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# *Texas Business in the Global Market: Looking Back and Looking Forward*

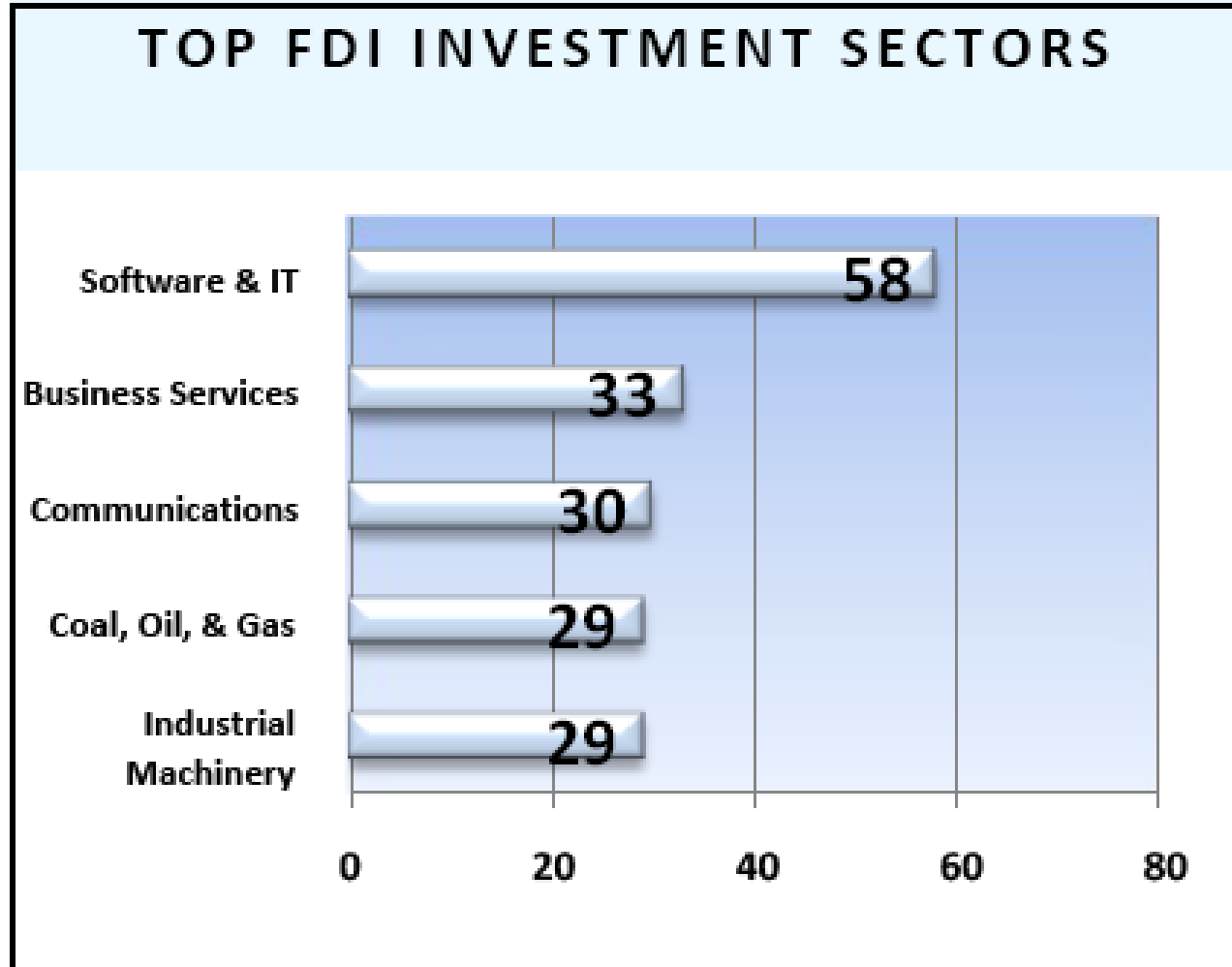
By:

