 F.3d 291, 295 (4th Cir. 2002).

[23]336 F.3d 321 (4th Cir. 2003).

[24]*Pasquantino*, 544 U.S. at 359.

[25]*Id*. at 365 (emphasis added).

[26]Brief of the United States, *supra* note 2, at 19-20 (internal quotations omitted).

[27]*Id*. at 20.

[28]*Pasquantino*, 544 U.S. at 382 (Ginsburg, J., dissenting).

[29]16 U.S.C.A. § 3372(a)(2)(A).

[30]*United States v. Bengis*, 631 F.3d at 36-37.

[31]The VWPA also applies to certain offenses under 49 U.S.C.A. §§ 5124, 46312, 46502 and 46504.

[32]18 U.S.C.A. § 3663(a).

[33]18 U.S.C.A. §§ 3663A(a), (c)(1)(A)(ii). In *Bengis*, it is the allegation of conspiracy under 18 U.S.C.A. § 371 that triggers the MVRA and VWPA; a Lacey Act violation on its own would not have led to the application of either restitution statute.

[34]18 U.S.C.A. § 3663(a)(2); 18 U.S.C.A. § 3663A(a)(2).

[35]*U.S. v. Bengis,* 2007 WL 241370 (S.D. N.Y. 2007), vacated and remanded, 631 F.3d 33 (2d Cir. 2011), cert. denied, 131 S. Ct. 2911, 179 L. Ed. 2d 1262 (2011); *U.S. v. Bengis,* 2007 WL 2669315 (S.D. N.Y. 2007), vacated and remanded, 631 F.3d 33 (2d Cir. 2011), cert. denied, 131 S. Ct. 2911, 179 L. Ed. 2d 1262 (2011).

[36]*Bengis,* 631 F.3d at 41.

[37]*See* Brief for Defendants-Appellees at 54 n.17, *U.S. v. Bengis,* 631 F.3d 33 (2d Cir. 2011), cert. denied, 131 S. Ct. 2911, 179 L. Ed. 2d 1262 (2011); Reply Brief for the United States of America at 42, *U.S. v. Bengis,* 631 F.3d 33 (2d Cir. 2011), cert. denied, 131 S. Ct. 2911, 179 L. Ed. 2d 1262 (2011).

[38]At oral argument in *Pasquantino*, the Government changed position and argued without elaboration that restitution in favor of a foreign sovereign did not infringe the Revenue Rule, notwithstanding the position it had taken about the impropriety of restitution below. Transcript of Oral Argument at 36-37, *Pasquantino*, 544 U.S. 349 (No. 03-725). Neither the majority nor the dissent accepted that position, and it was not addressed in *Bengis*.

[39]Brief for the United States, *supra* note 2, at 20-21.

[40]*R.J. Reynolds*, 268 F.3d at 131.

[41]*U.S. v. Bonner,* 522 F.3d 804, 807 (7th Cir. 2008).

[42]*See* 18 U.S.C.A. § 3664(m).

[43]Following the Second Circuit's decision in *Bengis*, the defendants filed a writ of certiorari which was denied by the Supreme Court. The case is currently pending in the district court for the determination of the amount of restitution owed to South Africa.

[44]*See* 16 U.S.C.A. § 3372(a)(2)(A), *supra*.

[45]*Bengis*, 631 F.3d at 41 ("Every overharvested lobster that South Africa did not seize and sell represents a loss that has not been recovered.").

[46]*See* 18 U.S.C.A. § 1956(c)(7)(B).

[47]*See* Gibson, Dunn & Crutcher LLP, *2011 Year End Update on Corporate Deferred Prosecution and Non-Prosecution Agreements* (Jan. 4, 2012), http://www.gibsondunn.com/publications/Pages/2011YearEndUpdate-CorporateDeferredProsecution-NonProsecutionAgreements.aspx; Gibson, Dunn & Crutcher LLP, *2010 Year End Update on Corporate Deferred Prosecution and Non-Prosecution Agreements* (Jan. 4, 2011), http://www.gibsondunn.com/publications/Pages/2010Year-EndUpdate-CorporateDeferredProsecutionAndNon-ProsecutionAgreements.aspx; Gibson, Dunn & Crutcher LLP, *2009 Year End Update on Corporate Deferred Prosecution and Non-Prosecution Agreements* (Jan. 7, 2010), http://www.gibsondunn.com/publications/Pages/2009YearEndUpdateCorpDeferredProsecutionAgreements.aspx.

