

Michigan International Lawyer

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Disclaimer: The opinions expressed here in are solely those of the authors and do not necessarily reflect those of the International Law Section or the Editors.

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Letter from the Chair

Dear Members and Colleagues:

As my term as Chairman of the State Bar of Michigan International Law Section comes to an end, I would like to express my sincere appreciation for the opportunity and privilege it has been to serve you. I will pass the gavel to Bruce D. Birgbauer at the Sections Annual Meeting at the Sheraton Detroit-Novu Hotel on October 6, 2005 and join the ranks of the Ex-Officio.



The Section has a long tradition of strong support and participation by its Ex-Officio members. At many of the meetings and events over the past few years, a majority of the participants were Ex-Officio members. The Section benefits from the cumulative wisdom during their participation, and they help preserve and perpetuate the quality of spirit and camaraderie that is so evident at our meetings.

Bruce Birgbauer and I represented the Section at the 2005 State Bar of Michigan Leadership Forum this summer. The Forum focused on issues that impact the profession such as increased taxation on revenues from

professional services and multidisciplinary practice. Also, we participated in a very informative session on bar section leadership and management.

At the Sections strategic planning meeting this summer we launched initiatives to enhance member participation (including participation in meetings and events via the internet), expand the committee structure, continue the law school scholarship program, and add a law student international summer intern program.

I write this letter on the fourth anniversary of the September 11th attacks on our country, and in the midst of dealing with the tragedy on the Gulf Coast. The incredible resolve of the victims of both to rebuild their lives, and the generosity of all Americans to insure that happens is very heartwarming.

One of the reasons that our country continues to be secure against both natural disasters and its enemies is the Department of Homeland Se-

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Submissions Guidelines

The Michigan International Lawyer, which is published three times per year by the International Law Section of the State Bar of Michigan, is Michigan's premiere international law journal. Our mission is to enhance and contribute to the public's knowledge of world law and trade by publishing articles on contemporary international law topics and issues of general interest.

The Michigan International Lawyer invites unsolicited manuscripts in all areas of international interest. Manuscripts should be available in hard copy and electronic format. Manuscripts submitted for consideration cannot be returned unless accompanied by a \$5 check or money order made payable to Wayne State University Law School for shipping and handling.

All submissions may be forwarded to the editor at the following address:

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If you know of any upcoming event, please let us know.

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Articles due December 1

Spring Issue
Articles due March 1

Fall Issue
Articles due August 1

U.S. Government approves CAFTA to Promote Free Trade with Central America

Andrew Doonaert, Miller Canfield Paddock and Stone PLC

In August 2005, the U.S. Government approved the Central American Free Trade Agreement ("CAFTA"), which will remove trade barriers between the U.S. and Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and the Dominican Republic.

CAFTA will reduce the duty rates for goods imported into the U.S. that qualify as "originating" from one of the countries above under the new country rules of origin. The rules of origin provide for tariff shifts and regional value content formulas similar to the North American Free Trade Agreement ("NAFTA"). There are significant differences between some of the individual CAFTA rules of origin compared to the NAFTA rules of origin for similar imported items. Some CAFTA rules of origin allow for lower regional value content requirements, for example 35% or greater, and in some cases the regional value content requirement can be met through the "build-up method" or "build-down method."

The Caribbean Basin Economic Recovery Act ("CBERA") or Generalized System of Preferences ("GSP") are special U.S. government trade programs that currently exist, which allow goods from the CAFTA countries to realize duty free status for qualifying goods imported in the U.S. U.S. companies currently taking advantage of CBERA and GSP should consider transitioning to using CAFTA for the following reasons:

1. CBERA and GSP have to be periodically renewed by Congress


so the duty-free privileges have lapsed on some occasions;

2. To originate for CBERA and GSP, a part imported from non-beneficiary country may have to undergo a "double substantial" transformation which can be more difficult to determine compared to a tariff shift allowed under CAFTA which compares the Harmonized Tariff Schedule Code ("HTS") of the imported material to the HTS code of the finished good; and
3. The record-keeping requirements and eligibility requirements of CAFTA may be more compatible with a company's business and accounting practices compared to the requirements of CBERA and GSP. U.S. companies should give the decision to transition serious consideration and may seek outside counsel to consider the advantages and disadvantages of participating in each trade program.

It is not yet clear when CAFTA will actually enter into force because the language of the implementing legislation specifically avoids naming a date but it does indicate the U.S. will enter into the agreement with each of the other countries as they adopt it.

In addition to CAFTA, the Bush Administration has overseen the implementation of Free Trade Agree-

ments with Australia, Chile, Jordan, Morocco and Singapore. On the horizon are Free Trade Agreements with Bahrain, Thailand and the Andean countries in South America.

For more information about CAFTA and other free trade agreements, contact Andrew Doornaert, Esq. 

Andrew P. Doornaert is a senior attorney in the Detroit office of the law firm of Miller, Canfield, Paddock and Stone P.L.C. where he provides expertise in the area of customs and international trade law. He reduces the costs and liability risks associated with import and export transactions. His experience includes tariff classification, rates of duty and valuation of imported merchandise, Free Trade Programs (NAFTA, GSP, AGOA, CAFTA), country-of-origin marking and labeling requirements, NAFTA verifications, customs compliance assessments, customs penalty cases, foreign trade zones, customs bonded warehouses, maquiladoras, value added taxes and other customs considerations that arise in the shipment of goods between the United States and foreign markets. He also advises companies on export control regulations and assists companies to secure export licenses through the Department of Commerce, Department of State and Department of Treasury.



Section Meetings at-a-Glance

October 6, 2005

Annual Meeting

November 8, 2005

Meeting — Oakland County

January 24, 2006

Meeting — Detroit

April 18, 2006

Meeting — Law School

June 20, 2006

Planning Session

September 2006

Annual Meeting

From the Chair

Continued from page 1

curity. The fact that a delegation from our Section toured the US Customs and Border Security area at the Detroit Metropolitan Wayne County Airport speaks volumes about the unit's organization and confidence. Also, the delegation was briefed by representatives from the Airport Authority on airport operations, expansion and preparations for Super Bowl XL.

Please plan on joining us at the Section's Annual Meeting this year. Following the business meeting there will be a program on the topic ***Business and Legal Challenges in China and India for Automotive Suppliers***. Of course, we would like you attend all meetings and events during the year. However, if you only attend one, please join us at the Annual Meeting. It is an excellent opportunity for you to meet your Section's leadership and members.

Finally, I would like to thank all of you that supported my tenure as Chair of the Section this year, especially those involved in speaking at various events, writing articles and publishing the *Michigan International Lawyer*. The talent, diversity and professionalism of our Section's membership are very evident and appreciated.

Sincerely,

Randolph M. Wright
Chair

The Foreign Corrupt Practices Act: The Impact of Sarbanes-Oxley and Other New Developments

Stuart H. Deming, Deming PLLC

Prohibiting the payment of bribes to foreign officials is generally viewed as the sole focus of the Foreign Corrupt Practices Act (“FCPA”).¹ Yet, in reality, its provisions have far greater implications than simply prohibiting the payment of bribes to foreign officials. To address practices associated with the making of improper payments, the FCPA placed new and significant affirmative obligations on issuers to maintain systems of internal controls and to maintain records that accurately reflect transactions and dispositions of assets. These obligations are known as the “accounting and record-keeping provisions.”²

The Accounting and Record-Keeping Provisions

The FCPA’s accounting and record-keeping provisions constitute the FCPA’s second and less-known mechanism for deterring bribes to foreign officials. While their application is limited to issuers, the accounting and record-keeping provisions constitute the far more potent mechanism. Unlike the anti-bribery provisions,³ they are not limited to the making of improper payments. Regardless of whether an issuer is engaged in international business, they apply to all aspects of an issuer’s practices relating to the preparation of its financial statements.

Officers, directors, employees, and agents acting on behalf of an issuer are subject to the FCPA. To the degree that they may be complicit, privately-held companies as well as individuals not affiliated with an issuer can be subject to the prohibitions of

the FCPA. However, unlike the anti-bribery provisions, the accounting and record-keeping provisions apply to the operations of majority-owned foreign subsidiaries of an issuer.⁴

Significantly, the record-keeping provisions apply to all payments, not merely sums that would be material in a traditional financial sense. Even if the amount of a transaction would not affect the “bottom line” of an issuer in quantitative terms, it could still constitute a violation of the record-keeping provisions if not accurately recorded. As a result, transactions involving small amounts of money, if not properly recorded, can have serious ramifications.

Historically, except for disclosures as to certain aspects of an issuer’s activities, materiality was the overriding consideration as to what required disclosure and what constituted a violation of U.S. securities laws. The record-keeping provisions represented a dramatic departure from the traditional approach taken by U.S. securities laws. The concept of materiality does not control what constitutes a violation of the core part of the record-keeping provisions.⁵ However, materiality does control disclosure obligations to shareholders.

The Impact of Sarbanes-Oxley

In the wake of the accounting scandals involving Enron and other U.S. companies, Congress adopted a range of remedial measures commonly referred to as “Sarbanes-Oxley.”⁶ Foremost among these measures were the heightened obligations associated with the accounting provisions of the

FCPA. Issuers are required to include in their annual reports an assessment by management of the adequacy of their internal controls.⁷ An attestation is also required by an issuer’s outside auditor as to management’s assessment of the adequacy of the issuer’s internal controls.

Expansion of Criminal Sanctions

To give added impetus to the degree to which Congress views a violation of U.S. securities laws, the penalties for a criminal violation of the accounting and record-keeping provisions were dramatically increased. Incarceration was increased from 10 to 20 years.⁸ Fines for individuals were increased from \$1 million to \$5 million and from \$2.5 million to \$25 million for entities. The penalties for a violation of the anti-bribery provisions, which were already less severe, remained unchanged.⁹

Protection of Informants

Individuals who provide information relative to a violation of U.S. securities laws, including the FCPA, were given added protection by Sarbanes-Oxley. It is a criminal offense for any individual or entity to knowingly retaliate against any person for providing information relating to the commission or possible commission of a federal offense.¹⁰ In addition, these protections are expressly intended to apply to situations outside of the United States.¹¹

“Retaliation” can consist of “interfering with the lawful employment or livelihood” of the informant.¹² Along these same lines, new criminal

statutes were added for the destruction, alteration, or falsification of records to impede a federal investigation or in anticipation of such an investigation and for the destruction of audit records in violation of rules and regulations promulgated by the SEC.¹³

Added Responsibilities for Audit Committees

Sarbanes-Oxley imposed added responsibilities for audit committees. Audit committees are required to establish procedures for the receipt, retention, and treatment of complaints received by an issuer regarding accounting, internal accounting controls, or auditing matters. Procedures are also required to be established for the confidential and anonymous submission by employees regarding questionable accounting or auditing practices.¹⁴

Private Right of Action for Whistleblowers

Sarbanes-Oxley established a new cause of action for retaliation against whistleblowers who provide information to federal law enforcement agencies, to Congress, to supervisors, to those conducting internal investigations, or to any litigation involving various violations of federal law or any provision of federal law relating to fraud against shareholders.¹⁵ Provision is made for reinstatement, back pay, and litigation costs. But a short 90-day statute of limitations is imposed along with a requirement that administrative remedies be exhausted with the Department of Labor.