Andrew Melsheimer

# *Texas Business in the Global Market: Looking Back and Looking Forward*

- **Overview of FDI into Texas**
- **Sampling of cross-border transactions: 2010-2011**
- **Canadian trust trend?**
- **Beware of the Brazilian Pre-Salt?**
- **FCPA and “Forced Marriages”**

# Foreign Direct Investment in Texas



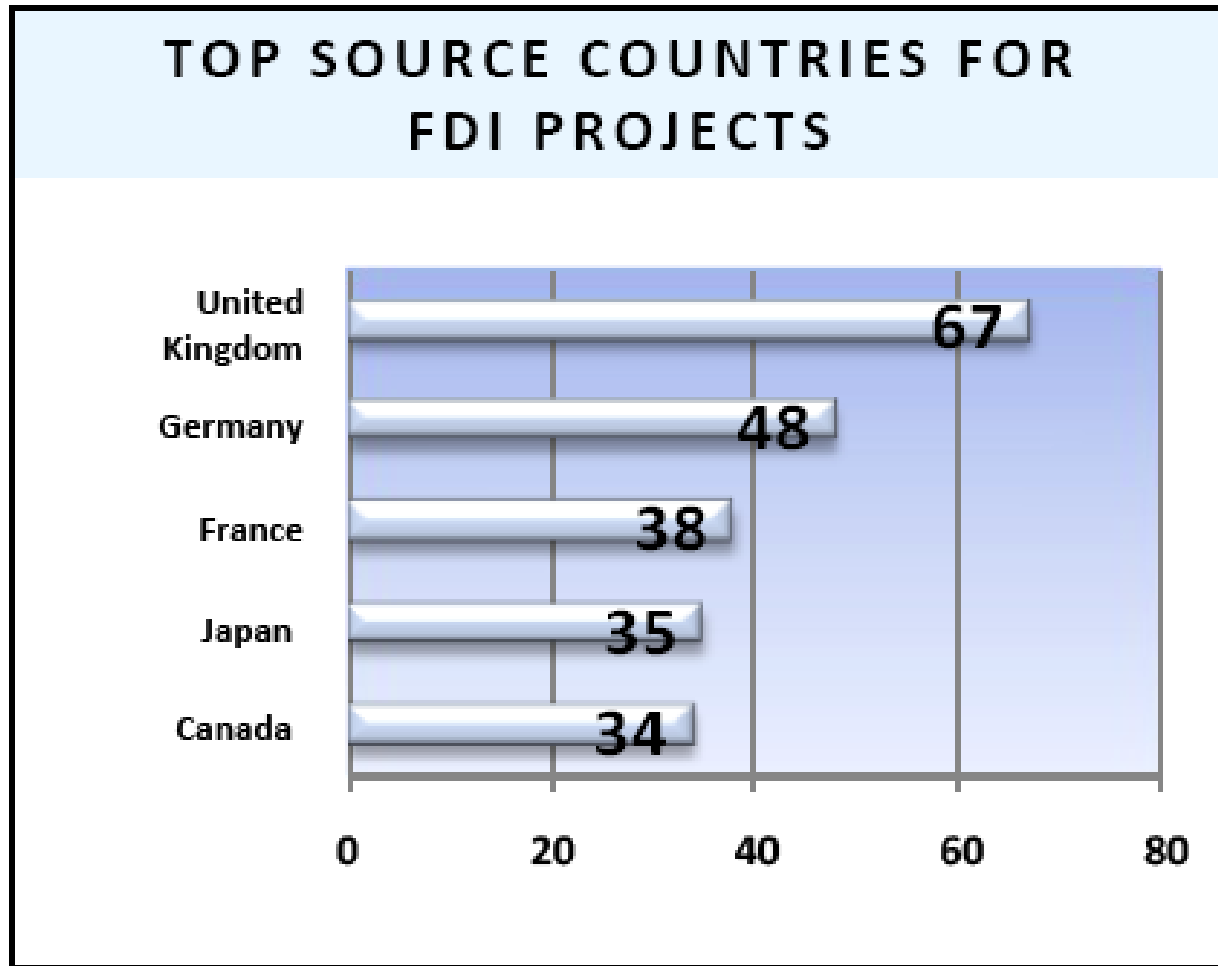
\* Since 2005

Source: [www.governor.state.tx.us/files/ecodev/Foreign\\_Investment.pdf](http://www.governor.state.tx.us/files/ecodev/Foreign_Investment.pdf)

