Risky Business:
The Legal Challenges Posed by Offsets Accompanying Foreign Sales

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INTRODUCTION
What are Offsets?

- Offsets are measures used to encourage local development or improve the balance-of-payment accounts by means of domestic content, licensing of technology, investment requirements, counter-trade or similar requirements.  
  
  Article XVI-Footnote 7 – GPA (Marrakesh Agreement)

- Offsets are non-standard contracts that require, as a condition for the sale of goods and/or services, that the vendor transfers a form of economic activity to the buyer’s government.
  
  (Travis K. Taylor – University of Richmond)

- Offsets in defense trade encompass a range of industrial and commercial benefits provided to foreign governments as an inducement or condition to purchase military goods or services, including benefits such as co-production, licensed production, subcontracting, technology transfer, purchasing, and credit assistance. This mandatory compensation can be directly related to the purchased defense article or service or it can involve activities or goods unrelated to the defense sale.

Enormous Commitment – Little Data

Changing landscape: increased foreign demand for defense equipment while US and EU demand is slowing

US Dept. of Commerce reports that in 2013:

- US defense contractors entered into 67 new offset agreements with 18 countries valued at $5B
- Those agreements equaled 52.9% of the $9.4B in reported sales associated with offset obligations
- 21 U.S. firms reported offset data to BIS
- There were 541 “offset transactions” (to fulfill offset obligations) with 32 countries with an actual value of $3.1B and offset “credit value” of $3.5B


Avascent estimates $214 billion in offset commitments, worldwide, were generated 2005-2011. For the period 2013-18, it predicts ~ $30B in new annual obligations.

Avascent estimates that rising global demand for military purchases will produce another $225 billion in offset commitments through 2016.

This “yields” a total obligation of nearly a half-trillion dollars.

What percentage of existing commitments has been satisfied? How much is yet to be performed? Are there performance risks?

BIS requires disclosure of offset commitments >$5M and offset transactions – but not offset agreements or performance status. Nothing requires disclosure of promised or unfulfilled offsets. No country-by-country data is furnished.
Who requires offsets?

• Offsets required by virtually every country in the world that purchases defense supplies or services (>100)

• Offsets persist despite official hostility in some quarters
  – US: “the general policy of the Department of Defense with regard to offsets is that they are market distorting and inefficient.” Presidential policy mandates that "no agency of the U.S. Government shall encourage, enter directly into, or commit U.S. firms to any offset arrangement in connection with the sale of defense goods or services for foreign governments.” DoD, “Offsets of Foreign Military Sales,” at http://www.acq.osd.mil/dpap/cpic/ic/offsets_of_foreign_military_sales.html
  – Notionally, EU Directive 2009/81, governing defense and security procurement, treats offsets (and other demands for industrial compensation in return for awarding a contract to a non-national supplier) as illegal. Nonetheless, many EU members justify demands for offsets by invoking Article 346 of the Treaty on the Functioning of the European Union (TFEU) (member states may act as necessary to protect “essential interests of its security”)

• Developing countries are expanding offset demands ... and several (e.g., Turkey, Thailand, India(?)) will extend beyond defense buys to infrastructure, power, etc.

• This is despite provisions in Article XVI of the Agreement on Government Procurement (GPA) applicable to WTO signatories that bars use of offsets except (per Article XXIII) for national security purposes
Many variations, little consistency

- There are neither “best practices” or “accepted government norms” that govern how purchasing nations obtain offsets.
- Among purchasing countries, enormous variation key elements:
  - **Threshold**: above what purchase amount are offsets required?
  - **Quota**: what percent of the purchase value must be discharged?
  - **Responsible**: beyond the prime, can tier 1 or other subcontractors satisfy?
  - **Fulfillment period**: how long does the obligor have to perform?
  - **Grace period**: is extra time available to discharge?
  - **Qualifying activities**: what purchases, investments, transfer of technology or other commitments discharge offset obligations?
  - **Eligible partners**: does the buyer decide who qualifies as “offset partner”?
  - **Multipliers**: do some activities earn credit above the commitment value?
  - **Modification**: is it legally possible to modify the offset plan?
  - **Penalties**: how much are penalties and when do they apply?