[48]As was suggested by the U.S. Government in its Reply Brief in *Bengis*, Reply Brief for the United States of

America, *supra* note 41, at 6. The defendants in Bengis went further and asserted that the United States and South Africa had an agreement whereby South Africa would only prosecute Bengis's South African fishing company and the United States would prosecute the individual defendants. The magistrate judge actually included this allegation in his factual recitation in his report and recommendation to deny the United States' motion under the MVRA. *U.S. v. Bengis,* 2006 WL 3735654 (S.D. N.Y. 2006), report and recommendation adopted, 2007 WL 241370 (S.D. N.Y. 2007), vacated and remanded, 631 F.3d 33 (2d Cir. 2011), cert. denied, 131 S. Ct. 2911, 179 L. Ed. 2d 1262 (2011).

[49] *Bengis*, 631 F.3d at 36.

[50] The FSIA transferred from the Executive Branch to the judiciary the task of making immunity determinations by establishing a uniform standard for all courts in the United States to apply in actions against foreign states and their agencies and instrumentalities. *See* 28 U.S.C.A. § 1602 ("The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. . . . Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.")

[51] *Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480, 487 103 S. Ct. 1962, 76 L. Ed. 2d 81 (1983).

UPDATES

CUSTOMS

CBP GLOBAL ENTRY PROGRAM ARRIVES AT DENVER INTERNATIONAL AIRPORT AND CHARLOTTE-DOUGLAS AIRPORT

According to recent releases, on March 20, U.S. Customs and Border Protection launched the Global Entry program at Denver International Airport with a ribbon-cutting ceremony and interactive Global Entry kiosk demonstrations for invited guests and news media. Officially, the system became operational on March 19, the day before the media event. U.S. Customs and Border Protection recently also launched the Global Entry program at the Charlotte-Douglas International Airport with a ribbon-cutting ceremony and interactive Global Entry kiosk demonstrations for invited guests and news media. Joining CBP Area Port Director Patty Fitzpatrick at this event were partners and stakeholders who were excited to see this convenient and secure trusted traveler initiative expand to the CLT.

Global Entry is a voluntary expedited clearance initiative for pre-approved, low risk international travelers, who are processed by biometric identification using a designated kiosk, rather than waiting in line for entry processing by a CBP officer. Global Entry reduces average wait times by more than 70%.

Denver International Airport has two Global Entry kiosks, conveniently located at the main terminal international arrivals, and within the CBP Global Entry enrollment center which will open on April 2 for applicant interviews.

Announced as a pilot program in 2008, Global Entry was established as a permanent voluntary program last month. It now operates at 24 U.S. airports including the recently added airports in Minneapolis, Charlotte, Denver, and Phoenix.

This expansion will make expedited clearance through the Global Entry program available at airports serving 97% of international travelers arriving in the United States. Nearly 300,000 members have enrolled in Global Entry thus far and have used the designated kiosks more than two million times. And, as an added advantage, Global Entry members are eligible to participate in other programs such as the Transportation Security Administration Pre-Check passenger expedited screening program.

EXPORT CONTROLS

MAN AND HIS FIRM INDICTED IN PLOT TO EXPORT RESTRICTED MILITARY AND OTHER U.S. TECHNOLOGY TO IRAN

According to a recent DOJ release, an Australian man and his company were indicted March 1 by a federal grand jury in the District of Columbia for conspiring to export sensitive military and other technology from the United States to Iran, including components with applications in missiles, drones, torpedoes, and helicopters.

The five-count indictment charges David

Levick, 50, an Australian national, and his company, ICM Components Inc., located in Thorleigh, Australia, each with one count of conspiracy to defraud the United States and to violate the International Emergency Economic Powers Act (IEEPA) and the Arms Export Control Act; as well as four counts of illegally exporting goods to an embargoed nation in violation of IEEPA; and forfeiture of at least $199,227.41.

Levick, who is the general manager of ICM Components, remains at large and is believed to be in Australia. If convicted, Levick faces a potential maximum sentence of five years in prison for the conspiracy count and 20 years in prison for each count of violating IEEPA.

According to the indictment, beginning as early as March 2007 and continuing through around March 15, 2009, Levick and ICM solicited purchase orders from a representative of a trading company in Iran for U.S.-origin aircraft parts and other goods. This person in Iran, referenced in the charges as "Iranian A," also operated and controlled companies in Malaysia that acted as intermediaries for the Iranian trading company.