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# Foreign Direct Investment in Texas



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# Foreign Direct Investment in Texas

- **Software & IT**
  - ▶ 14% of total FDI projects
  - ▶ Led by U.K., Canada and France
  - ▶ Concentrated in Austin, Dallas and Houston
- **Business Services**
  - ▶ 8% of total FDI projects
  - ▶ Led by U.K., Norway and Germany
  - ▶ Concentrated in Houston, Dallas and San Antonio

\*Since 2005

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# Foreign Direct Investment in Texas

- **Communication**
  - ▶ 7% of total FDI projects
  - ▶ Led by China, France and Japan
  - ▶ 50% of Chinese TX-FDI were in communications
  - ▶ Majority located in Dallas, Richardson and Austin
- **Coal, Oil & Natural Gas**
  - ▶ 7% of total FDI projects
  - ▶ Led by Canada, U.K. and Australia
  - ▶ Texas was destination of 1 of every 9 foreign projects

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# Sampling of Deals in 2010-2011

- **Total USA acquired Barnett Shale interests from Chesapeake for ~\$800 million and a carry (Jan 2010)**
- **Match.com (based in Dallas) and Meetic (FR on-line dating service) set up venture for South American on-line dating service for payment of \$3 million to Meetic (Feb 2010)**
- **Dell acquires Exanet (Israel) for \$12 million, giving Dell an R&D center in Israel (Feb 2010)**
- **Bell Helicopter acquired Aviation Service a.s. (CZ-based avionics, special systems and engineering company) for an undisclosed consideration (Feb 2010)**
- **Luminex (biological testing technologies) acquires Bizpac (Australia) Pty Ltd (laboratory instruments and software) for an undisclosed consideration (Mar 2010)**
- **TecPetrol SA (AR) acquires Erskine Energy Production, giving company first entry into the U.S. (May 2010)**