Disclosure by Attorneys

Following a framework similar to that for auditors under the Private Securities Litigation Reform Act of 1995,¹⁶ Sarbanes-Oxley imposed disclosure obligations on attorneys who practice before the SEC.¹⁷ Disclosures

are required to be made at the highest levels of an issuer relative to material violations of U.S. securities laws.¹⁸ Disclosure to the SEC may also be required.¹⁹ A material violation can include a material violation by an officer, director, employee, or agent of an issuer.

To be subject to these obligations, an attorney need not be employed or retained by an issuer. Attorneys practicing before the SEC include attorneys communicating with the SEC, representing anyone before the SEC, providing legal advice with respect to submissions to the SEC, and providing legal advice to an issuer as to whether a submission or other information is required to be furnished to the SEC under U.S. securities laws. The obligations can also apply to supervising and subordinate attorneys.

New Developments

One of the most challenging issues presented to an issuer is whether a disclosure to shareholders must be made of a suspected violation of the anti-bribery or accounting and record-keeping provisions of the FCPA or of the anti-bribery prohibitions of other countries. Frequently misunderstood, or overlooked, is the obligation to make timely disclosures in financial statements or filings with the SEC. These disclosures are required to be made regardless of whether an investigation is launched or any other action is taken by enforcement authorities.

Disclosure in financial statements or filings is dependent upon an issuer's obligations under U.S. securities laws to make timely disclosure of information that may be material to shareholders. A failure to make timely disclosure of material information can also expose an issuer to civil liability to claims brought by its shareholders under U.S. securities laws as well as

to the prospect of criminal and civil enforcement action.

What appear to be *de minimis* payments or isolated events can have far greater ramifications than what may initially be perceived. Even with an immaterial amount and an absence of management involvement, the payment of a bribe can be material.²⁰ However, no *per se* rule exists. Courts have typically looked to the circumstances of a particular situation.²¹

Materiality can be premised upon how a set of circumstances may bear on a key segment or prominent subsidiary of an entity.²² An affirmative duty is generally not recognized with respect to making immediate disclosure of material non-public information or to correcting or updating previous disclosures.²³ But disclosure of material non-public information may be required with respect to periodic and episodic filings.²⁴

Section 21(a) Report in Titan

The SEC's recent Section 21(a) report arising out of its investigation of the Titan Corporation provides an example of how the payment of bribes may not be material in a quantitative sense but material from a qualitative perspective.²⁵ Titan affirmatively represented in its merger agreement with Lockheed that it was not aware of any information of it having violated the FCPA. The representation was included in its proxy statement and a copy of the merger agreement with the same representation was attached to its proxy statement.

Even though the merger agreement was amended to take into account SEC and Department of Justice investigations of Titan for FCPA violations, FCPA representations associated with the proxy statement were never changed. The failure to qualify or correct the representation

in the proxy statement as to there being no evidence of a violation of the foreign payment provisions of the FCPA was found to be material in a qualitative sense and therefore requiring disclosure.

The SEC issued its report of investigation which held that “[w]hen an issuer makes a public disclosure of information – *via* filing a proxy statement or otherwise – the issuer is required to consider whether additional disclosure is necessary in order to put the information contained in, or otherwise incorporated into that publication, into context so that such information is not misleading.”²⁶ It found that “a reasonable investor could conclude that the statements made in the representation describe the actual state of affairs and the information could be material.”²⁷

Consistent with the SEC’s Section 21(a) report, the circumstances surrounding Titan and its proposed merger with Lockheed further illustrate how FCPA violations can be material to shareholders well after an applicable statute of limitations may have expired or after the prospect of enforcement action has abated. Titan’s FCPA violations were discovered in the course of Lockheed’s due diligence investigation associated with its proposed merger with Titan. Lockheed would not go forward with the merger without Titan reaching a resolution with SEC and Department of Justice officials.

The merger eventually failed because a timely resolution could not be worked out. Hence, from Titan’s shareholders’ standpoint, the FCPA violations proved to be costly and thereby material as the value of their investment was substantially reduced. It also demonstrates that well after the expiration of applicable statutes of limitations, evidence of possible

violations of the anti-bribery provisions can have a bearing on a merger or acquisition and, in turn, be material to shareholders.²⁸

The Absence of a Compliance Program

For an issuer engaged in extensive overseas activities, the mere absence of a company-wide FCPA compliance program may constitute a violation of the internal control provisions. Among the allegations in the complaint against Titan, the SEC alleged that Titan failed to devise or maintain an effective system of internal controls to prevent or detect FCPA violations.²⁹

The SEC’s Litigation Release reported that “[d]espite utilizing over 120 agents and consultants in over sixty countries, Titan never had a formal company-wide FCPA policy, failed to implement an FCPA compliance program, disregarded or circumvented the limited FCPA policies and procedures in effect, failed to maintain sufficient due diligence files on its foreign agents, and failed to have meaningful oversight over its foreign agents.”

The Use of Deferred Prosecutions

Another set of recent cases relates to the use of deferred prosecutions by the Department of Justice with respect to FCPA violations. The most recent case involved a company by the name of Micrus Corporation.³⁰ After a voluntary disclosure to the Department of Justice, it was determined that Micrus had paid more than \$105,000 to doctors employed by publicly-owned and operated hospitals in Europe in return for the purchase of Micrus’ products. A deferred prosecution was also the basis for resolution in a relatively recent case involving *Monsanto*.³¹

The deferred prosecutions in *Micrus* and *Monsanto* followed the

model used at times with respect to fraud involving defense contractors. Deferred prosecutions are almost always limited to entities and, in exchange for not filing criminal charges, they typically include the same basic components:

1. The acceptance of responsibility for the misconduct;
2. The payment of a fine;
3. The full and affirmative disclosure to the Department of Justice of evidence of possible violations of the FCPA;
4. The adoption of an FCPA compliance program and a set of internal controls designed to prevent future violations; and
5. The retention of an independent compliance expert for a specified period to ensure that the compliance program and internal controls are effective.

Implications on Business and Employment Relationships

The FCPA and the implementation by many countries of the international anti-corruption conventions will increasingly have implications on relationships between and among private parties.³² Regardless of whether action is taken by enforcement officials, a growing body of domestic and international law bears on the conduct of business as a result of a failure to comply with the FCPA and other legal regimes prohibiting improper payments to foreign officials.

Public-Policy Exception to At-Will Employment

In employment contexts, the FCPA has been found in the United States to serve as a basis for the application of the public-policy exception for the termination of at-will employees.³³ For employees who are alleged to have been terminated for their re-

fusal to condone or carry out practices that are prohibited by the FCPA, the practical effect is to shift the burden to an employer to demonstrate that the termination was for cause.

Especially in the wake of the corporate scandals in recent years, this public policy exception to at-will employment associated with possible FCPA violations can be expected to be followed by more and more courts. Indeed, in *dicta*, the Seventh Circuit has stated in applying the public-policy exception in *Brandon v. Anesthesia & Pain Management Associates, Ltd.*, 277 F.3d 936, 942 (7th Cir. 2002), that states are “required to treat federal law on a parity with state law, and thus [are] not entitled to relegate violations of federal law or policy to second-class citizenship.”

Enforcement of Contracts

Within the context of contractual disputes, the FCPA can in certain situations serve as a basis for not enforcing a contract. In litigation in U.S. courts and in other common law jurisdictions, the “unclean hands” doctrine can bar a claim for equitable relief. In some jurisdictions the doctrine has also been applied to bar a cause of action. This includes situations where a payment may have been made in violation of the anti-bribery provisions of the FCPA.³⁴

In the context of international arbitration, arbitral tribunals and courts in enforcing or annulling arbitral awards are increasingly confronted with situations where the enforcement of a contract or the enforcement of an award relating to a contract may be barred due to improper inducements in conjunction with the contract. Over the years, arbitrators have asserted the existence of “an international public order which makes bribery contracts invalid and contrary

to *bonos mores*.”³⁵ Some tribunals have found national laws to also hold such contracts to be illegal.

Until the recent adoption of the anti-bribery conventions, no specific reference to international law could be made. That has now changed. There can be little question that an agreement to pay a bribe is contrary to customary international law and not just a breach of moral standards. Arbitrators can accordingly be expected to be more and more confronted with arguments of this nature by parties challenging the enforcement of a contract where allegations of improper payments exist.

Conclusion

Focusing on the FCPA as being solely related to making improper payments to foreign officials can be a dangerous proposition. Sarbanes-Oxley has dramatically increased the seriousness of the implications for any individual or entity that takes a narrow or cavalier approach to abiding by the terms of the FCPA. Especially for issuers, the pervasive nature of the accounting and record-keeping provisions cannot be overstated. Great care must be exercised to ensure that all of an issuer’s obligations under the FCPA are strictly observed. 🌐

Stuart H. Deming of Deming, PLLC has written and spoken extensively in the United States and abroad on a range of legal issues related to international business. He is the author of the American Bar Association treatise, The Foreign Corrupt Practices Act and the New International Norms.

Deming is also an adjunct professor at the John Marshall Law School Center for International Business and Trade Law in Chicago. He is the vice chair of ABA Securities and Capital Markets Committee, the chair of the

International Accounting Standards Subcommittee, and a vice chair of the Anti-Money Laundering and Professional Ethics Committee. Deming is also a former Chair of the International Law Section of the State Bar of Michigan, former co-chair of the ABA’s National Institutes on the Foreign Corrupt Practices Act, founder of the ABA’s Task Force on International Standards for Corrupt Practices, and former member of the Board of Editorial Advisors to the Foreign Corrupt Practices Act Reporter.

Deming received his B.A., M.B.A., and J.D. from the University of Michigan. He is licensed to practice in Michigan and in the District of Columbia. He is a member of the bar of the U.S. Supreme Court as well as a number of federal district and appellate courts. He has also been licensed as a Certified Public Accountant in Michigan.