National objectives & the role of offset authorities also vary greatly.
Recent Trends

- Increasingly, offset proposals are key determinants to the selection process. (Business capture requires more than the best supply proposal.)
- Many countries seek to achieve broad and durable industrial development objectives through offset programs. Some demand export outcomes. (Whether these are realistic is highly debatable.)
- Increasingly, political leaders of purchasing countries employ offsets to justify buys from foreign sellers. (Little empirical evidence shows that the industrial benefits justify the price premium.)
- Offsets “directly” related to the supply contract are in less favor as now purchasers demand expansive “indirect” projects with long-term goals. (This complicates the business challenge and risk to the seller.)
- Some countries are moving away from encouraging FDI investment or even transfer of technology and insisting instead upon joint ventures or implementation of design and production capability. (Such demands risk IP dilution and the creation of long-term competitors.)
REPRESENTATIVE COMPARISON
## Overview: The Basics

<table>
<thead>
<tr>
<th>INDIA*</th>
<th>TURKEY [2013]</th>
<th>UAE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Threshold</td>
<td>Rs 3 billion crores ($65M)</td>
<td>$5 million</td>
</tr>
<tr>
<td>Offset %</td>
<td>30% (can be higher)</td>
<td>70 %</td>
</tr>
<tr>
<td>Preference</td>
<td>Direct, Indirect, FDI, DFI</td>
<td>Direct &amp; Indirect</td>
</tr>
<tr>
<td>Eligible</td>
<td>Certain supplies/services</td>
<td>(Per RFP Category)</td>
</tr>
<tr>
<td>Discharge</td>
<td>Within contract + 2</td>
<td>Within contract + 2</td>
</tr>
<tr>
<td>Banking</td>
<td>Ordinarily 7 years</td>
<td>Pre-credit / 5 yrs.</td>
</tr>
<tr>
<td>Transfer</td>
<td>Only Vendor ↔ Tier 1</td>
<td>Limited</td>
</tr>
<tr>
<td>Responsible</td>
<td>Vendor + Tier 1</td>
<td>Prime &amp; Subs (K)</td>
</tr>
<tr>
<td>Penalties</td>
<td>Maximum 20%</td>
<td>6%</td>
</tr>
<tr>
<td>Multipliers</td>
<td>1.50 – 3.0</td>
<td>1.0 – 8.0</td>
</tr>
<tr>
<td>Modification</td>
<td>Now – on approval DAC</td>
<td>Contemplated</td>
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* India is now working on revised Defence Offset Guidelines
# High Level Differentiators

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<th>UAE</th>
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</thead>
<tbody>
<tr>
<td>• Broad list of eligible supplies &amp; services</td>
<td>• Offset/IP weighed in selection process</td>
<td>• “Hybrid” discharge</td>
</tr>
<tr>
<td>• Many avenues for discharge; complex rules</td>
<td>• Formulaic application of discharge categories</td>
<td>• Focus on “shareholder value” (profit) rather than revenues</td>
</tr>
<tr>
<td>• Potentially narrow set of eligible suppliers</td>
<td>• Focused on industrial participation beyond the “direct transaction”</td>
<td>• JV-focused – no credit* for traditional direct offset purchases</td>
</tr>
<tr>
<td>• Little access to DOMW during development</td>
<td>• Central role of SSM in policy and execution</td>
<td>• Potential flexibility for gestation &amp; completion</td>
</tr>
<tr>
<td>• “Indian Offset Partner” qualification uncertain</td>
<td>• Building “out” from co-production to targeted indigenization</td>
<td>• Business case development assures alignment with national goal</td>
</tr>
<tr>
<td>• Virtually no flexibility in implementation</td>
<td>• Some success measured by export growth</td>
<td>• Are expectations realistic or achievable?</td>
</tr>
<tr>
<td>• Little accomplished – priorities shifting</td>
<td></td>
<td>Most “businesslike” but suffers from excess ambition</td>
</tr>
</tbody>
</table>

Much expended, little accomplished

Industrialization has built on co-production foundation

Are expectations realistic or achievable?