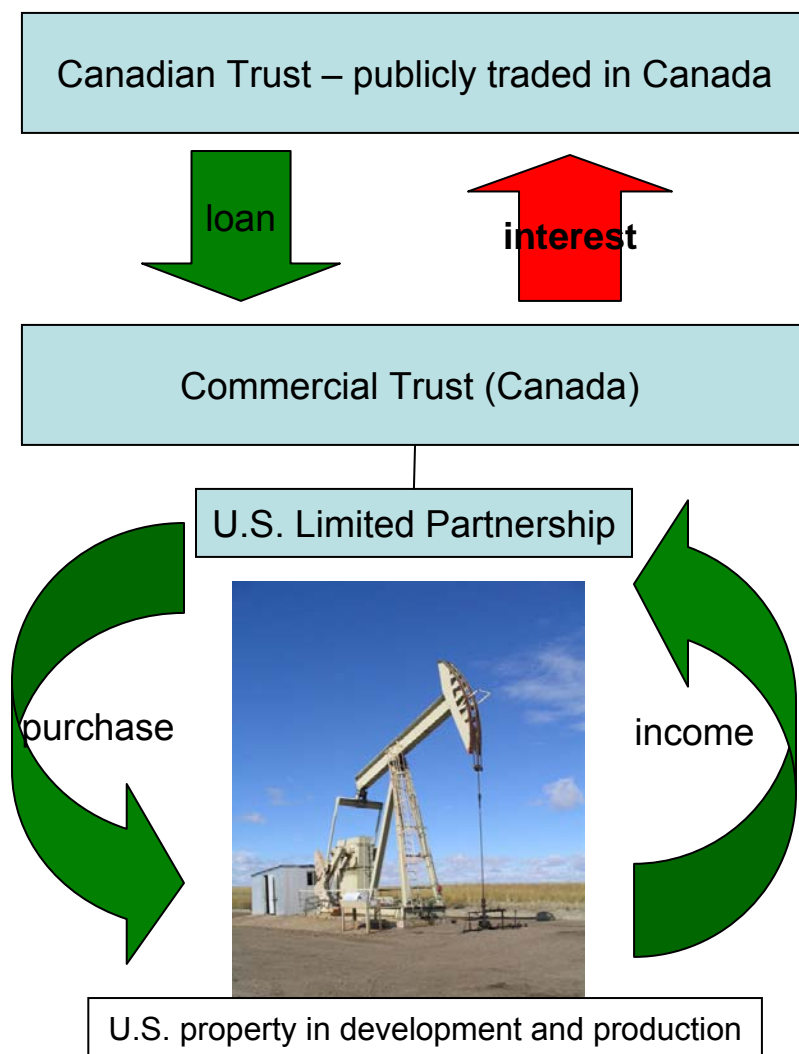
# Sampling of Deals in 2010-2011

- **Hunting Plc (UK integrated energy services provider) acquired Innova Holdings, Inc. (manufacturer of circuit boards for the oilfield services industry and other technologies) for a cash consideration of \$125 million (Sep 2010)**
- **Patara Oil and Gas acquires “West End Holdings” assets (400,000 acres) from Encana for undisclosed consideration (Jun 2010)**
- **Apache Corporation acquired Egyptian concessions of Egypt of BP Plc (UK) for a total consideration of \$0.65 billion (Nov 2010)**
- **NuStar Energy L.P, acquired 75% stake and operational control of two petroleum terminals and an offshore loading facility in Turkey, for a minimum estimated consideration of USD 50m (Feb 2011)**
- **Temasek Holdings PT Ltd (Singapore based state-owned private equity firm), RRJ Capital (Singapore-based private equity firm), Korea Investment Corp (South Korea-based sovereign wealth fund), and Public Sector Pension Investment Board of Canada (PSP Investments) (Canadian public pension fund manager) acquired a total of 70% stake in Frac Tech Services for an enterprise value of \$5 billion (Apr 2011)**
- **Lone Star Funds (US), Shinsei Bank Limited (JP) and Credit Agricole SA (FR), and Aozora Bank Limited (JP) agreed to acquire a 98% stake in The Tokyo Star Bank, Limited (JP) for an undisclosed consideration (May 2011)**