Endnotes

- 1 15 U.S.C. §§ 78m, 78dd-1; 78dd-2; 78dd-3, 78ff.
- 2 Conceptually, an issuer is a publicly-held company. However, from a technical standpoint, an issuer is any entity that is required under the Securities Exchange Act to register under Section 12 or to file reports under Section 15(d). *Id.* at §§ 78l, 78o(d). Issuers may be foreign companies, including a foreign company with American Depositary Receipts (“ADRs”), that are registered pursuant to Section 12 or required to file reports pursuant to Section 15(d). The accounting and record-keeping provisions apply to issuers and not solely to publicly-held companies.
- 3 The anti-bribery provisions relate to the prohibitions on improper payments to foreign officials. *Id.* at §§ dd-1; dd-2; dd-3.
- 4 While the anti-bribery provisions do not technically apply to foreign subsidiaries, a parent can be held vicariously liable for the conduct of a subsidiary if it has sufficient knowledge and control. As a practical matter, there are relatively few situations where parent companies have little knowledge or control over the activities of their subsidiaries. Moreover,

- what is often termed “willful blindness” cannot be used as a defense to a violation of the anti-bribery provisions.
- 5 15 U.S.C. § 78m(b)(2); 17 C.F.R. § 240.13b2-1. However, in terms of representations or omissions to auditors, materiality is a factor. *Id.* at § 240.13b2-2.
 - 6 “Sarbanes-Oxley” is derived from the names of the respective chairmen of the pertinent oversight committees of the Senate, Paul S. Sarbanes, and the U.S. House of Representatives, Michael G. Oxley.
 - 7 15 U.S.C. § 7262.
 - 8 *Id.* at § 78ff(a).
 - 9 The maximum fine for a criminal violation by an entity is \$2 million, and the maximum period of imprisonment for an individual is 5 years. 15 U.S.C. §§ 78dd-2(g); 78dd-3(e); 78ff(c).
 - 10 18 U.S.C. § 1513(e).
 - 11 *Id.* at § 1513(d).
 - 12 *Id.*
 - 13 *Id.* at §§ 1519 and 1520.
 - 14 15 U.S.C. § 78j-1(m)(4).
 - 15 18 U.S.C. § 1412A.
 - 16 15 U.S.C. § 78j-1.
 - 17 *Id.* at § 7245.
 - 18 17 C.F.R. § 205.2(i).
 - 19 *Id.*, § 205.3(d)(2).
 - 20 *See, e.g., Roeder v. Alpha Industries, Inc.*, 814 F.2d 22, 26 (1st Cir. 1987) (“Illegal payments that are so small as to be relatively insignificant to the corporation’s bottom line can still have vast economic implications”); *In re Rospach Sec. Litigation*, 760 F. Supp. 1239, 1252 (W.D.Mich. 1991) (“The spirit of the federal securities laws requires that those who are in positions to know of serious wrongdoing ought to disclose any such wrongdoing to the public”).
 - 21 For example, in *Roeder*, at 26, the First Circuit cited to a situation where small illegal payments could be material to an entity that “relies heavily on government because such activity can result in the corporation being barred from obtaining future government contracts or subcontracts.” *See also SEC v. Jos. Schlitz Brewing Co.*, 452 F. Supp. 824, 830 (E.D. Wis. 1978) (it may be material that brewery risked losing its license to sell beer by engaging in illegal practices).
 - 22 *E.g., In re Kidder Peabody Securities Litigation*, 10 F.Supp.2d 398, 410-411 (S.D.1998) (that a prominent subsidiary of GE was able to generate false profits, apparently without GE’s knowledge, arguably raised concerns about GE’s internal controls, efficiency, and integrity, all of which would have been relevant to a reasonable investor).
 - 23 *See, e.g., G. Porter, What Did You Know and When Did You Know It?: Public Company Disclosure and the Mythical Duties To Correct and Update*, 68 *FORDHAM L. REV.* 2199 (2000); M. Gulati, *When Corporate Managers Fear a Good Thing is Coming to an End: The Case of Interim Nondisclosure*, 46 *UCLA L. REV.* 675 (1999).
 - 24 “The periodic disclosure requirements include: (1) the annual filing of Form 10-K, which requires an extensive discussion of the corporation’s business for the preceding five years; (2) disclosure of audited financial statements for the immediately preceding three fiscal years, and management’s analysis of the changes in its financial condition and the results of its operations for the periods covered by its financial statements (known as the “MD&A”); and (3) quarterly filings of Form 10-Q, which require quarterly and year-to-date financial statements and an MD&A covering the quarter and year-to-date period. Episodic disclosure requirements include: (1) filing of a proxy statement preceding any meeting of the corporation’s stockholders, which requires detailed information about the items to be voted on at the stockholder’s meeting; (2) registration statements that are required to be filed prior to the sale of the corporation’s securities, which requires an extensive disclosure regarding the contemplated offering; and (3) the filing of Form 8-K, which is required to be filed within 10 days following certain material events such as a change of control of the corporation, significant acquisitions or dispositions of assets, and changes in a corporation’s auditors.” Porter at 2202 n. 13.
 - 25 The investigative report is located at <http://www.sec.gov/litigation/investreport/34-51283.htm>, reprinted in *BUSINESS LAWS, INC. (FCPA)*, § 699.9204. A “Section 21(a) report” is prepared pursuant to Section 21(a) of the Securities Exchange Act. 15 U.S.C. § 78u(a). It does not represent a factual finding or adjudication. However, it is a significant report in that it is rarely issued and, most important, it signifies a major statement of SEC policy, particularly in terms of future enforcement policy.
 - 26 *Id.*
 - 27 *Id.* In explaining its position, the SEC cited to *Basic Inc. v. Levinson*, 485 U.S. 224, 240 (1988) (“materiality depends on the significance the reasonable investor would place on the withheld or misrepresented information”).
 - 28 In a situation similar to *Titan*, GE encountered evidence of possible FCPA violations in the course of its acquisition of InVision Technologies, Inc. SEC Litigation Release No. 19078 (Feb. 14, 2005) (<http://www.sec.gov/litigation/litreleases/lr19078.htm>), reprinted in *BUSINESS LAWS, INC. (FCPA)*, § 699.9202. Disclosures to the Department of Justice and SEC followed along with a resolution. While the SEC’s ability to seek civil fines may be limited by the expiration of applicable statutes of limitations, its ability to seek equitable relief is not limited by a statute of limitations.
 - 29 SEC Litigation Release No. 19107 (March 1, 2005) (<http://www.sec.gov/litigation/litreleases/lr19107.htm>), reprinted in *BUSINESS LAWS, INC. (FCPA)*, § 699.9203.
 - 30 *BUSINESS LAWS, INC. (FCPA)*, § 101.00801.
 - 31 *Id.*
 - 32 The international conventions include the Convention on Combating bribery of Foreign Officials in International Business Transactions, often referred to as the “Organization for Economic Co-operation and Development (‘OECD’) Anti-Bribery Convention,” the Inter-American Convention Against Corruption, the Council of Europe Criminal Law Convention on Corruption, and the United Nations Convention against Corruption.
 - 33 *E.g., D’Agostino v. Johnson & Johnson, Inc.*, 133 N.J. 516, 628 A.2d 305 (N.J. 1993); *Thompson v. St. Regis Paper Co.*, 102 Wash.2d 219, 685 P.2d 1081 (Wash. 1984).
 - 34 *E.g., Adler v. Federal Republic of Nigeria*, 219 F.3d 869, 876-78 (9th Cir. 2000); *SEDCO International, S.A. v. Cory*, 683 F.2d 1201, 1210-11 (8th Cir. 1982).
 - 35 Martin, *International Arbitration and Corruption: An Evolving Standard*, *INTERNATIONAL ENERGY AND MINERAL ARBITRATION, MINERAL LAW SERIES* (Spring 2002).

The Intensifying Conflict between State and Federal Government Procurement Policy

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Since 1979 and the Tokyo Round of world trade negotiations, the United States has participated in a limited international regime on the opening of specified government procurement opportunities to other participating nations, on a reciprocal basis, that have also signed the Agreement on Government Procurement (“AGP”).¹ With certain threshold limits and certain other exceptions, the intent of the AGP is to require the participants to treat bidders from the other signatory nations on an equal basis as their domestic bidders for procuring entities and for items listed in their respective annexes. In effect, the AGP calls for national (i.e., “equal”) treatment² and for non-discrimination³, with the attainment of gradual liberalization driven by negotiations, primarily on a bi-lateral basis but with plurilateral effects, over inclusion of an ever-increasing number of procuring entities and procurement opportunities to each participant’s respective annexes. Originally, the AGP only covered the procurements of a “central” or federal government and did not include sub-central governments’ procurements, special state enterprises, etc.⁴ The U.S. (federal) position favored a more inclusive agreement, which was not feasible at

that time in light of reservations held by other nations.⁵ Today, however, the AGP organizes the participants’ offerings into five basic categories, which are set out in five different annexes to each participant’s Appendix I: 1) Central Government Entities; 2) Sub-Central Government Entities; 3) Other Entities; 4) Services; and 5) Construction Services.⁶

The heightened importance of government procurement is best understood not only by the inclusion of more items to which the AGP applies,⁷ but also to the number of new participants, and as importantly, to the number of new bi- and multi-lateral trade agreements that now include government procurements as a topic of trade liberalization. Today, the AGP now has thirty-seven signatory nations and the European Communities, twenty observers, and nine nations (currently observers) that have applied for accession.⁸ The United States has included procurement in several of its bi-lateral and regional trading arrangements,⁹ and is currently negotiating procurement coverage as part of several new agreements.¹⁰ Moreover, other nations as well are including government procurement in their bi-lateral and regional trading arrangements at the sub-AGP level. If the reasoning behind carving out the ability of WTO/GATT members to enter into regional trading arrangements proves true,¹¹ at some point the regional gains and regional experience will be folded into the larger WTO/GPA framework. All of this is pointing

in a single direction, which underscores the importance of government procurement on a national and an international level. In turn, there is added pressure on a federal level to negotiate even further liberalization of procurement opportunities on a reciprocal basis.

In 2004, federal aspirations received a setback in what appears to be a backlash to the outsourcing of telephone call centers to nations such as India.¹² At least thirty-seven states have taken steps to prohibit or to discourage outsourcing where it involves the expenditure of state funds.¹³ In Michigan, Executive Directives 2004-2 and 2004-3 now direct Michigan state procurers to favor Michigan-based businesses to the extent permitted by federal law.¹⁴ In light of the fact that the States’ participation in the sub-central procurement regime of the AGP is voluntary, the extent to which a State may opt out of federally-agreed obligations under the AGP would appear to be total.¹⁵ However, while a recent U.S. Supreme Court decision that recognized federal supremacy over state procurement law was narrowly tailored to avoid direct conflict with States’ rights in this area, the omens point toward a conflict wherein the States’ rights over the question with whom they choose to afford procurements opportunities will be subjugated to federal policy.¹⁶

The purpose of this article is to set out the current state of affairs with regard to U.S. state’s authority over their respective government procure-

ments with an eye on the intensifying conflict occasioned by efforts toward further liberalization by the United States Trade Representative and the States' respective policies and practices. The intent of the article is not to take a side or to debate with any degree of detail the pros and cons of worldwide free trade that include central and sub-central procurement opportunities. Rather, the goal is to point out the approaching conflict and to attempt to define some of the issues that States should consider early enough to ensure meaningful participation in the process of including sub-central procurements in federally negotiated free trade agreements.