Most “businesslike” but suffers from excess ambition

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*Note: The text above is a summary of the differentiator factors for India, Turkey [2013], and UAE, highlighting key points and outcomes.
Administration of Offsets

INDIA

- MOD divides roles:
  - Defence Acquisition Wing - leads contracting
  - DOMW - Defence Offset Management Wing - sets policy and administrates
  - DDP - Defence Production Department - responsible for DPSUs and Ordinance Factories
  - DRDO - Defence Research Development Org’n

- Also DIPP (Dep’t of Industrial Policy & Promotion) at Ministry of Commerce and FIPB (Foreign Investment Promotion Board) at Ministry of Finance

TURKEY [2013]

- SSM - Undersecretariat for Defence Industries

- Responsible for:
  - Industry Policies
  - Acquisition
  - Industrial Participation and Offset
  - R&D / Technology Management
  - International Cooperation & Exports
  - Funding

Concentration of responsibilities contrasts with India (for example)

UAE

- Tawazun Economic Council

  “a strategic investment firm focused on the long-term development of UAE’s industrial manufacturing and technology capabilities and knowledge-transfer with a specific focus on the defense sector.”

- Replaced the Offset Program Bureau

Tawazun reviews the Concept Paper & Business Plan and administers the Offset Agmt.

A “Relationship Manager” is appointed; implementation is “monitored thoroughly”
# Key Program Documentation

## INDIA
- **DPP** - Defence Procurement Procedure (since 2006)
- **Revisions** to DPP and DOG announced April 2013
  - Generally intended to reduce offset-generating transactions such as “Buy (Global)” and “Buy and Make with Transfer of Technology”

## TURKEY [2013]
- **Industrial Participation/Offset Guideline** (April 2011)

## UAE
- Defence Contractor Offset Guidelines
- Tawazun Economic Program Agreement
- Supplemental Agreement
- “Credit Guidelines”?

Elaborate documentation of rules
- many questions remain
## Offset Program Objectives

### India
Leverage capital acquisitions to develop defence industry by:
- fostering development of internationally competitive enterprises,
- augmenting capacity for Research, Design and Development related to defence products and services
- Encouraging development of synergistic sectors like civil aerospace, and internal security.

Increase manufacturing and employment opportunities

### Turkey [2013]
Principal objectives are:
- Develop the national defense industry
- Modernize armed forces

Priorities include “Industrial Depth” - “Technological Competence” - “Export & Logistics Support”

### UAE
- Develop modern defense industry in UAE through industrial infrastructure
- Promote partnerships to facilitate tech transfer
- Create employment opportunities for UAE Nationals

**Tawazun’s Mission:**
“to develop profitable ventures through industrial partnerships and strategic investments that add to the country's industrial manufacturing layer in the areas of defense, defense manufacturing and manufacturing technology”

**SSM’s Aim:**
“to contribute to the balance of international payments by establishing import/export balance in product/service supply, to maintain and develop domestic industry and [spread] technology”
### Business Focus Areas

#### INDIA
- No mission focus
- No concentration on target industries
- DRDO technology a “wish list”
- Historical reservation favoring DSPUs
- Uncertain role for private sector
- Now promote MSMEs

Laudable goals frustrated by excess ambition

#### TURKEY [2013]
- 70% of Industrial Participation / Offset to be within Defence Industry projects
- Industrial development key
- Co-development now favored over co-production
- More emphasis on industrialization than on direct “offset” buys
- Export emphasis though some satisfied by export to offset obligor

Appears pragmatic and focused rather than diffuse

#### UAE
- Land & Naval Systems
  - Armored vehicles
- Munitions & Weapons Systems
  - Guided ammunition
  - Surface ship guns
  - Firearms
- Aerospace Systems
  - Aero engines & structure
- Advanced Material
  - Advanced armoring mtl's
- Other Technologies
  - Oil drilling systems

Shortage of qualified partners limits choices – earnings focus also an issue
How it Works

**INDIA**
- Vendors select offset partners & products
- Determine if eligible to discharge offset obligations under 4 categories
- Six avenues for discharge are available (e.g., direct purchase, FDI, ToT)
- Offset obligor or Tier 1 sub
- Confirm qualification of suppliers as Indian Offset Partners (IOPs)
  - FDI limit of 26% on defence sector
  - Industrial licensing also may be required