# Sampling of Deals in 2010-2011

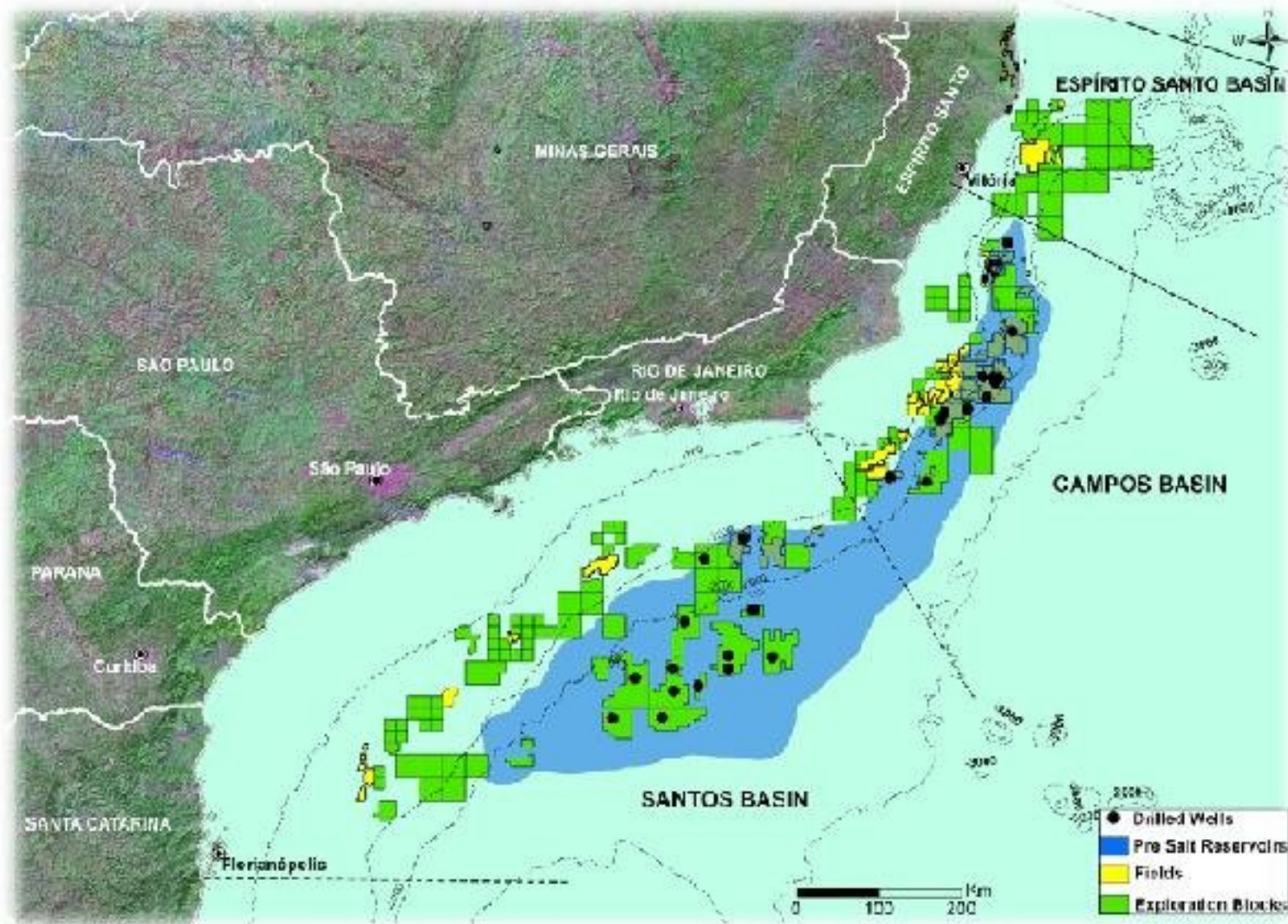
- **Match.com offers to buy Meetic for ~ €344.8 million (May 2011)**
- **Dresser-Rand Group Inc acquired Grupo Guascor SL (SP-based company engaged in electrical generation and renewable energy, construction and development of environmental treatment plants) for implied equity value of \$518 million (May 2011)**
- **Linc Energy (Australia) acquires 14 oil fields from ERG Resources for consideration of \$236 million (Jun 2011)**

# Canadian trust influx?



- **Canadian trust lends to Commercial Trust**
- **Commercial Trust acquires U.S. property in development and production**
- **Commercial Trust subject to U.S. tax**
- **Limited U.S. taxable income**
  - ▶ **Deduction for costs because of development**
  - ▶ **Deduction for interest on loan from Canadian Trust**
- **Payment from Commercial Trust to Canadian Trust not subject to U.S. withholding tax**
  - ▶ **U.S.-Canada treaty protocol eliminated tax on interest in cross-border payments**
- **Canadian Trust pays no income tax if it pays out all income**