Current State of Play

Currently, participation of the States in federally-negotiated government procurement agreements is voluntary.¹⁷ In addition, negotiations between the European Union and the United States led to inclusion, again on a voluntary basis, of procurements conducted by several large cities, including the City of Detroit for out-of-city suppliers.¹⁸ Worthy of note is the fact that the commitments for the City of Detroit and for several other sub-state procuring entities only apply to the European Communities, further underscoring the voluntary nature of sub-federal commitments.¹⁹

In all, thirty-seven states have agreed to treat the suppliers from other AGP member nations as equivalent to domestic bids for procurements by entities set out in Annex 2 of Appendix 1 of the AGP for goods, services, and construction services.²⁰ The threshold amount at or above which the equal treatment and non-discrimination obligations arise for covered procurements in the cases of

goods, services, and construction services, respectively, is SDR 355,000.²¹ Michigan's commitment is for procurements made by the Department of Management and Budget, with exception for construction-grade steel, motor vehicles, and coal.²² Several bills have been introduced in the Michigan House of Representatives that would address concerns over loss of jobs and opportunities due to outsourcing of procurements,²³ but none have been enacted into law. Rather, Michigan's commitments have come in the form of executive letters from the Governor to the United States Trade Representative ("USTR"). In fact, the current federal approach to state procurement liberalization is for the USTR to request increasing commitment of governors rather than of state legislatures.²⁴ Moreover, the drive for increasing state participation in the developing international procurement regime includes, again on a voluntary basis, the North American Free Trade Agreement ("NAFTA"), the U.S.-Israel Trade Act, and is urged with regard to several other bi- and multi-lateral trade agreements, including the Central American – Dominican Republic Free Trade Agreement ("CAFTA"), AUSFTA, and the U.S.-Singapore Free Trade Agreement.²⁵

In what appears to be a backlash to outsourcing of state procurements that may have started in Tennessee,²⁶ it would appear that at approximately thirty-seven to thirty-nine states have adopted or have attempted to adopt mechanisms to prevent outsourcing.²⁷ The forms of protection that are advocated by these actions include preferences for state-based procurers, requirements that all call centers identify their location, information requirements on a bidder's organization and places of doing business, and

restrictions on outsourcing. Most, if not all, of these actions remain in committee, or await some other approval of the other state legislative body. It would seem that state anti-outsourcing activity began in 2003 in the period leading up to the 2004 U.S. Presidential election, but has been stalled in the aftermath. Michigan's response is contained in two Executive Directives. The likely reason is that the executive directive, unlike a state law or an executive order, does not carry the force of law, allowing it to be amended or dropped without a time-consuming and possibly contentious legislative battle. In effect, the embodiment of Michigan's anti-outsourcing rules in an executive directive maintains the current state of *détente* between state and federal policies. The same appears to be true of other states, although the manifestations of anti-outsourcing attempts and the method for putting them on hold differ.

The stalling of state anti-outsourcing attempts may be attributable to at least several factors, such as conclusion of the 2004 Presidential election (were this movement to have been a political platform of sorts intended to affect the election), or even tacit agreement between state and federal players in furtherance of the current state of *détente*. Another possibility is use by the federal government of its "power of the purse" to discourage states from taking strong and irrevocable steps under the cloud of losing discretionary federal funding dollars. Michigan's use of the executive directive may be the ideal mechanism by which to maintain the state's position while stopping short of seriously offending federal sensibilities. What is clear, however, is that the states' anti-outsourcing movement and federal policy on liberalization of

procurement policy will someday collide if both sides continue on their respective courses. This eventuality is best exemplified by challenges, filed by the European Communities and by Japan, for the alleged breach by the U.S. of its commitments under the AGP after Massachusetts passed a law prohibiting the granting of procurement contracts to a category of businesses that engaged in commerce with Burma with the purpose of forcing changes to Burma's record on human rights.²⁸ A brief analysis of the Supreme Court's ruling in the case challenging Massachusetts' "Burma Act" is in order.

The Burma Act and *Crosby v. National Foreign Trade Council*²⁹

In 2000, the U.S. Supreme Court was asked to decide whether a state law that prohibited the award of state procurement contracts to businesses that had significant commercial dealings with Burma. The goal of Massachusetts' Burma Law³⁰ was to pressure Burma to improve its practices in the area of human rights by attempting to restrict commerce. The Burma Act created a 'restricted purchase list' to which parties doing business in Burma were added.³¹ The term "doing business" was defined especially broadly,³² although certain activities in important and non-political sectors were exempted, such as those relating to news reporting in Burma,³³ international telecommunications goods or services,³⁴ and medical supplies.³⁵ In addition to these exemptions, the Burma Act also provided for three important exceptions to its application in cases where: 1) there would be no bids or insufficient competition without a bid from a party 'doing business in Burma' as defined by the Burma Act³⁶; 2) the procurement was for medical supplies³⁷; and 3) no com-

parable bids from non-restricted bidders were received.³⁸ The exceptions provided a degree of flexibility, in the areas or sectors so provided or under somewhat extreme circumstances. Nevertheless, and as the Supreme Court clearly noted, Burma Act did not contain either a general waiver provision or a termination provision.³⁹ It is for this reason that the Burma Act was inflexible with regard to possible federal policies (i.e., if they did not fit into Massachusetts' defined categories) and provided the basis for a pre-emption challenge.

The federal district court found, and the Court of Appeals for the First Circuit agreed, that the Burma Act 1) unconstitutionally interfered with the foreign affairs power of the executive branch; 2) unconstitutionally interfered with the dormant Foreign Commerce Clause of the federal Congress; and 3) that the Burma Act was pre-empted by a federal Act of the same ilk that was enacted three months after Massachusetts' enactment.⁴⁰ The Supreme Court majority commenced its analysis with a focus on the third issue, i.e. pre-emption of the Burma Act by the federal government's own enactment. In ruling that the federal law pre-empted the Massachusetts Act, the majority relied on the line of reasoning in *Youngstown Sheet & Tube Co. v. Sawyer*⁴¹, whereby the executive's foreign affairs power, when bolstered by full congressional support on the level of foreign commerce, establishes a particularly virulent form of federal pre-emption. In effect, the majority was able to combine the first two issues addressed by the lower courts and wrap them into a ruling based only on the third, i.e., federal pre-emption. In the final analysis, the majority holding in *Crosby* makes clear that state

law must be subjugated to federal law where the Congress has spoken and/or where the executive function in implementing the congressional mandate is threatened *in the case that a state law is based on a political motive that has been addressed by the federal government*.

Therefore, the question whether federal law pre-empts state law based on the paramount concern over the health and welfare of its citizens, which is unquestionably linked to state spending, remains an open one. Whether it will be answered by federal legislation or by federal court decision when the conflict is unavoidable is another question.

Conclusion

The climax in the conflict between state and federal authority over procurement, in light of the developing international regime, has not yet been reached. In light of the developments in international trade, particularly with respect to further efforts of the USTR to include government procurement opportunities in bi- and multi-lateral trade agreements, the conclusion must be drawn that the impending conflict between state and federal policy is approaching its apex, and that the outstanding issues from the *Crosby* majority opinion will be answered.

The benefits of international trade, which rely on open markets, are unassailable. The importance of government procurement as a part of international trade, in light of the fact that it represents a significant portion of nation's respective economies,⁴² is also clear, which in turn highlights what may be the new frontier of international trade liberalization as tariffs and other barriers to trade are resolved. Accordingly, from a state perspective, thought should be given

to the approach to be taken, including possible legislative or even constitutional changes, that maximize states' rights in light of what may prove to be inevitable pre-emption. For example, states could perhaps condition their participation in federally-requested (or, some day, federally-mandated) government procurement schemes on the level of access that bidders from the respective state have abroad, or even based on some comparison of respective state benefits from such openness such that an equal protection challenge may be possible. In the final analysis, states may wish to find a way to clearly bootstrap the economic and social welfare of their citizens that derives from employment levels and related economic factors effectuated by state procurement policies to the federal responsibility. In such a way, at least the states may retain some degree of authority, moral or legal, to engage in state-federal horse-trading over items such as federal monies for highway projects, etc., or in the least point to the exact source of responsibility when state economies experience difficulties.

It is possible that the conflict is ultimately resolved by federal statute, in which case states may wish to pass legislation and/or constitutional amendment making clear a federal legislator's duties to the state which are not in conflict with federal rules. In this way, legislators at the federal level will have their votes watched carefully for possible constitutional infringements. In effect, this would throw the concept of the "conscientious legislator" as has been applied to state legislators and governors back onto the federal system⁴³ and basically require that responsibility be taken if the current, voluntary system is changed due to federal activity. Another possibility is that

a federal law that does not directly impact on the issue nevertheless will be found to take precedence over state authority and lead to pre-emption. In such case, the best mechanism from a state's point of view is craft something that will force a further stand-off or require the federal system to clearly accept responsibility for any damage to the citizens of the individual states, i.e., require that the burden of any net losses be shared equally by all states under the supervision and protection of the federal system. A word of caution is in order. Whatever step is taken, if at all, it should be narrowly tailored so as not to trigger the federal need to pre-empt. Rather, any change should only sanctify each state's rights and duties relating to protecting the health and welfare of its citizens.

The current steps by the federal system to bring about collective state participation may be found in a memorandum of the Intergovernmental Policy Advisory Committee submitted to the United States Trade Representative.⁴⁴ The recommendations include establishment of a Federal-State International Trade/Investment Policy Commission, collection and reporting of data, etc. While this is an excellent idea and may lead to significant universal gains based on a more open government procurement system, it may not be optimal for states to go along without bolstering their positions.

What is clear is that the current state of *détente* is unlikely to continue. Accordingly, states wishing to retain sovereignty over procurements, even if only to capitulate to federal requests after some return consideration, should be actively participating in the debate. It may also be in a state's best interest to bolster its rights by carefully crafting legislation that would not permit quick decisions

and simple-majority voting requirements. In the least, states could try to condition their participations in any federal scheme on assurances of the equal sharing of benefits and burdens by all states. Of course, states could wait for the right (or wrong?) test case to reach the U.S. Supreme Court in this area, after which such ruling may be applied as a matter of course to reject subsequent (and perhaps more effectively tailored) arguments on the basis of decided precedent.🌐

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Endnotes

- 1 Agreement on Government Procurement, General Agreement on Tariffs and Trade, 26th Supp. BISD 33 (1980) (entered into force Jan. 1, 1981). In addition to market liberalizations in world trade pursuant to the General Agreement on Tariffs and Trade ("GATT"), the Tokyo Round of world trade negotiations resulted in the creation of four side agreements, of limited participation, including the Agreement on Government Procurement. These four agreements were commonly referred to as the four Tokyo Round Codes, hence the common form of "Government Procurement Code" prior to the Uruguay Round, wherein this "Code"

was adopted as part of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, [opened for signature Apr. 15, 1994, in GATT Secretariat, The Results of the Uruguay Round of Multilateral Trade Negotiations at 438, GATT Sales No. 1994 - 4 (1994). This was revised[[revised text, expected to enter into force on January 1, 1996, is contained in document GPR/Spec/77 (Dec. 15, 1993).(hereafter the “AGP”).]] The original signatories from the Tokyo Round Code were the United States, Canada, Japan, Sweden, Finland, Norway, Austria, Switzerland, Hong Kong, and the countries of the European Communities (these were at that time Belgium, Luxembourg, the Netherlands, France, Italy, Republic of Ireland, Germany, Denmark, and the United Kingdom).