**TURKEY [2013]**
**Req’d Industrialization Plan**
- Bidders must offer IP/O in Categories A, B and C
  - A: Turkish industrial activities within scope of the Contract
  - B: product/service export within defense & related fields
  - C: technology cooperation and investment
  - RFP sets IP/O liability
  - SSM can set IP/O activity
- IP/O evaluated for supply contract award
  - Score = 0.5 × T + 0.40 × I × 0.10 × E
  - T = Technical; I = IP/O; E = Admin

**UAE**
- Approval of the Offset Plan is mandatory before GHQ Contract
- Satisfaction via a “hybrid” of input (30% max) and output measures (70%)
- Grace period depending on project complexity
- Normal 7 year fulfillment period
- Annual, “progressive” milestones
  - “Early Planning Rewarded”
Evaluation of Proposals

**INDIA**
- RFP states requirement
- Vendor makes “Offset Compliance Commitment” at time of Technical and Commercial Proposals
- Technical & Commercial Offset Proposals normally due 3 months later
- Technical Offset Evaluation Committee (TOEC) reviews proposals for conformity
- CNC then verifies the commercial terms
- Finalize Offset Contract
- Signing of Main and Offset Contract

**TURKEY [2013]**
- IP/O scoring is done by formulas taking into account assigned category significance, value and duration (rewarding prompt fulfillment)
- Failure to meet “IP/O Liability” percentage requirements can disqualify
- Criteria tree is applied to evaluate a Category-A IP/O proposal against the Bidder’s Industrialization Plan according to “coefficients”

**UAE**
- Stepped process:
  1. Tawazun Economic Program Agreement ↓
  2. Submit Concept Paper ↓
  3. Submit Business Plan ↓
  - Negotiations
  ◊ Receive Tawazun OK
  4. Notification of Supply ↓ Agreement
  5. Execute Supplemental Agreement (if > $10M) ↓
  ⇒ Perform Agreement

Contractor may apply for “in-principle approval”
Methods for Discharge

**INDIA**

- Six basic methods
  1) Direct purchase and export orders
  2) FDI in ventures w/ eligible products or services
  3) “In-Kind” transfer of ToT
  4) “In-Kind” provision of equipment
  5) ToT or provision of equipment to PSUs
  6) Technology acquisition by DRDO

  **Complex rules apply.**

**TURKEY [2013]**

- As specifically defined by SSM in the RFP
- Industrialization Plan defines activities of Turkish industry in scope of the contract
- Domestic companies approved by SSM to fulfill Category A activities
- Contractor may propose new IP/O activity to satisfy Industrialization Plan
- “Domestic Net Added Value” criteria applied to invoice for product / service

**UAE**

- Local value added projects
- Tech Transfer
- Know-how transfer
- Export sales
- “Causality” (of business)
- Generated Net Profit
- Equity Contribution
- Expansions of existing business

**INPUT:** (≤ 30%): industry enablers + knowledge empowerment + equity contribution

**OUTPUT:** (≥ 70%): Net Profit / Export Sales + Hiring UAE Nationals = Output Value
### Eligible Supplies or Services

#### INDIA
- **Defense Products**
  - Includes “software specially designed or modified for the development, production or use” of mil systems
- **Inland/Coastal Security**
- **Civil Aerospace**
  - Design, development, manufacturing, upgrade, composites, G&N, test facilities, and software
- **Services [suspended]**
  - MRO, upgrade, software development, QA, training, R&D

#### TURKEY [2013]
From Appendix-B
**Industrialization Plan**

**Table of Work Share**

**Local Industry Participation**
- Design & Development
- Other Engineering Tasks
- Manufacturing Tasks
- Qual, Cert, Test & Verification
- Logistic Support Tasks
- Project Management
- Systems Engineering
- Quality Management

**Supplier Company/SME**
- Supplier Company Work Share
- SME Work Share

**R&D Activities**
- Technology & Ability Acquis’n

#### UAE
(Accepted Projects:)
- MRO – AMMROC
- 76mm ammo – SAMOUM
- 8x8 and 6x6 vehicles
- Ammo mf’g: Burkan
- Advanced Materials (metallic, composite, trmt)
- 25/30 mm ship turrets
- Remote-controlled systems
- Shipyard building
- Autonomous Systems
- SHORAD and Anti-Ship missiles
Multipliers

### INDIA
- **1.5X** Micro, Small and Medium Enterprises
- **2.0–3.0X** Technology Acquisition by DRDO
  - 2.0: offered for use by IAF w/o restriction on quantity
  - 2.5 offered for use only in Indian Market but for both military and civil applications
  - 3.0 offered w/o restriction and full rights inc’g export

DRDO’s list of sought technologies includes few likely to be releasable by U.S.