# Brazilian Pre-Salt: Warning



# Brazilian Pre-Salt: Warning

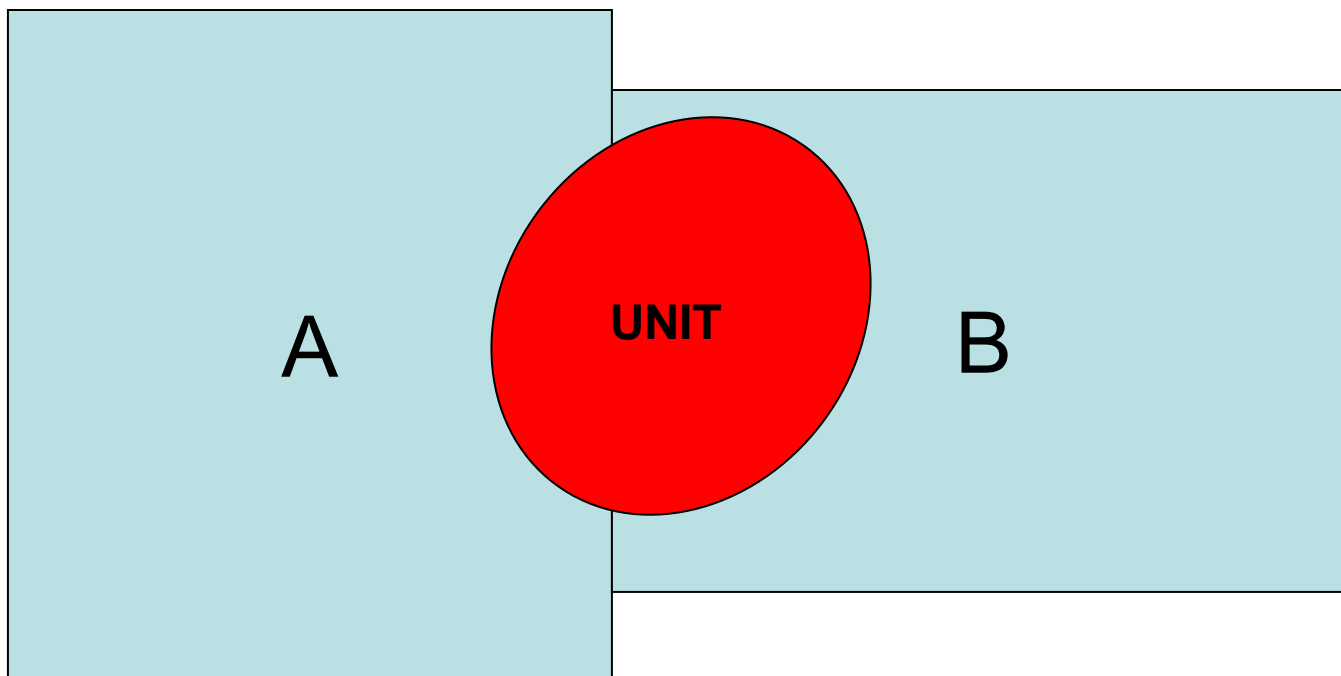
- **Estimated size**
  - ▶ Some 800 km in length and up to 200 km in width
  - ▶ Total area of 122,00 km<sup>2</sup>
- **Production - 2020**
  - ▶ Double Brazilian production
  - ▶ Petrobras global production 5.7MM bopd
- **Reserves**
  - ▶ 14 billion boe
  - ▶ 50 to 100 billion boe in Pre-Salt
- **Pre-Salt Concessions**
  - ▶ 28% of the 149,000 km<sup>2</sup> under concession
  - ▶ 85% success rate
- **Petrobras Capex Budget to 2020**
  - ▶ \$111.4 on current pre-salt concessions
  - ▶ \$500 billion +

# Brazilian Pre-Salt: Warning

- **Effect of recently passed legislation**
  - ▶ **Direct assignment to Petrobras of acreage having reserves of 5 billion boe or more**
  - ▶ **New state entity - Pre-Sal Petr6leos - will be a party to new production sharing contracts (PSCs) without any risk or responsibility**
    - **Golden voting share**
  - ▶ **Introduces PSCs**
    - **Petrobras must have at least 30% interest in future PSCs**
      - **Contracted company explores at own risk with reimbursement of exploratory, development and production costs**

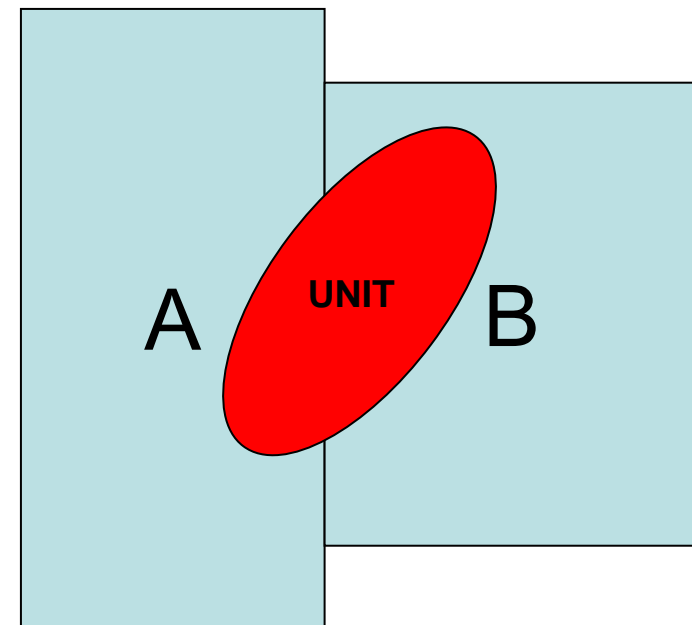
# Brazilian Pre-Salt: Warning

What happens if your existing concession or your new PSC becomes part of a unit?