2 AGP Art. III.

3 *Id.* U.S. examples of “other” entities of Annex 3 include the Tennessee Valley Authority and the Port Authority of New York and New Jersey.

4 See Alan Kashdan, *Government Procurement, in THE WORLD TRADE ORGANIZATION: THE MULTILATERAL TRADE FRAMEWORK FOR THE 21ST CENTURY AND U.S. IMPLEMENTING* legislation 555, 557 (T. Stewart, ed. 1996).

5 *Id.*

6 AGP, see *supra* n. 1, Appendix I. See also *id.* n. 1 and accompanying text; Amelia Porges, *Expansion of the World Trade Organization (WTO) Agreement on Government Procurement (1994) Consequent to the Enlargement of the European Communities on May 1, 2004; U.S. Implementing Actions* [], [] (Project of the American Society of International Law Interest Group on International Economic Law, June 18, 2004).

The four new annexes to Appendix I were added after the Uruguay Round of multilateral trade negotiations. See *Government Procurement, supra* n. 4 at 571,

7 Liberalization before the Uruguay Round was carried out at the central government level by adding to a nation’s respective Annex 1. After the Uruguay Round, liberalization

includes additions to four new Annexes (including Annex 2 on sub-central procurements) as well as increased inclusion of central procurements set forth in the participants’ respective Annex 1 of Appendix I.

8 The list of members, observers, nations seeking accession, and international organizations that have observer status such as the International Monetary Fund is available at the official WTO website, link http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm (last accessed May 23, 2005).

9 See *infra*

10 The Central America – Dominican Republic Free Trade Agreement (“CAFTA”) was signed on August 5, 2004, but has not yet been ratified by Congress. For the USTR’s reasons for ratification of CAFTA, see http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/Briefing_Book/asset_upload_file680_7178.pdf. A version of CAFTA, including its Chapter 9 and Annexes on government procurement, is available at the USTR website http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html. Worthy of note is that the list of sub-central procurements is not co-extensive with that of the AGP. For example, the State of Michigan has not undertaken any obligations to date (as evident from review of Annex 9.1.2(b)(i)). The Australia-U.S. Free Trade Agreement (“AUSFTA”) was signed on [], and its Chapter 15 and accompanying Annex 15-A set out central and sub-central procurements. A copy of the agreement is available at the USTR website http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Australia_FTA/Final_Text/asset_upload_file148_5168.pdf, Chapter 15 at

http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Australia_FTA/Final_Text/asset_upload_file218_5160.pdf, and Annex 15-A at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Australia_FTA/Final_Text/asset_upload_file780_5161.pdf. The State of Michigan is not listed as having offered at least some of its procurements for purposes of equal treatment and non-discrimination

in Annex 15-A, however, Governor Granholm, in a letter to United States Trade Representative Robert Zoellick dated June 30, 2004, agreed to inclusion of state procurements at the same level as Michigan’s commitment for purposes of the AGP (copy of letter available at <http://www.citizen.org/documents/MIgovtoZoellickAUSFTA.pdf>). To determine whether a bi-lateral or regional trade agreement, or agreement-in-process, contains provisions on sub-central procurements, one may access copies of agreements or drafts at the official cite of the United States Trade Representative, “Trade Agreements” tab, “Bilateral” and/or “Regional” tabs, and simply click on the agreement or draft then search for chapters and annexes on government procurement (home page available at <http://www.ustr.gov/>).

11 See General Agreement on Tariffs and Trade, Apr. 15, 1994, Marrakech Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments - Results of the Uruguay Round, Art. XXIV (permitting regional trading arrangements as exceptions to the most-favored-nation obligation from Art. I). The spirit of this exception is set out in Art. XXIV:4: “The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.”

12 See *infra* n. 13.

13 Outsourcing is a major concern of states and of workers’ groups. For example, there is a website entitled “Rescue American Jobs” that lists bills and other legislative steps that states are considering or have taken with regard to protection against outsourcing and calls for users to report any new, state activity on the outsourcing issue. See <http://www.rescueamericanjobs.org/legislation/states-bills.php>; see also <http://www.ncsl.org/standcomm/>

- scecon/04legisecon.htm (National Conference of State Legislatures website, 2004 Legislation Regulating or Prohibiting Non-U.S. Citizens from State Contracts as of June 29, 2004). Currently, the websites are tracking and reporting on bills and other state government activity in at least 37 states, including Michigan. It would appear that state granting of bids to foreign call centers, particularly in India, are the first source of the domestic preference in procurement backlash. *See, e.g.*, Darren Dunlap, *State law against outsourcing might be first in U.S.*, DAILY TIMES, May 18, 2004, available at <http://www.thedailytimes.com/sited/story/html/164029>; Bruce Stokes, *Use Outsourcing to Spur Change in India: Anti-outsourcing initiatives should be designed as negotiating tools to force India to liberalize*, THE NATIONAL JOURNAL, February 28, 2004, available at <http://yaleglobal.yale.edu/display.article?id=3431>; Indrajit Basu, *India sees bright side to US outsourcing threat*, THE ASIAN TIMES, Jan. 27 2004, available at http://www.atimes.com/atimes/South_Asia/FA27Df06.html. Of course, the problem is bigger than potential competition from any one nation. Other nations with low costs of labor or raw materials, such as Russia, are poised to underbid U.S.-based bidders on government procurement opportunities.
- 14 Exec. Directive. No. 2004-2, available at <http://www.michigan.gov/gov/0,1607,7-168-21973-88888--,00.html>, and Exec. Dir. No. 2004-3, available at http://www.michigan.gov/gov/0,1607,7-168-21975_22515_28804-88890--,00.html.
- 15 The voluntary nature for inclusion of sub-central procurements should apply to other U.S. federal trade agreements. *Cf. infra* n. 25.
- 16 *See infra*
- 17 *See* World Trade Organization, Trade Policy Review: United States, Report by the Secretariat, Doc. WT/TPR/S/56 (1 June 1999), para. 277 (hereafter *U.S. Procurement Report*) (noting that the states “apply” AGP rules to sub-federal procurements while further noting that states *must* comply with such rules where funded by federal money in certain cases). *See also, e.g.*, Jason F. Hellwig, *The Retreat of the State? The Massachusetts Burma Law and Local Empowerment in the Context of Globalization(s)*, 18 WIS. INT’L L. J. 477, 500 and n. 132. *See also, e.g.* Letter of Gov. Jennifer Granholm to U.S. Trade Representative Robert Zoellick of June 30, 2004, available at <http://www.citizen.org/documents/MIgovtoZoellickAUSFTA.pdf> (agreeing to the same commitments in the Australia-U.S. Free Trade Agreement as in the AGP, but specifically excluding such commitments in any other agreement).
- 18 Agreement in the form of an exchange of letters between the European Community and the United States of America on government procurement, O.J. L 134 (20 June 1995); U.S. Procurement Report, *supra* n. 18, para. 277.
- 19 *Id.* The other cites are Boston, Chicago, Dallas, Indianapolis, Nashville, and San Antonio. Further, to states have agreed to AGP-styled commitments in favor of suppliers from the European Communities but not all of the AGP members: North Dakota and West Virginia.
- 20 The states are Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, Wisconsin, and Wyoming. *Id.* The level of coverage for equal treatment varies.
- 21 *See* U.S. Procurement Report, *supra* n. 18, Table III.20. There are also different threshold amounts for certain of the other procuring entities that have signed onto the AGP, such as SDR 400,000 for procurements by the New York and New Jersey Port Authority, and SDR 182,000 for the Tennessee Valley Authority. The “SDR” or “special drawing rights” is a convention for reporting the real value of national currencies based on a basket of international currencies. *See* <http://www.imf.org/external/np/exr/facts/sdr.HTM>. Calculations are according to a formula found at http://www.imf.org/external/np/fin/rates/rms_sdrv.cfm, and daily values are available from International Monetary Fund’s main web page. *See* <http://www.imf.org/external/map.htm>. Using the exchange rate for June 1, 2005, of 0.6804010000, the SDR value in USD is approximately \$241,542.36.
- 22 AGP, *supra* n. 1, App. I, Annex 2. Other states with the same exceptions include New York, Illinois and Pennsylvania.
- 23 *See* HR No. 4940 of July 2, 2003, as modified by HR No. 5081 of Sept. 25, 2003, HR No. 5128 of October 2, 2003, and HR No. 6084 of July 21, 2004. All of these bills manifest an intention to provide preference to Michigan-based firms.
- 24 *See* USTR Sends New Procurement Request to Governors – Dismissing State Legislators’ Concerns, available at http://www.citizen.org/print_article.cfm?ID=13068. A copy of the letter sent to Maine Governor John Baldacci of January 27, 2005 is available at http://www.citizen.org/documents/USTR_to_ME_Panama.pdf.
- 25 A list of bi- and multi-lateral trade agreements with government procurement commitments, whether in force or pending, may be obtained at http://www.ustr.gov/Trade_Agreements/Section_Index.html by clicking the Tabs “Bilateral” and “Regional” and by then selecting an agreement and searching for government procurement provisions.
- 26 *See* Darrel Dunlap, *State law against outsourcing might be first in U.S.*, The Daily Times, May 18, 2004, available at <http://www.thedailytimes.com/sited/story/html/164029>.
- 27 A web site named “Rescue American Jobs” attempts to track state outsourcing and “insourcing” legislation, *see* <http://www.rescueamericanjobs.org/legislation/states-bills.php> (last accessed June 6, 2005) as does the National Conference of State Legislatures website, 2004 Legislation Regulating or Prohibiting Non-U.S. Citizens from State Contracts as of June 29, 2004, *see* <http://www.ncsl.org/standcomm/scecon/04legisecon.htm> (last amended June 29, 2004). The latter lists thirty-seven, rather

than thirty-nine, states' actions in this regard. The purpose of this article is not to delve into significant detail in this area such as by engaging in an exhaustive, state-by-state analysis of legal provisions. Rather, the purpose at this juncture is to demonstrate the extent of concern that outsourcing has caused. There is significant, but not entire, overlap between the list of states that have voluntarily signed onto the AGP, *see supra* n. 20 and those that have taken steps to prevent outsourcing.