### TURKEY [2013]

#### A: Industrial Participation
  - 2 = SME design & engineering

#### B: Product/Service Export
  - 4-5 = Certain platforms (Air)
  - 2-3 = System/Subs/Compnts
  - SME workshare +1
  - Export to prior market +1

#### C: Technological Coop’n
  - 4-5 = Technologies such as network based warfare, C2IM, EW, missile control, sensors
  - 6-8 = as requested by SSM
  - 4 = DFI
  - 3 = Equipment to Resch Instns
  - 5 = R&D Support

### UAE

#### Input Multipliers (2.0 – 5.0)
- End Market Technologies (strategic tech = 5)
- Special Products & Services (focus system = 5)
- Key Functions (manufacturing = 5)
- Infrastructure Development
- IP transfer & Skill dvlpment

#### Output Multipliers
- \(2 \times \text{Net Profits} + \text{Additional Multiplier of 1.5 - 3.0 based on exports \% of sales}\)
- Bonus of 1.0 – 2.0 depending on \% of UAE Nationals employees
Potential Liabilities

**INDIA**
- 5% penalty for failure to fulfill the offset obligation in a year
- Unfulfilled offset value will be carried forward
- Penalty may be paid by vendor or recovered from Bank Guarantee
- 20% cap during main K period
- DOMW administers penalties
- Failure to fulfill full offset obligations risks debarment
- Vendor responsible for Tier-1 supplier shortfall
- Differences settled via discussions. Decision of the Acquisition Wing and DOMW (as responsible) are **final**.

**TURKEY [2013]**
- Penalty of 6% on unfulfilled IP/O commitments
- Recoverable vs. contract(s) payments or Guarantee
- Escalation applies to liabilities added after Program Period
- At end of Program Period Contractor may be liable to an additional fine of up to 6% of the amt unfulfilled
- Payment of penalty sanctions does not extinguish liability.

**UAE**
- Penalties apply to late or partly unfulfilled Milestone obligations
- Payment of penalties does not discharge oblg.
- Liquidated damages of 8.5% of shortfall amount if Milestone missed; can be returned if later met
- Bank Guarantee equal to 8.5%
- Default Account holds 50% of unfulfilled oblgn.
BUSINESS RISKS
Unrecognized & Unreported Risks

• Offsets present business and compliance risks
  – Business risks are largely unreported and unrecognized
    • Neither management, nor shareholders nor governments know
    • Failure to fulfill offset commitments can jeopardize enterprise
    • Companies should assess commitments and new prospects
  – Offsets are “uniquely” susceptible to compliance risks
    • Risks proliferate with the many junctures of the offset process
    • Compliance risks are “context sensitive” to the purchasing nation
    • Many of the high-growth markets have poor corruption risk ratings
  – These risks demand new measures
    • Strong, centrally-managed enterprise offset control programs
    • Increased reporting and transparency could be required
    • Companies should support trans-national best practices
  – Offsets also complicate and likely will delay the contracting process; these realities should be recognized in risk-adjusted return calculations
Key indicators of business risk include realism of the national objectives, state of the indigenous defense industrial base, ability to use existing subsidiaries, the presence of established supply chain partners, limits on foreign direct investment, the willingness of the offset authority to negotiate the T&Cs of the offset contracts, and the opportunity to revise offset partners & commitments.