# Brazilian Pre-Salt: Warning

- **What happens if your existing concession or your new PSC becomes part of a unit?**
  - ▶ Importance of Unit Operating Committee
  - ▶ Role of Pre-Sal Petr6leos and effect on voting rights
  - ▶ Budgetary controls and rights
  - ▶ Sole risk operations
  - ▶ Production sharing contract vs. concession contract
  - ▶ Existing contracts? JOAs?



# FCPA and “Forced Marriages”

- **Relevant portion of the FCPA**

- ▶ to (a) any foreign official, (b) any foreign political party or party official, (c) any candidate for foreign political office, or (d) any other person while knowing that the payment or promise to pay will be passed on to one of the above

15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a)

- **“Forced Marriages”**

- ▶ Local law requires a foreign company to take on an indigenous partner
- ▶ Some countries dictate the choice of a partner

# FCPA and “Forced Marriages”

- **Issues:**
  - ▶ **Who owns the foreign company?**
  - ▶ **Any relationship to a government official?**
  - ▶ **Who controls the venture?**

# FCPA and “Forced Marriages”

- **Angolan Local Requirement**

- ▶ **Licensees, the National Concessionaire and its associates, and any other entities which cooperate with them in carrying out Petroleum Operations shall:**

**Contract local service providers, to the extent to which the services they provide are similar to those available on the international market and their prices, when subject to the same tax charges, are no more than ten percent higher than the prices charged by foreign contractors for similar services.**

**Petroleum Activities Law, Republic of Angola  
Article 26(1)(b)**

# FCPA and “Forced Marriages”

- **Angolan Ministry of Petroleum issued requirements on the procurement of goods and services by oil companies operating in Angola**
  - ▶ **Activities which do not require substantial investment or expertise are reserved for “Angolan companies”**
    - **“Angolan companies” have 51% share capital held by Angolans**
    - **Examples: catering, cleaning, general maintenance of equipment, transportation of equipment**

Oil Ministry, Order 127/03, 14 October 2003, Articles 1 and 3

# FCPA and “Forced Marriages”

- ▶ **Activities which require a reasonable level of investment and know-how are for Angolan companies or joint ventures with Angolan companies**
  - **Examples: geographical surveys, construction of drilling and production facilities**

Oil Ministry, Order 127/03, 14 October 2003, Articles 1 and 3

# FCPA and “Forced Marriages”

- **Issues arising under “forced marriage” requirements:**
  - ▶ **What diligence is required on a local company with which the U.S. company is required to partner under local law?**
  - ▶ **What can a U.S. company do if the identity of an individual as a foreign official is not readily apparent?**
  - ▶ **What duty does a U.S. minority joint venture partner have to persuade against corrupt payments?**
  - ▶ **What duty does a U.S. majority joint venture partner have to prevent such corrupt payments?**

# FCPA and “Forced Marriages”

- **Issues arising under “forced marriage” requirements:**
  - ▶ **Is the joint venture partner a relative of a government official?**
  - ▶ **Is the relationship with the relative of the official such that a payment to the relative will be viewed as tantamount to a payment directly to the official?**
  - ▶ **Is there a risk of payment by the relative of the official because of the family relationship?**

# FCPA and “Forced Marriages”

- **Why perform due diligence?**
  - ▶ **Due diligence not a defense to the FCPA**
  - ▶ **Helpful evidence to show no corrupt purpose or “knowledge”**
  - ▶ **Helpful to avoid problematic transactions**
  - ▶ **“To avoid being held liable for corrupt third party payments, U.S. companies are encouraged to exercise due diligence and to take all necessary precautions to ensure that they have formed a business relationship with reputable and qualified partners and representatives.”**