²⁸ *See* United States – Measures Affecting Government Procurement, Request for Consultations by the European Communities, WT/DS88/1, GPA/D2/1 (26 June 1997), available via link from web page http://www.wto.org/wto/english/tratop_e/gproc_e/disput_e.htm; United States – Measure Affecting Government Procurement, Request to Join Consultations, Communication from Japan, WT/DS88/2, (2 July 1997) (joining in the EC's challenge), available via link from web page http://www.wto.org/wto/english/tratop_e/gproc_e/disput_e.htm. A panel was requested and established to consider the merits, however, the panel was later requested to suspend its consideration of the matter in light of “a U.S. court ruling barring implementation of the measure at issue” *See* United States – Measure Affecting Government Procurement, Communication from the Chairman of the Panel, WT/DS88/5 and WT/DS95/5 (12 February

1999). The ruling to which reference is made for the suspension would appear to be the federal district court *Crosby v. National Foreign Trade Council*, 26 Fl.Supp.2d 287 (D.Mass. 1998), *aff'd*. 181 F.3d 38 (C.A. 1, 1999).

²⁹ 530 U.S. 363, 120 S.Ct. 228, 147 L.Ed.2d 352 (2000).

³⁰ 1996 Mass. Acts 239, ch. 130, *codified at* Mass Gen. Laws §§ 7:22G-7.2M (1997) (hereafter the “Burma Act”). Burma has changed its name to Myanmar, but for purposes of this article, the common terminology of “Burma Act” is used.

³¹ *Id.* § 7:22J(a)-(d).

³² *Id.* § 7:22G(a)-(d).

³³ *Id.* § 7:22H(e).

³⁴ *Id.*

³⁵ *Id.* § 7:22I (exemption for purchase of special medical supplies or those for which there is no medical substitute).

³⁶ *Id.* § 7:22H(b)(1)-(2).

³⁷ *Id.* § 7:22I (exception from the restriction for suppliers whose operations in Burma involve the provision of medical supplies only).

³⁸ *Id.* § 7:22H(d). In the case that other bids from non-restricted bidders were received, this exception would apply where such other bids were higher by more than 10 percent of a bid from a restricted bidder. *See id.* § 7:22G. This exception looks suspiciously like a domestic price preference that has long been a part of the international government procurement regime.

³⁹ *Crosby*, *supra* n. 28, 120 S.Ct. at 2291.

⁴⁰ Foreign Operations, Export Financing, and Related Programs Appropriations

Act, 1997, § 570, 110 Stat. 3009-166 to 3009-167 (enacted by the Omnibus Consolidated Appropriations Act, 1997, § 101(c), 110 Stat. 3009-121 to 3009-172). *See Crosby*, *supra* n. 28, at 368.

⁴¹ 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed.1153 (1952).

⁴² Estimates of U.S. government procurement as a percentage of GDP in the 1990's, for example, hover above 30%. *See* Trade Policy Review: United States, *supra* n. 17, para. 274.

⁴³ *See* Matthew Schaefer, *Conscientious Legislators and the Cultures of Compliance and Liberalization Relating to International Trade Agreements*, Proceedings of the 95th Annual Meeting 52 (American Society of International Law, April 4-7, 2001), *citing* P. Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975) (for the idea of conscientious legislators at the federal level), and Louis Henkin, *International Law: Politics, Values, and Functions*, 216 RECEUIL DES COURS 21 (1989) (on the “culture of compliance” that state legislators should follow based on their oaths of fealty to uphold the U.S. Constitution).

⁴⁴ Intergovernmental Policy Advisory Committee Memorandum, Recommendations for Improving Federal-State Trade Policy Coordination (August 5, 2004), available at <http://www.ncsl.org/print/standcomm/scecon/IGPAC8504.pdf>.

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Changes in India's Patent Law and its Repercussions on the Global Drug Industry

Ashish S. Joshi, *Lorandos, Gravel-Henkel, Stipanovic PLLC*

India is among the world's top five drug producers in terms of volume, though its \$7 billion market does not rank as high in value.¹ Prices are low because of the profusion of generic drug makers and the competition among them – made possible through the old Patents Act of 1970.

The procedure for obtaining a patent in India, and matters connected therewith are detailed in the Patents Act 1970 and Patent Rules framed thereunder.² The Patents Act 1970 is modeled substantially on the U.K. Patents Act of 1949.³ The basic concepts of this law in India and U.K. being the same, the decisions of English Courts along with leading English authorities on the subject are often cited by lawyers and Judges alike in the interpretation of some of the provisions of the Indian Act. Not surprisingly, even decisions of Commonwealth Countries have persuasive value in Indian courts.

The Old Law

The Act of 1970 defines an invention as follows:

Invention means any new and useful

- (i) art, process, method or manner of manufacture,
- (ii) machine, apparatus or other article,
- (iii) substance produced by manufacture,

and includes any new and useful improvement of any of them, and an alleged invention.⁴

Indian courts have held that a method or process is a "manufacture" if it (1) results in the production

of some vendible product, or (2) improves, or restores to its former condition a vendible product, or (3) has the effect of preserving from deterioration some vendible products to which it is applied.⁵

Before 1970, India's patent laws, like many others, were derived from its colonial days resulting into some of the world's highest drug prices. However, by 1970, India, along with other developing countries had adopted "process patenting regime".⁶ The Act of 1970 by granting "process patents" on drugs in combination with extensive use of fertilizers and pesticides not only led to low drug prices but also extended life expectancy and ended regular famines. In order to appreciate the gravity of the amendment and its repercussions on the international drug industry it is imperative to understand the difference between "product patents" and "process patents". Process patenting implies the patenting of the *method* of manufacturing a product. Under the Indian Patents Act of 1970, process patenting was provided for. Aside from the fact that India has surplus flow of relatively cheap labor, it also has a long tradition of manufacturing drugs of various types. This resulted into several new techniques of making drugs cheaply. After the product has been manufactured with the patented process, it would then be known as patented product in a country adhering to process patenting, such as India. Any other manufacturer cannot produce a product by the patented process, although the manufacturer can produce it by an-

other process. Thus, patenting a product assumes a slightly different complexion from the patenting of a process.

The Act of 1970 stated that with regard to medicine or drug and certain classes of chemicals no patent is granted for the substance itself *even if new*, but a *process* of manufacturing the substance is patentable.⁷ Therefore, with respect to food, medicine or drugs, patents were granted only for the *process* of manufacture of the substance but not for the substance itself. Such restrictions on the grant of product patents do not exist in virtually any other country. All Western countries grant "product patents" on new inventions – i.e. the patent is granted for the substance itself. However, since 1970, India has granted "process patents," which allow another inventor to patent the same product as long as it was created by a "novel process". In pharmaceutical industry, it could mean that a tiny tweak in the synthesis of a molecule yields a new patent. Several companies can produce the same drug, creating competition that drives down prices and puts multinational corporations that spend millions of dollars in research and development at a serious disadvantage.

The old patent system allowed Indian pharmaceutical companies to copy drugs patented abroad by



Ashish S. Joshi

merely changing their manufacturing process. This served two purposes: one, it kept cost of drugs inexpensive in India; two, it also allowed a local pharmaceutical company to thrive which otherwise would have faced multi-million dollars lawsuit for patent infringement. By copying drugs other companies spent millions of dollars to develop, Indian pharmaceuticals companies could sell them at as little as one-tenth their original prices.

The 2005 Amendments to the Old Law

It is widely believed that the 2005 amendments⁸ were made mainly due to international pressure, as the World Trade Organization (“WTO”) demanded that India observe international drug patents. In 1995, the WTO’s Trade-related Intellectual Property Rights (TRIPS) agreement was reached in Marrakesh, Morocco, where India, along with many other countries, agreed to grant 20-year patents on pharmaceutical *products* from January 1, 2005. The new WTO regime effectively outlawed the generic production of new medicines.

In March 2005, India’s Parliament approved patent regulations to stop local drug makers from copying new drugs developed by other, primarily Western companies. The new law, amending India’s 1970 Patent Act, affects everything from electronics to software to medicines, and has been expected for years as a condition for India to join the World Trade Organization. Previously, companies could copy drugs discovered or invented by other companies by tweaking the processes used to make them. As an executive of a leading Indian company puts it: “The winner

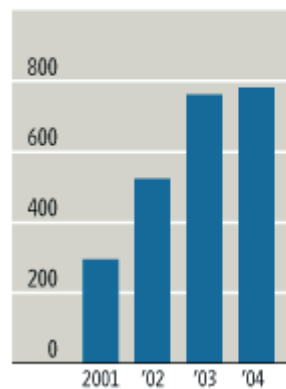
used to be the guy who could copy faster. Now that has completely changed so that companies that don’t innovate will die, especially in the pharmaceutical industry”.⁹ The new patent system recognizes registered original drugs as products *no matter how they are produced*, thus making it illegal to copy drugs still under patent. Also, it appears that the 2005 amendments have done away with the practice of “evergreening” of pharmaceutical patents, where patent owners allegedly try to extend patent life through grant of new patents by minor “innovations” or improvements on formulations, dosage forms or minor chemical variations of an earlier patented product. However, the new law¹⁰ also makes it clear that any invention that enhances the *known efficacy* of the substance or results in a *new product* or employs *at least one new reactant* is patentable and that only the *mere* discovery of a new form or of any new property or new use of a known substance or process is excluded. It may not be too difficult to prove that the improved dosage form is more efficacious or that one new reactant is involved in the known process to make the product.¹¹

These amendments to India’s

patent law have sparked worries that Indian companies will face tough global competition, and that the cost of medicines would jump in poor countries now supplied by Indian generic drugs. Since 2000, the gathering momentum of the global popular outrage against a tighter patent regime has become a powerful countervailing force due to emergence of the AIDS crisis.¹² Many international aid organizations use inexpensive Indian generic drugs to save money as they save lives. For example, India is a big supplier of low-price generic versions of drugs for treating AIDS. In Africa, exports by Indian companies, especially Cipla and Ranbaxy Laboratories, helped drive the annual price of antiretroviral treatment down from \$15,000 per patient a decade ago to about \$200 now. Though the new patent law is not as restrictive as many feared and won’t dry up supply of today’s generic AIDS drugs, international organizations worry that the need to pay royalties or get licenses may constrict supplies of new drugs. All generic drugs could have been removed from the market. However, all the generic drugs already approved in India can still be sold, though sellers must pay licensing fees.¹³

Marketplace of Ideas

India’s international patent applications are rising...



