

Trade Policy

Suit Filed Against CFIUS Order Seen As Trial Balloon in National Security Law

Fisher Sees Case as Model Trial Balloon

Key Development: Ralls files complaint against CFIUS, presidential orders.

Potential Impact: Case has potential precedent-setting effect.

By Len Bracken

The civil complaint recently filed by the Chinese-owned Ralls Corp. against the president, the Committee on Foreign Investment in the United States (CFIUS), and the secretary of the treasury involving the purchase of four wind farms in Oregon can be seen as a “well-picked trial balloon” to test whether a CFIUS order is subject to judicial review, Bart Fisher, a professor and practitioner of international trade law, told BNA Oct. 9.

CFIUS conducts national security reviews of foreign investment in the United States. The Treasury Department Sept. 28 announced a presidential order prohibiting the acquisition and ownership of four wind farm project companies by Ralls Corp., its owners, its subsidiaries, and its affiliates following CFIUS reviews. A related presidential order directed Ralls to divest its interest in the wind farm project companies (189 ITD, 10/1/12).

Treasury said the president took this action pursuant to Section 721 of the Defense Production Act of 1950, as amended by the Foreign Investment and National Security Act of 2007, because wind farm sites are all within or in the vicinity of restricted air space at Naval Weapons Systems Training Facility Boardman in Oregon.

The Oct. 1 complaint challenges the issuance of an order by CFIUS as violating the Administrative Procedure Act and the United States Constitution, and the issuance of an order by President Obama as violating Section 721 of the Defense Production Act of 1950, as amended, and the United States Constitution (*Ralls Corp. v Obama*, D.D.C., Case No. 1:12-cv-01513-ABJ, 10/1/12). The statute governing CFIUS states that actions and findings of the president are not subject to judicial review, but this part of the statute has not been tested in court.

Fisher noted that case filed in the U.S. District Court for the District of Columbia raises the profile of the CFIUS order and the contention that Chinese investors are discriminated against in the United States. He said the second count of the four counts, alleging violation of the Administrative Procedure Act, stands the best chance if arbitrary and capricious agency action can be proven.

“The courts are reluctant to side against the executive branch in cases like this that raise issues of national security and executive discretion,” Fisher said, citing the political-question doctrine and the Curtiss-Wright doctrine.

The political-question doctrine is the judicial principle that a court should refuse to decide issues involving the discretionary powers by the executive or legislative branch of government. The Curtiss-Wright doctrine stems from the 1936 Supreme Court case *United States v. Curtiss-Wright Export Corp.*

in which the court established in its decision the principle of executive supremacy in national security and foreign affairs.

“The case is, however, winnable if Ralls can prove the decision is without any rational basis,” Fisher said. He added that proving there is no rational basis for the decision is difficult because a bureaucrat can usually find some rationale, but the case is being closely watched for a potential precedent-setting effect.

The plaintiffs may also be counting on the government's unwillingness to disclose sensitive national security information related to the nearby Naval facility conducting electronic combat training and research and development on unmanned aerial systems, he said.

Ralls Is 'Reluctant Plaintiff.'

In a separate interview, a source familiar with the case highlighted the three maps included as exhibits in the complaint that he said show hundreds of wind towers in the area, most of which have been built by foreign firms, using foreign technology and foreign investment funding. The maps depict a circle with rectilinear areas to its east and west that form a restricted airspace boundary.

“Why does Ralls have to be treated differently, just because it is a Chinese company,” the source said, noting, moreover, that only one of the four projects planned by Ralls was located within the restricted airspace boundary. “If the government has a security concern inside the restricted space, why would it further limit Ralls's rights to develop the other three projects?”

The source, who supports Ralls's case, said that CFIUS might argue that the sites are close to the restricted airspace boundary, which he said begs the question of how close is too close.

“You have to define that,” the source said, noting that one of the projects that Ralls intended to develop was seven miles away from the restricted airspace boundary. “If that is not absurd, what can constitute absurd government action?”

There are two federal state highways, Route 82 and Route 84, that intersect and pass through the restricted airspace boundary, the source noted, which he said means that any vehicle can freely pass through this “so-called restricted space” without any limitations.

“If there is a risk to our national security, why not put a sign up that says no Chinese can pass through this part of the federal highway,” the source said.

Ralls is a reluctant plaintiff, the source said, and filed the case only after unsuccessfully seeking fair compensation for its expenses.

The lead attorney for Ralls is Paul Clement, a partner at Bancroft PLLC and former solicitor general of the United States from June 2005 until June 2008.

CFIUS is chaired by the secretary of the treasury and includes as members the secretaries of state, defense, commerce, energy, and homeland security, the attorney general, the director of the White House Office of Science and Technology Policy, and the U.S. trade representative. The director of national intelligence and the secretary of labor participate as nonvoting, ex-officio members.

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