Eleventh Circuit Broadly Defines "Instrumentality" Under the Foreign Corrupt Practices Act

On May 16, 2014, in United States v. Esquenazi,[1] the United States Court of Appeals for the Eleventh Circuit interpreted the critical term "instrumentality" under the Foreign Corrupt Practices Act (the "FCPA") to include an entity controlled by a foreign government which performs "a function the foreign government treats as its own."

I. Background and Procedural History

In relevant part, the FCPA prohibits issuers from providing things of value to foreign officials in order to affect or influence a decision of the official's government, or an "instrumentality" thereof.[2]

In 2009, the Department of Justice (the "DOJ") indicted Joel Esquenazi and Carlos Rodriguez (collectively, the "defendants") for violations of the FCPA. The defendants owned Terra Communications ("Terra") a Florida corporation that purchased and resold telephone minutes from foreign vendors. One of Terra's largest vendors was Telecommunications D'Haiti, S.A.M. ("Teleco"), a company chartered by the Haitian government. By 2001, Terra owed Teleco over $400,000. To reduce the debt, the defendants made payments to companies linked to Teleco executives, and disguised the payments as consulting fees.

At trial, the DOJ argued that under the FCPA, Teleco was an "instrumentality" of the Haitian government, and Teleco executives were therefore public officials. The Haitian government chartered Teleco in 1968, granted Teleco a monopoly and tax advantages, and appointed senior Teleco officials through 2003. In the 1970's, a government-owned bank acquired a 97% stake in Teleco. Finally, an expert witness for the DOJ testified that Teleco "belonged totally to the state," and was seen as a "public entity."

A jury convicted the defendants on all counts. On appeal, the defendants challenged the definition of "instrumentality" in the jury instructions.[3] While several District Courts had considered whether a state-controlled enterprise qualified as an "instrumentality" under the FCPA, the issue was before an appellate court for the first time.[4]

II. The Eleventh Circuit's Decision

Because the FCPA does not define "instrumentality," the Court sought to analyze the plain meaning of the term, concluding that an "instrumentality" must, at a minimum, perform a government function.[5] The Court

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[1] United States v. Esquenazi, 2014 WL 1978613 (11th Cir. 2014) ("Esquenazi").

[2] 15 U.S.C. §78dd-3(a)(3)(B).

[3] The district court's jury instructions defined an "instrumentality" as a "means or agency through which a function of the foreign government is accomplished."

[4] See, e.g., United States v. Aguilar, 738 F.Supp.2d 1108 (C.D. Ca 2011) (utility company owned by the Mexican Government qualified as an instrumentality under the FCPA); United States v. Carson, et. al., 2011 WL 5101701 (C.D. Ca 2011) (rejecting claim that state-owned companies can never qualify as instrumentalities of a foreign government); Aluminum Bahrain B.S.C. v. Alcoa Incorporated, 2012 WL 2094020 (W.D. Pa 2012) (finding that because Aluminum Bahrain was owned by a foreign government, questions of fact existed as to whether employees were foreign officials under the FCPA).

[5] See BLACK'S LAW DICTIONARY 870 (9th ed. 2009) (defining "instrumentality" as "[a] means or agency through which a function of another entity is accomplished, such as a branch of a governing body); WEBSTER'S THIRD NEW

then looked to other relevant provisions of the FCPA for guidance, noting that the FCPA defines a "foreign official" as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof."[6] The Court reasoned that "agency" and "department" referred to entities under government control which perform a government function. The Court therefore concluded that under the FCPA, an "instrumentality" must be controlled by a foreign government, and perform a government function.

To determine what it means to perform a government function, the Court relied on the legislative history of the FCPA, observing that in 1998, the Senate ratified the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the "OECD Convention"). The OECD Convention prohibits, *inter alia*, bribes directed to an enterprise under government control which performs a government function.[7] Congress subsequently amended the FCPA to comply with the OECD Convention.[8] While the amendments did not modify the "instrumentality" language, the Court reasoned that this was because Congress already understood "instrumentality" to reach entities such as Teleco, that operated under the control of a foreign government, and performed a government function.

The Court also applied a presumption against superfluous language to conclude that "instrumentality" reached an entity that provided phone service, like Teleco.[9] The Court cited the FCPA's "facilitating payments" provision, which exempts payments to expedite routine government actions, including providing phone service, from FCPA liability.[10] The Court reasoned that "instrumentality" must reach an entity that provided phone service, like Teleco; otherwise, the exemption from liability would be superfluous.

Based on this analysis, the Court defined an "instrumentality" under the FCPA as an entity controlled by a foreign government, which performs "a function the foreign government treats as its own." Importantly, the Court indicated that whether an entity qualifies as an "instrumentality" was a fact-bound question, determined on a case-by-case basis, though the Court did not articulate a definitive test. Instead, the Court applied a non-exhaustive list of factors for assessing whether an entity is under the control of a foreign government, and performs "a function the foreign government treats as its own."

The opinion cited six factors relevant to whether an entity is under the control of a foreign government:

1. The foreign government's formal designation of the entity.
2. Whether the foreign government has a majority interest in the entity.
3. Whether the foreign government can hire and fire principals of the entity.
4. The extent to which the entity's profits go directly into the governmental fisc.
5. The extent to which the government funds the entity if the entity suffers a monetary loss.
6. The length of time these indicia have existed.

INTERNATIONAL DICTIONARY 1172 (3d ed. 1993) (defining 'instrumentality' as "something that serves as an intermediary or agent through which one or more functions of a controlling force are carried out: a part, organ or subsidiary branch esp. of a governing body.").

[6] 15 U.S.C. §78dd-2(f)(1)(A).

[7] See OECD Convention art. 1.1.

[8] See International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302.

[9] See Regions Hospital v. Shalala, 522 U.S. 448, 467 (1998) ("It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word.").

[10] 15 U.S.C. § 78dd-2(b); 15 U.S.C. § 78dd-2(h)(4)(A).

The Court then reasoned that four factors are particularly relevant to whether an entity performs a function the foreign government treats as its own:

1. Whether the entity has a monopoly over the function it exists to carry out.
2. Whether the foreign government subsidizes the costs associated with providing the services.
3. Whether the entity provides services to the public at large in the foreign country.
4. Whether the public and government of the foreign country generally perceive the entity to be performing a governmental function.

Applying this test, the Court held that Teleco was an "instrumentality" of Haiti for purposes of the FCPA, and affirmed the convictions.

III. Significance

The DOJ has long advocated a definition of "instrumentality" that includes state-owned and state-controlled entities.[11] In Esquenazi, the DOJ has found an interpretive approach that will bolster future FCPA prosecutions.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; Brian Markley at 212.701.3230 or bmarkley@cahill.com; or John Schuster at 212.701.3323 or jschuster@cahill.com.

[11] See FCPA: A Resource Guide to the U.S. Foreign Corrupt Practices Act 29, *available at* http://www.justice.gov/criminal/fraud/fcpa/guide.pdf.