Though still dwarfed by those of the biggest corporate applicants (Applicants for the most international patents in 2004)

RANK	COMPANY	NUMBER OF APPLICATIONS
1	Philips Electronics NV	2,362
2	Matsushita Electric Industrial Co.	1,711
3	Siemens AG	1,296
4	Nokia Corp.	805
5	Robert Bosch GmbH	710
6	Intel Corp.	620
7	BASF AG	597
8	3M Co.	595
9	Motorola Inc.	578
10	Sony Corp.	572


Source: World Intellectual Property Organization

Nonetheless, many of India's innovative companies¹⁴ have welcomed the stronger patent protections saying that these changes have made India more competitive on global scale and will trigger further investment and innovation in India.¹⁵ It is expected that with the stronger patent protection, more

multi-national corporations will tap India's relatively inexpensive engineers, scientists and computer programmers

for product design, drug development and clinical testing. In fact, multinational corporations such as General Motors Corp., Microsoft Corp. and Nokia Corp. already have research facilities in India. Financial and country analysts expect the research-outsourcing industry to grow to more than \$10 billion globally in the next five years.¹⁶

As India opens its markets and its companies venture abroad, companies are seeking to ensure that they profit from their own innovations. The list of top applicants in 2004 shows the importance of patents in global competition. Among the top applicants are Sony Corp, Procter & Gamble Co. and DaimlerChrysler AG – all with more than 300 applications each last year. From the Indian side, the top applicants include Dr. Reddy's Laboratories Ltd. and Ranbaxy Laboratories Ltd. – both have more than doubled their research-and-development spending to about 10% of revenue.¹⁷ Nicholas Piramal, a generics company based in Mumbai, India,



"In March 2005, India's Parliament approved patent regulations to stop local drug makers from copying new drugs developed by other, primarily Western companies."

has invested \$100 million in research and development in the last couple of years. India's generic drug companies, which until now made money copying best-selling foreign drugs, has now increased spending on research with an eye to launch low-cost drugs for the global market. As Dr. Swati Piramal, director

for strategic alliances and communications of Nicholas Piramal says: "If an Indian company makes a drug whose development costs

are under \$50 million, compared with a billion-dollar-plus development costs in the West, we will be able to change the paradigm of drug discovery."¹⁸

Ambiguities in the new law

The 2005 amendments to the patent law have many ambiguities that need to be addressed. To illustrate a few: under the new law, a maker of generics can apply to copy a patented drug, but only after it has been marketed for three years. The generic's maker however must pay a "reasonable" royalty. The new law does not define what can be considered to be "reasonable". This can result into unwarranted complications and needless litigation.¹⁹ Further, the amendments have sparked fears that with the new law, prices on patented breakthrough drugs would most likely rise to nearly the level in the United States, while prices on more commonly used drugs would most likely rise only moderately. The Indian government has said it would step in if price rises

were excessive but has not said how that would be determined.²⁰ In fact, the new law bars the government from over-riding any patent for at least three years – a provision not required under the TRIPS Agreement. Further, the new law states that the Controller of Patents has a series of wide-ranging discretionary powers to determine all kind of criteria like "reasonable affordability," "reasonable pricing," and "reasonable royalty."²¹ As Subbaraman Ramkrishna, senior director for corporate affairs at Pfizer India Ltd. noted, the word "reasonable" appears 42 times in the bill, giving the impression that royalty rates would be imposed subjectively.²² Lastly, with the removal of Section 5 of the law, it is not clear if chemical processes continue to be defined to include biochemical, biotechnical and microbiological processes.²³

Conclusion

The amendments made to the patent law by India have been ostensibly to comply with its WTO obligations on intellectual property, the amended law represents a compromise between opposing interests. This compromise has resulted in a complicated and confused law with potential negative consequences that could have been avoided. The new law at times seems to exceed the requirements of the Agreement on TRIPS, or has provisions unique to India, and at other times, appears to be in conflict with the TRIPS Agreement. It is also believed that India, ironically, has swung from one extreme to another, moving from 1970 law that was clearly anti-patent to a law that is pro-patent applicant but not necessarily pro-innovation.²⁴ At a time when there is increasing skepticism around the world over the patent-system as it

has evolved so far, particularly in the U.S.²⁵, it remains to be seen whether the hybrid Indian patent-system stands the true test of time.

“The works of founders of states, law givers, tyrant destroyers and heroes cover but narrow spaces, and endure but for a little time, while the work of the inventor though of less pomp is felt everywhere and lasts forever”.²⁶ 🌍

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Endnotes

- 1 See *The New York Times*, March 24, 2005, Section C , Page 6 , Column 5
- 2 P. Narayanan, Intellectual Property Law (2nd edition) at page 14, Eastern Law House.
- 3 This Act has been replaced by Patents Act 1977 resulting into substantial changes in the U.K. Patent Law.
- 4 Section 2(1)(j) of The Patent Act, 1970. This definition has been retained by the amended law.
- 5 P. Narayanan, supra at page 14.
- 6 Asthana, B. N., Patents in the WTO Regime, *Chartered Secretary*, December 2002, page 1657
- 7 Section 5 of The Patent Act, 1970 states, inter alia, “In the cases of inventions – (a) claiming substances intended for use, or capable of being used, as food or as medicine or drug, or (b) relating to substances prepared or produced by chemical processes no patent shall be granted in respect of claims for the substances themselves, but claims for the methods or processes of manufacture shall be patentable.

- 8 The 2005 amendments have made many changes to the Act of 1970. However, this article focuses on the change made to adopt “product patenting” system and its effect on the international drug industry.
- 9 Shrikumar Suryanarayan, President for Research & Development at Biocon Ltd., Bangalore, India. See *Wall Street Journal*, dated April 11th, 2005 at A20.
- 10 Section 3(d)
- 11 A Confusing Patent Law for India, *Economic and Political Weekly*, April 16, 2005
- 12 V. Sridhar, A Tempered Patents Regime, *Frontline*, Volume 22 - Issue 08, Mar. 12 - 25, 2005
- 13 There are also provisions allowing companies that make generics to copy drugs in the future. However, there are relatively tough criteria for such copying, and activists predict that prices for newly invented drugs will be much higher, because drug-makers will have the same 20-year patent monopolies as they have in the Western countries. See www.doctorswithoutborders.org.
- 14 As Indian economy opens up to foreign competition, its leading companies are increasing their spending on research and development to stay competitive. Indian companies applied for nearly 800 patents at the World Intellectual Property Organization last year – more than twice the number of patents it applied for four years ago. See *Wall Street Journal* dated April 11th, 2005, page A20
- 15 The “mailbox” system designed by Indian Government two years ago in which drug makers could deposit patents they hoped to file when the law was amended had 1,500 proposals from Indian companies and 7,000 from foreign ones, suggesting the new law would benefit foreign companies more.
- 16 See *Wall Street Journal*, dated April 11th, 2005 at A20.
- 17 Id.
- 18 See *The New York Times*, March 24, 2005, Section C , Page 6 , Column 5

- 19 Couple of years ago, U.K.- based GlaxoSmithKline demanded 40 percent of the sales proceeds of an AIDS drug it licensed to a South African company. However, under pressure from South African regulators and activists, it later licensed it to three rival companies for only 5 percent.
- 20 See *The New York Times*, March 24, 2005, Section C , Page 6 , Column 5
- 21 Id.
- 22 Id.
- 23 See Footnote 7
- 24 A Confusing Patent Law for India, *Economic and Political Weekly*, April 16, 2005
- 25 See Jaffe, Adam and Josh Lerner, *Innovation and its Discontents*, Princeton University Press, 2004
- 26 Francis Bacon, quoted in *Mainly on Patents* at page 1, edited by Felix Liebesny, Butterworths.



Enforcement of Investors' Rights Under Investment Treaties

Grant Hanessian and Peter Swiecicki, Baker & McKenzie LLC



With investment in foreign countries having reached record levels, there is now more than ever a need for protection of those investments, particularly in developing countries, in which the financial and economic risks have been severe. Investors, both companies and individuals, should be aware that protection is available through a world-wide legal structure of over 2,400 Bilateral Investment Treaties (“BITs”), primarily between developing countries, together with the International Center for the Settlement of Investment Disputes (“ICSID”), an agency of the World Bank in Washington, D.C.

Use of World Bank Leverage

Investors may invoke against a host state with whom they have a dispute the substantive rights provided by the BITs through an arbitration procedure provided by ICSID, with final decisions not reviewable by the courts. The World Bank has leverage, both political and economic, over countries that do not comply with ICSID awards. The essence of the structure is that in return for obtaining foreign investment, host states must provide stable and favorable conditions for that investment.

Structure of BITs

While no two BITs are identical, the substantive risks and concomitant protection covered by the BITs are crucial for investors in foreign countries. BITs require compensation for expropriation of assets, treatment no less favorable than that accorded to the host state's own investors (“na-

tional treatment”), and to investors from other countries (“most favored nation treatment”), free transfer of funds and returns, and non-discriminatory and fair and equitable treatment of the investment.

The term “investment” is broadly defined. In practice the term is interpreted widely by ICSID to include almost anything other than a contract for the sale of goods, and even that is covered if the host state itself is party to a contract with the investor.

Most BITs are bilateral (two country) treaties and provide for arbitration of disputes with the host state arising from BITs to be referred to ICSID arbitration. But there are also multilateral investment treaties, such as the Energy Charter Treaty and the North American Free Trade Agreement, which call for ICSID arbitration as their dispute resolution procedure. The ICSID secretariat is legally obliged to register a request for arbitration against the host state unless the request is manifestly outside its jurisdiction.

ICSID Arbitration

ICSID arbitration is different from the usual international commercial arbitration, not just because it involves claims against host state governments, but because the process is self-contained in the sense that ICSID awards are not subject to any judicial process outside of ICSID. There is a very limited right, entirely within ICSID, to seek annulment of an award on basic procedural grounds, such as the arbitral tribunal was not properly constituted, or manifestly

exceeded its powers, there was corruption, or a serious departure from a fundamental rule of procedure. Annulment attempts are few in number, and rarely succeed.

ICSID also has an Additional Facility which allows ICSID to administer certain proceedings between States and nationals of other States that fall outside the scope of the ICSID Convention. These include:

- investment disputes where one of the parties is not an ICSID Contracting State or a national of such a State;
- disputes which do not arise directly out of an investment but where at least one of the parties is an ICSID Contracting State or a national of a Contracting State and the underlying transaction has features which distinguish it from an “ordinary commercial transaction”; or
- fact-finding, a pre-dispute mechanism for providing an impartial assessment of the facts aimed at preventing differences of view arising on specific factual issues in the course of a long-term relationship.

On-line Sources Regarding BITs and ICSID

There are several on-line sources that provide information on BITs and ICSID. To find:

- a specific BIT between two countries or all available BITs signed by one country, see http://www.unctadxi.org/templates/DocSearch_779.aspx
- the list of the 150 States that

have signed the ICSID Convention and the 134 States that have deposited their instruments of ratification to the Convention, see <http://www.worldbank.org/icsid/constate/c-states-en.htm>

- a precedent for an ICSID arbitration clause, see <http://www.worldbank.org/icsid/model-clauses-en/main-eng.htm>
- the ICSID arbitration rules and other basic documents, see <http://www.worldbank.org/icsid/basicdoc/basicdoc/htm>.