Layperson’s Guide to FCPA, Department of Justice

# FCPA and “Forced Marriages”

- **What diligence is recommended on a local company or individual?**
  - ▶ **What is the competence, expertise, and reputation of company/individual?**
  - ▶ **What is the company’s (and individual’s) contacts with important government decision makers?**
  - ▶ **What is the individual’s experience, education, prior government/military service, family and business relationships?**
  - ▶ **Who recommended the company or individual?**

# FCPA and “Forced Marriages”

- **What diligence is recommended for the transaction?**
  - ▶ **How is compensation handled? Any fees based on percentage of gains?**
  - ▶ **For non-local requirement situations, does the transaction comply with local law?**
  - ▶ **Does the agreement contain standard reps and warranties on the FCPA?**
  - ▶ **Can local counsel provide an opinion to the legality of the transaction under local law?**

# FCPA and “Forced Marriages”

- **How can you identify an individual as a foreign official if not readily apparent?**
  - ▶ **Ask the individual**
  - ▶ **Consult auditing and law firms**
  - ▶ **Contact U.S. Embassy, Commerce and State Departments**
  - ▶ **Inquire with banking institutions and community leaders**

# FCPA and “Forced Marriages”

- **What about family members as venture partners?**
  - ▶ **May be the best (or only) choice for a partner**
  - ▶ **Family member involvement is not FCPA violation *per se***
    - **Covenant not to pass money on to third parties**
    - **Covenant to comply with FCPA**
    - **Covenant not to deal with particular governmental entity / relative?**

# FCPA and “Forced Marriages”

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# FCPA and “Forced Marriages”

- **Advisory opinions from the DOJ**
  - ▶ **Attorney General will provide opinion as to whether certain specified, prospective conduct (not hypothetical) conforms with the DOJ’s current enforcement policy regarding the FCPA**
  - ▶ **DOJ recommends seeking opinion prior to proceeding with a transaction**
  - ▶ **Request must be signed by senior officer and certified as to truthfulness and completeness**

# FCPA and “Forced Marriages”

- **Advisory opinions from the DOJ**
  - ▶ **Within 30 days, Attorney General issues written opinion or DOJ requests additional information**
  - ▶ **Opinion binding only on applicants and the DOJ**
  - ▶ **Rebuttable presumption that conduct in opinion conforms with DOJ enforcement policy**

# FCPA and “Forced Marriages”

- **Protective provisions for agreements**
  - ▶ **Confirmation of awareness of FCPA (including notice of potential liability to foreign nationals)**
  - ▶ **Agreement not to violate FCPA**
  - ▶ **Agreement not to pay anything of value to foreign officials**
  - ▶ **Representation that foreign national is not an employee, officer, or agent of a foreign government (or candidate) and agreement to advise if circumstances change**
  - ▶ **Agreement that the foreign partner will keep accurate books and records and that allows U.S. partner to review or audit books and records of joint venture partner**

# FCPA and “Forced Marriages”

- **Protective provisions for agreements**
  - ▶ **Agreement that payments made under the venture agreement will be made only by check or wire transfer to an account under the name of the contracting party located in host country**
    - **To the extent applicable, agreement from foreign partner that all purchases will be made pursuant to an authorized list of expenditures and will have proper recording**
    - **To the extent applicable, agreement that certain actions above a certain value require prior written approval from U.S. partner or grant veto power to U.S. partner**

# FCPA and “Forced Marriages”

- **Protective provisions for agreements**
  - ▶ **Termination provision in the event a violation of FCPA or other foreign anti-corruption laws**
  - ▶ **Optional remedies: indemnification, buy-out of partner’s interest, withhold capital or funding**

# FCPA and “Forced Marriages”

- **Other considerations**

- ▶ **Can a U.S. company effectively use a foreign subsidiary to mitigate potential exposure to FCPA risks in “forced marriage” transactions?**
- ▶ **What impact will a diligence strategy have on the U.S. company’s underlying business operations with the foreign host government?**
- ▶ **What other risks do U.S. companies face even if due diligence strategy is successful?**

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**Thank you!**



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