The indictment alleges that Levick and ICM then placed orders with U.S. companies on behalf of Iranian A for aircraft parts and other goods that Iranian A could not have directly purchased from the United States without U.S. government permission Among the items the defendants allegedly sought to procure from the United States are the following:

- VG-34 Series Miniature Vertical Gyroscopes. These are aerospace products used to measure precisely and/or maintain control of pitch and roll in applications such as helicopter flight systems, target drones, missiles, torpedoes and remotely piloted vehicles. They are classified as defense articles by the U.S. government and may not be exported from the United States without a license from the State Department or exported to Iran without a license from the Treasury Department.

- K2000 Series Servo Actuators designed for use on aircraft. The standard Servo Actuator is designed to be used for throttle, nose wheel steering and most flight control surfaces. High-torque Servo Actuators are designed to be used for providing higher torque levels for applications such as flaps and landing gear retraction. These items are classified as defense articles by the U.S. government and may not be exported from the United States without a license from the State Department or exported to Iran without a license from the Treasury Department.

- Precision Pressure Transducers. These are sensor devices that have a wide variety of applications in the avionics industry, among others, and can be used for altitude measurements, laboratory testing, measuring instrumentations and recording barometric pressure. These items may not be exported to Iran without a license from the Treasury Department.

- Emergency Floatation System Kits. These kits contained a landing gear, float bags, composite cylinder and a complete electrical installation kit. Such float kits were designed for use on Bell 206 helicopters to assist the helicopter when landing in either water or soft desert terrain. These items may not be exported to Iran without a license from the Treasury Department.

- Shock Mounted Light Assemblies. These items are packages of lights and mounting equipment designed for high vibration use and which can be used on helicopters and other fixed wing aircraft. These items may not be exported to Iran without a license from the Treasury Department.

According to the charges, Levick and ICM, when necessary, used a broker in Florida to place orders for these goods with U.S. firms to conceal that they were intended for transshipment to Iran. The defendants also concealed the final end-use and end-users of the goods from manufacturers, distributors, shippers and freight forwarders in the United States and elsewhere, as well as from U.S. Customs and Border Protection. To further conceal their efforts, the defendants structured payments between each other for the goods to avoid restrictions on Iranian financial institutions by other countries.

The indictment further alleges that Levick and ICM wired money to companies located in the United States as payment for these restricted goods. Levick, ICM and other members of the conspiracy never obtained the required licenses from the Treasury or State Department for the export of any of these goods to Iran, according to the charges.

In addition to the conspiracy allegations, the indictment charges the defendants with exporting or attempting to export four specific shipments of goods from the United States to Iran in violation of IEEPA. These include a shipment of 10 shock mounted light assemblies on Jan. 27, 2007; a shipment of five precision pressure transducers on Dec. 20, 2007; a shipment of 10 shock mounted light assemblies on March 17, 2008; and a shipment of one emergency floatation system kit on June 24, 2008.

FOREIGN CORRUPT PRACTICES ACT

BIZJET INTERNATIONAL SALES AND SUPPORT INC., RESOLVES FOREIGN CORRUPT PRACTICES ACT INVESTIGATION AND AGREES TO PAY $11.8 MILLION CRIMINAL PENALTY

BizJet International Sales and Support Inc., a provider of aircraft maintenance, repair and overhaul (MRO) services based in Tulsa, Okla., has agreed to pay an $11.8 million criminal penalty to resolve charges related to the Foreign Corrupt Practices Act (FCPA) for bribing government officials in Latin America to secure contracts to perform aircraft MRO services for government agencies, according to a recent release.

The department filed a one-count criminal information in March charging BizJet with conspiring to violate the FCPA's anti-bribery provisions and a deferred prosecution agreement in U.S. District Court for the Northern District of Oklahoma.

According to court documents, BizJet paid bribes to officials employed by the Mexican Policia Federal Preventiva, the Mexican Coordinacion General de Transportes Aereos Presidenciales, the air fleet for the Gobierno del Estado de Sinaloa, the air fleet for the Gobierno del Estado de Sonora and the Republica de Panama Autoridad Aeronautica Civil. In many instances, BizJet paid the bribes directly to the foreign officials. In other instances, BizJet funneled the bribes through a shell company owned and operated by a BizJet sales manager. BizJet executives orchestrated, authorized and approved the unlawful payments.

Under the terms of the department's agreement with BizJet, the department agreed to defer prosecution of BizJet for three years. In addition to the monetary penalty, BizJet agreed to cooperate with the department in ongoing investigations, to report periodically to the department concerning BizJet's compliance efforts, and to continue to implement an enhanced compliance program and internal controls designed to prevent and detect FCPA violations. If BizJet abides by the terms of the deferred prosecution agreement, the department will dismiss the criminal information when the agreement's term expires.