Realistic assessment is necessary at each juncture. Those involved should be separate from the capture or market team. The risk evaluation should recognize country-specific considerations. Involvement of corporate and specialist counsel is recommended. The risk assessment methods should be standardized and the results documented.
Business Risks in the Offset Contract

• The diversity of national requirements means that the business challenge (and legal risks) vary enormously
  – Fulfillment period; gestation; banking; transfers
  – Direct vs. Indirect Offsets; required allocation by category
  – Measurements and metrics; value added; buyback; IP valuation
  – Qualification of Eligible partners, supplies and services; amendment
  – Multipliers, Allowable Discharge Methods
  – Integrity Pact, Penalties & Sanctions

• The offset contract defines the business commitment

• Only some issues can be negotiated
  – T&Cs may be far from “market”
  – Sizable LOCs or Guarantees may be required
  – Dispute resolution may be other than ideal

Obligors should not assume that offset authorities take consistent positions during either contract negotiation or offset performance.

The final business risk assessment reflects both the performance risk of the offset plan and the legal risks of the Offset Contract; these should be considered along with the risks and rewards of the related supply contract.
ECCO Perspective on Risks

Business & Legal Risks

**Monetary**
- Cost of Offset
- Failure to budget for all costs
- Hidden costs or liabilities

**Reputational**
- Media exposure
- Ethical issues

**Legal**
- Liability: effective legal agreement
- Contracts dictate business
- Variety of laws

**Operational**
- Logistics challenges
- Sourcing
- Order accumulation
- Partnerships in foreign countries

**Commercial**
- Non-performance (blacklisting)
- Creating competition
- Protecting intellectual property
- Accuracy, corruption, fraud

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COMPLIANCE RISKS
Case Study: India’s VVIP Helicopter Scandal

Govt of India

$753M Supply Contract

Finmeccanica/Agusta Westland

Offset Contracts

IDS INFOTECH-INDIA
Software

AEROMATRIX-INDIA
Services

IDS-TUNISIA

GORDIAN SERVICES-MAURITIUS

GLOBAL TRADE & COMMERCE

€18m paid for derelict WG-30 helicopters?

Former A.C.M & Family

Four Middlemen: Guido Haschke*
Carlos Garosa
Christian Michel
Gautam Khaitan

* Plea bargain 4/5/14

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April 30, 2015 -27-
Scrutiny of Compliance Risks

- Offsets present serious and continuing compliance risks from "inception" through "execution" and extending to "reporting"

“Offsets are under much less scrutiny – either governmental or public – during their negotiation than the main arms deal. In many countries, there is almost no due diligence on potential improper beneficiaries from offsets, no monitoring of performance on offset contracts, no audits of what was delivered compared to pledges and no publication of offset results, benefits or performance. This makes offsets particularly vulnerable to corruption.”

“Offsets transactions carry potentially high risks of corruption, not only due to the high level of secrecy within defence procurement as a whole, but because they usually lack the scrutiny and monitoring of the corresponding acquisition contract. Additionally, most offset transactions have few, if any, transparency and public accountability requirements.

Besides the risk of bribery in offsets contracts, there is an additional risk that main supplier companies may be using the offsets package as a vehicle to offer benefits to individuals in return for undue influence or access to defence contracts. In short, offsets may influence the acquisition decision rather than the quality of the good or service offered. Agents, offsets brokers and intermediaries negotiating offsets packages may also be offering benefits to officials to secure undue advantage for the main supplier company or create a demand for offsets in defence contracting.”


Transparency International UK: Due Diligence and corruption risk in defence industry offset programmes, at 10 (2012)
Risks at Many Transaction Junctures

- Virtually every facet and phase of a foreign defense procurement and accompanying offset contract presents compliance risks

- Requirements definition
- Political decisions to buy
- Evaluation & Selection

- Eligible offset partners
- Selection of suppliers
- Acceptable business plan

- License for JV Formation
- Approval of FDI
- Receipt of req’d permits

- ToT and investment credit
- Multipliers
- Valuation & Value Added

Improper influence on need
Influence on supply contract award
Favors to politicians or bureaucrats

Favors or bribes to decision-makers
Steering to “friends and family”
Kickbacks
Securing necessary consents

Payments for ministerial actions
Gratuities for agents and expediters
“Pay to play” practices

Favors or bribes to decision-makers
“Buying” desired outcomes
Influencing valuation decisions
Estimated 2014 offset obligations: $32 Billion US
Source: Avascent Analytics
Indicators of Offset Compliance Risk