In addition, BizJet's indirect parent company, Lufthansa Technik AG, itself a German provider of aircraft-related services, entered into an agreement with the department in connection with the unlawful payments by BizJet and its directors, officers, employees and agents. The department has agreed not to prosecute Lufthansa Technik provided that Lufthansa Technik satisfies its obligations under the agreement for a period of three years. Those obligations include ongoing cooperation and the continued implementation of rigorous internal controls.

The agreements acknowledge BizJet's and Lufthansa Technik's voluntary disclosure of the FCPA violations to the department and their extraordinary cooperation, including conducting an extensive internal investigation, voluntarily making U.S. and foreign employees available for interviews, and collecting, analyzing and organizing voluminous evidence and information for the department. In addition, BizJet and Lufthansa Technik engaged in extensive remediation, including terminating the officers and employees responsible for the corrupt payments, enhancing their due-diligence protocol for third-party agents and consultants, and heightening review of proposals and other transactional documents for all BizJet contracts.

Additional information about the Justice Department's FCPA enforcement efforts can be found at www.justice.gov/criminal/fraud/fcpa.

INTELLECTUAL PROPERTY

PFIZER EYES TIE-UPS WITH MORE CHINESE DRUGMAKERS

HONG KONG, Feb. 21 (Reuters)—Pharmaceuticals giant Pfizer Inc. is exploring partnerships with more Chinese drug companies as it pushes ahead with plans to sell more of its off-patent drugs in the Chinese market, after clinching a deal with a Shanghai-listed drugmaker.

"We are exploring business development opportunities, including partnerships with local companies that allow us to successfully expand into the generics segment of the market," a Pfizer spokesman said in reply to questions from *Reuters*.

Pfizer recently reported progress in a planned joint venture with Chinese drug firm Zhejiang Hisun Pharmaceutical to manufacture and sell off-patent drugs in China and the rest of the world.

The agreement comes as big Western drug companies are expanding their presence in China in the hope of cutting costs and lifting sales with top-selling drugs losing patent protection in Western markets.

Pfizer, which lost its U.S. patent on cholesterol fighter Lipitor—the world's top-selling drug—last November, said the memorandum of understanding with Hisun aimed to increase access to high-quality branded generic medicines.

Jason Mann, head of Barclays Capital's China health care and pharmaceuticals unit, said the tie-up would benefit Pfizer because Hisun was a leading producer of active pharmaceutical ingredients—the key content in drugs.

"There is a shortage of top-quality API manufacturers in China. India is a larger base of API manufacturing than China, but Chinese regulations and tax law favor drug manufactured in China. So Chinese API can help penetrate the Chinese market in a more cost-effective way," Mann said.

"(For Hisun, it's the) prestige of working with the largest, leading pharma company in the world. Also the chance to gain technological and management know-how through the JV," Mann added. "This is a win-win arrangement."

The joint venture, named Hisun Pfizer Pharmaceutical Co. Ltd. and owned 51% by Hisun and 49% by Pfizer, will develop, make and commercialize off-patent pharmaceutical products in China and global markets.

Its aggregate investment and registered

capital will be $295 million and $250 million, respectively, Pfizer said.

The Pfizer spokesman added that the joint venture would "mainly target the Chinese market," but he would not say which among its off-patent drugs it would push strongly into China.

Pfizer said in December it was expanding its research and development team in China and exploring possible collaboration with Chinese research outfits to tap the country's vast talent pool and emergence as a major market.

Apart from Pfizer, drugmakers like AstraZeneca Plc, Abbott Laboratories and Novartis AG are taking advantage of China's lower costs and enormous pool of scientists to make big investments in R&D in China in recent years.

China's prescription drug market, set to be the world's second largest by 2020, is estimated to be worth more than $110 billion by 2015, from $50 billion in 2010, according to various industry researchers.

(Reporting by Tan Ee Lyn.)

Company: Pfizer Inc.

This article first appeared in 18 No. 24 Westlaw Journal Intellectual Property 7

CHINA TO BOOST INTELLECTUAL PROPERTY RIGHTS: XINHUA

BEIJING (Reuters)—China's vice premier promised Apple Chief Executive Officer Tim Cook that the country would boost intellectual property protection, state media said on Wednesday (March 28), in Cook's second day of meetings in the company's biggest potential market.

China is the world's largest mobile market and already Apple's second-biggest market overall, but its growth there is clouded by issues ranging from a contested iPad trademark to treatment of local labor.

"To be more open to the outside is a condition for China to transform its economic development, expand domestic demands and conduct technological innovation," the official Xinhua news agency cited Vice Premier Li Keqiang as saying.

Apple is in a long-running dispute with Proview - a financially weak technology company that claims to have registered the iPad trademark. The legal battle is making its way through Chinese courts and threatens to disrupt iPad sales.

The company is also reviewing labor standards at the Taiwan firm which assembles its iPhones and iPads, Foxconn Technology Group, accused of improper practices in China.

Widely expected to become China's next premier in a leadership transition that begins later this year, Li called on multinational companies to "pay more attention to caring for workers" in China, Xinhua said.

Cook said Apple will conduct business in a law-abiding and honest manner, according to Xinhua.

Apple officials were not immediately available for comment.

Apple has begun releasing monthly labor data and said it reached 89 percent compliance with its 60-hour work week policy in February, up from 84 percent in January, according to a survey of 500,000 workers at suppliers worldwide.

Cook is on his first trip to the country since taking over from Steve Jobs in August. His closely guarded itinerary has included talks on Monday with Beijing's mayor and a visit to one of Apple's two stores in the capital.

Though it retails through more than 100 resellers, Cook has said Apple has merely scratched the surface in China, its biggest manufacturing hub where it has only five stores.

(Reporting by Michael Martina; Editing by Ron Popeski)

SANCTIONS

U.S. SETS SANCTIONS ON IRAN SHIPPING, ENGINEER FIRMS

WASHINGTON (Reuters)—The U.S. Treasury Department on Wednesday (March28, 2012) set additional sanctions against Iranian engineering firms with ties to the Iranian Revolutionary Guard Corp (IRGC), which it said has continued to expand its control of the Iranian economy.

It also sanctioned individuals and shipping companies with ties to the Islamic Republic of Iran Shipping Lines (IRISL).

"By designating the individuals and entities today, Treasury is sending a clear signal to the international community that Iran's attempts to evade international sanctions will not go unnoticed," Adam Szubin, director of the Treasury's Office of Foreign Assets Control, said in a statement.

The department imposed additional sanctions on Iran Maritime Industrial Company SADRA, which it said has offices in Iran and Venezuela. It said SADRA was owned by Khatam al-Anbiya, an engineering company used by the Islamic Revolutionary Guard Corp to fund its operations.

It also sanctioned Deep Offshore Technology PJS, which it said was a subsidiary of SADRA.

The Revolutionary Guard is a primary focus of U.S. and international sanctions against Iran because of the central role it plays in Iran's missile and nuclear programs, its support for terrorism and its involvement in serious human rights abuses, the department said.

It also has expanded its control over the Iranian economy - particularly in defense production, construction and oil and gas industries - subsuming increasing numbers of Iranian businesses and pressing them into service in support of the Revolutionary Guard's "illicit conduct," the department said.

"We will continue to target the Iranian regime and specifically the IRGC as it attempts to continue its nefarious infiltration of the Iranian economy," Szubin said.

In addition to freezing assets of the companies, any foreign financial institution that does business with the firms risk losing its correspondent account access to the United States, the department said.

It also designated Malship Shipping Agency Ltd and Modality Limited, which it said were affiliates of the Islamic Republic of Iran Shipping Lines (IRISL), and two individuals, Seyed Alaeddin Sadat Rasool and Ali Ezati, who it said worked for IRISL.

"IRISL has played a key role in Iran's efforts to advance its missile program and transport other military cargo," the department said.

(Reporting By Doug Palmer; Editing by Vicki Allen)

TRADE

OBAMA TRADE OFFICIAL SIGNS COOPERATIVE AGREEMENT WITH WORLD TRADE CENTER NEW ORLEANS

Under Secretary of Commerce for International Trade Francisco Sanchez celebrated a new strategic partnership with the World Trade Center of New Orleans (WTCNO) at a signing ceremony in March, according to a recent release. This new partnership will help more New Orleans businesses export their products and services to global markets.

Specifically, the International Trade Administration (ITA), led by Sanchez, and WTCNO will engage in joint marketing and education activities to increase New Orleans businesses' awareness about export opportunities; crosstrain their respective local staffs; and effectively and efficiently refer customers to the appropriate federal resource through a dedicated, cobranded www.export.gov webpage.

In 2011, shipments of merchandise totaled more than $55 billion, 13% of which went to China, the state's largest export market. China was followed by Mexico ($5.7 billion), Japan ($3.9 billion), the Netherlands ($3.3 billion), and Canada ($2.3 billion). In 2010, New Orleans led the state's metropolitan areas in merchandise exports, with $14 billion, accounting for 60 percent of the state's overall exports. For more information, visit www.trade.gov.