- Offset Requirement as % of Supply Contract
- Transparency in rules, regulations, policies, procedures
- Accountability of government officials; secrecy of process
- Role of agents, consultants and advisors
- Public reporting of decisions, results
- Electronic or manual record-keeping
- National compliance regimes and enforcement record
- Presence and nature of discretionary functions
- Maturity of the indigenous aerospace & defense industry
- Realism of the industrial program and economic objectives
- Potential financial exposure should offset program fail
- Presence of a local culture of compliance
CONCLUDING OBSERVATIONS
Making Offsets Successful

• Only in rare examples have offset programs achieved objectives.
• Success is linked to the duration of the related supply contract.
• Offset process and requirements can frustrate objectives in the supply contract – added price, delay, excluded competitors.
• Nations expend scarce capital on foreign purchases. If that is their sovereign decision, all stakeholders should strive to make the supply and the offset contract succeed in their key purposes.
• Restraint and discretion are needed on the part of purchasing countries. “More” becomes “too much” and invites failure.
• Today the entire offset process is characterized by excess risk. All stakeholders should act to improve:
  - Traceability
  - Efficiency
  - Fairness
  - Transparency
  - Accountability
The International Playing Field & Perspective

**States**
- Local value added created
- Level of economic value created
- Maturity

**International Institutions**
- Discovering what Offset is
- Discovering the risks it involves
- No international regulations for government procurement

**Contractors**
- Increasing demand for Offset distorting invitations to tender
- Higher costs resulting in higher prices
- Loss of sales consistency

**Offset Associations**
- Responsibility to train qualified personnel
- Responsibility to communicate with international institutions
- Responsibility to promote transparency

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### Shared Interests Among Competitors

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<th>Advocacy Objectives</th>
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<td>Offsets can determine new awards</td>
<td>Press for fair competition rules: Separate supply from offset award</td>
</tr>
<tr>
<td>Undisclosed rules &amp; inconsistent use</td>
<td>Improve disclosure, assure consistency</td>
</tr>
<tr>
<td>Unreasonable expectations</td>
<td>Mitigate and rationalize demands</td>
</tr>
<tr>
<td>Insufficient host country industrial base</td>
<td>Recognize in offset requirements</td>
</tr>
<tr>
<td>Exposure to enforcement and sanctions</td>
<td>Exposure should be relative to risk</td>
</tr>
<tr>
<td>Potential purchasing country exclusion</td>
<td>Common and fair process</td>
</tr>
<tr>
<td>Too many junctures at risk of corruption</td>
<td>Host countries must act to manage risk</td>
</tr>
<tr>
<td>Excess demands for bonds &amp; security</td>
<td>Demands should be relative to risk</td>
</tr>
<tr>
<td>Absence of reporting of obligations</td>
<td>New standards &amp; methods for reporting</td>
</tr>
<tr>
<td>No mutuality in offset contract terms</td>
<td>Develop “best practice” offset T&amp;Cs</td>
</tr>
<tr>
<td>Uncertainty in offset measurement</td>
<td>Consistent and disclosed metrics &amp; methods</td>
</tr>
<tr>
<td>Delivery of value through offsets</td>
<td>Recognize the high price of excess demands</td>
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Presenter: Robert S. Metzger

Robert S. Metzger received his B.A. from Middlebury College and is a graduate of Georgetown University Law Center, where he was an Editor of the Georgetown Law Journal. Before practicing law, Bob was a Research Fellow at the Center for Science & International Affairs, Harvard Kennedy School of Government (now “Belfer Center”).

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Rogers Joseph O’Donnell, a boutique law firm that has specialized in public contract matters for 33 years, is ranked in “Band 2” by the 2014 Chambers USA – the only boutique among the nine highest ranked firms. Mr. Metzger advises leading US and international companies on enterprise business strategy and on public contract compliance challenges.

SELECTED EXTERNAL PUBLICATIONS & PRESENTATIONS
many available at http://www.rjo.com/metzger.html

- Program, “Offsets from the U.S. Perspective: Key Performance and Compliance Challenges,” ECCO Symposium, EUROSATORY, Paris, France (June 18, 2014)