Examples of Dispute Resolution Under BITs

As discussed above, the types of disputes that may be resolved by relying on BITs cover a wide variety of claims. Here are some examples, based upon our experiences:

- a U.S. telecommunications company invested in a mobile telephone company as a joint venture with another telecommunications company wholly owned by the Republic of Poland. The U.S. company claimed that the Polish company and Polish state failed to

fulfill the investment agreement. Negotiations were unavailing. The U.S. company commenced an arbitration proceeding under the U.S.-Poland BIT, which states that the UNCITRAL arbitration rules govern and that ICSID serves as the appointing authority for arbitrators. Commencement of the arbitration broke the deadlock in negotiations, which eventually resulted in a settlement;

- an English company claimed expropriation of its assets by the State of Guyana of its investment. An ICSID arbitration was commenced (Case No. ARB/02/1);
- a French water company, unable to resolve a dispute with an Indonesian government entity, commenced an ICSID arbitration.

The variety of these examples show that it is important for counsel for aggrieved investors to examine the applicability of BITs when an investment dispute arises, even if the commercial contract did not contain an arbitration clause. 🌐

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Law Student Essay

Medical Malpractice Liability Under Chinese and American Law

Samuel Saks, Wayne State University Law School



I. Introduction

Chinese-foreign equity and contractual joint venture medical institutions (“foreign medical institutions”) are subject to general PRC medical malpractice (“malpractice”) law pursuant to Order No. 11 of the People’s Republic of China’s (“PRC”) Ministry of Health and the Ministry of Foreign Trade and Economic Cooperation. On September 1, 2002, new PRC regulations on medical malpractice became effective.¹ Because malpractice liability is one of the most important considerations in determining the financial viability of any medical institution, it is important that foreign companies understand how these new regulations will affect their potential liability. In the US, medical malpractice liability is a topic of fierce debate. Supporters of medical malpractice reform — which is often discussed under the umbrella term “tort reform” — point to the rising costs of health care. Opponents argue that medical malpractice liability serves to advance two important goals: compensating victims and deterring substandard health care.² The fact is that as a result of malpractice lawsuits, nearly every hospital in the US employs professionals to deal with quality assurance and risk management.

The PRC faces different health care challenges. Currently, the population of China is estimated at more than 1.3 billion.³ In 2001, the PRC’s total health expenditures consisted of 5.5 percent of its GDP,⁴ while the US spent 13.9 percent of its GDP. A PRC Ministry of Health survey showed that nearly 50 percent of its urban residents, and nearly 80 percent of its

rural population, were left out of the medical insurance system.⁵ However, the PRC does provide some basic services; for example, pregnant women, even in outlying and poverty-stricken areas, are legally entitled to medical support and assistance.⁶ In contrast, the US has the Medicare and Medicaid programs, providing qualified citizens with some basic support,⁷ which are expected to distribute approximately \$518 billion to almost 48 million Americans in 2005.⁸

II. Potential Liability of Domestic and Foreign Medical Institutions

Direct Liability

The PRC regulations provide for direct legal consequences for medical institutions when a malpractice is committed on-site. Once the existence of a malpractice is confirmed, the medical institution will receive a warning by the administrative department in charge of health.⁹ If the malpractice is serious (involving death or significant permanent harm), however, the medical institution will be ordered to suspend its operations to conduct “internal rectification.”¹⁰ Additionally, the institution’s license may be revoked.¹¹

The PRC regulations also list some per se violations of PRC malpractice law. The violations include: failing to inform a patient of his or her conditions, failing to properly handle medical records, and failing to report incidents of potential malpractice.¹² These violations are administrative in nature. Additionally, there are consequences for staff and supervisors who are “involved” in a medical malpractice.¹³

They are to be fined (and/or criminally prosecuted), suspended for six months to a year, and, if the circumstances are serious, may have their practice certificates revoked.¹⁴

General Corporate Liability

In the US, under the corporate responsibility doctrine, a hospital can be held directly accountable, under certain circumstances, for the actions of those who staff it.¹⁵ In such cases, the hospital’s liability is distinct from the physician’s liability. In fact, in some cases it may even attach in the absence of a finding of physician negligence.¹⁶ This was the case in *Schoening v. Grays Harbor Community Hospital*,¹⁷ where a woman brought suit against both the hospital and the physicians who treated her after she had a baby. She eventually settled with the physicians, but not the hospital.¹⁸ The court held that the hospital owed an independent duty of care to Schoening.¹⁹

Article 24 of the PRC interim measures, read in conjunction with the PRC malpractice law, seems to provide for corporate liability in cases of medical malpractice. This article specifically subjects foreign medical institutions to PRC medical malpractice law, not the law of foreigners’ home state. Thus, foreign medical institutions are subject to PRC administrative regulations of medical practice, laws regarding physicians and nurses, and, of course, general corporate law.²⁰ Foreign medical institutions are thereby given clear notice that they will be subject to PRC governmental scrutiny in all aspects of their business.

Potential direct and corporate liability is why hospitals in the US and

foreign medical institutions in the PRC have to understand medical malpractice law. A negligent physician may face suspension, civil suits, and in extreme cases, even criminal prosecution. He may ruin his career. But because of the doctrine of corporate liability and special regulations operative in the PRC, he may also cause his employer to go out of business.

II. Medical Malpractice Liability

Whereas malpractice is vaguely and variously defined under US law, the PRC medical malpractice regulations provide comparatively more specific guidance. Under PRC law medical malpractice is defined as “accidents of damages to patients negligently committed by medical institutions and their medical staff in the course of medical activities due to violation of laws.”²¹ The PRC malpractice regulations give priority to laws and administrative regulations, which are much easier to objectively determine. In the PRC, legal violations of medical law are *per se* malpractice. In the US, however, legal violations are merely relevant evidence in determining a breach of care: a claimant must still prove causation and injury.²²

Latent in this definition is a far more important difference. The PRC regulations classify malpractices based on the extent of the patient’s physical injuries.²³ This classification scheme does not take the patient’s pain and suffering into account. Nor does it consider the negligence of the treating physician or staff. Thus, a negligently performed procedure that causes enormous but temporary pain to a patient may not count as a malpractice at all. At most, it will fit into the fourth category of “other consequences of personal injuries.”²⁴ In the US, awards for “pain and suf-

fering” are often out of proportion to the physical injuries suffered by the patient. This has sparked malpractice award limits, such as those enacted under Michigan Law.²⁵ The PRC regulations clearly disfavor consideration of pain and suffering apart from a physical injury — even if results directly from physician negligence.²⁶

III. Procedures

Experts

The PRC regulations provide for “technical appraisal of medical malpractices,” organized by medical associations.²⁷ Local medical associations at the municipal and county levels are responsible for organizing “initial” technical medical appraisals.²⁸ Provinces, autonomous regions, and municipalities directly under the Central People’s Government are responsible for organizing “further” technical appraisal.²⁹ Where necessary, the “China Medical Association may organize the technical appraisal for disputes about medical malpractices that are difficult and complicated, and have serious consequences nationwide.”³⁰

A technical appraisal of a medical malpractice is a determination made by a selected group of experts — an expert testimony group — chosen from an “expert pool.” Experts must have “outstanding professional accomplishments and practice ethics” and have worked in a senior position for at least three years for medical institutions, or as a medical science teacher.³¹ Generally, the medical association responsible for the technical appraisal chooses qualified experts randomly from the pool.³² The experts in the testimony group act as independent judges and provide a medical basis for their findings. They must consider the “laws, administrative regulations, and departmental

rules on the control over medical hygiene, and standards as well as general rules for diagnosis, treatment, and nursing.”³³

From a westerner’s perspective, these provisions seem to make it difficult for a plaintiff’s attorney to obtain sympathetic experts. Why? The experts all serve under medical associations which have obvious interests in their primary constituents: physicians and the medical institutions that employ them. Senior physicians are similarly unlikely to testify against fellow physicians. Though experts are exhorted to act independently, they do so only within the context of established medical regulations. Even under “special circumstances” a patient *may* have a chance to choose an expert, but only from an expert pool of *another* medical association. Thus, while the PRC regulations give equal access to expert evaluation, they take away much of the potential benefit: the PRC’s established medical field is tasked with policing itself. Experts willing to challenge established medical doctrine are unlikely to qualify as experts because they are unlikely to have served in a senior position or be characterized having “excellent ethical practices”. Even if they are allowed into the expert pool, they will not get to choose their battles. Instead, absent special circumstances, they will be randomly assigned to cases.

If a majority of the experts in a testimony group agree, they issue a “technical appraisal paper” relating to the dispute. Among other things, the paper must contain a summary of the facts and claims of the parties, how the act has violated laws or general medical principles, causation, extent of responsibility, and, most startlingly, medical advice for the patient who suffered the malpractice.³⁴ Providing medical advice to the injured patient

forces the expert testimony group to become not merely the arbitrators of malpractice but practitioners as well. At the same time, the requirement³⁵ means acknowledged experts will get to weigh in on the case, whereas in the US, experts are nearly always on one side or another.

In the US, many states have enacted statutes defining the necessary qualifications for experts in medical malpractice suits. In Michigan for example, an expert must be board certified in the same specialty as the defendant-physician.³⁶ An evaluation of the expert's educational and professional training, area of specialization, length of time engaged in active clinical practice or instruction, and the relevancy of the testimony is required³⁷. During the year preceding the action, the expert must either have been in active clinical practice or a teacher in an accredited health profession school or accredited residency or clinical research program.³⁸ In other words, a plaintiff's expert must be, essentially, a colleague of the defendant-physician. The constitutionality of legislature enacting what amount to substantive laws of evidence was recently upheld, under Michigan law, in *McDougall v. Schanz*.^{39 40+}

The PRC regulations underscore the differences between the approaches of the two countries. The US legal system stresses justice as it is elicited from an adversarial confrontation of the parties; the PRC stresses administrative resolution and mediation: order even at the expense of an individual's opportunity recovery. This also helps explain why the regulations strongly favor the "technical appraisal" approach. Where a party attempts to bypass this level of administrative review (strongly geared toward mediation), the administrative department in charge of health must

terminate its handling of the case.⁴² The party thereby loses its opportunity for upfront technical appraisal by experts. And while the appraisal process may be biased against the rights of individual patients, it may still uncover valuable information relating to the technical aspects of the case — information that would be very expensive to acquire using independent experts. In egregious cases, where the expert testimony group may indeed find fault with the physicians and/or medical institution, the patient will be deprived of extremely convincing evidence of negligence as well as a chance at compensation.

Administrative Processing of Malpractice Claims

The PRC malpractice regulations institute an elaborate administrative procedure for handling medical malpractice. Jurisdiction over medical malpractice is conferred to administrative departments in charge of health.⁴³ Medical institutions have an affirmative duty to formulate contingent schemes for preventing and handling medical malpractices.⁴⁴ As part of such a scheme, once medical negligence is discovered (or claimed) the medical staff has a duty to immediately report it to their supervisors.⁴⁵ The supervisors must report it to the staff in charge of quality control and oversight, who in turn must immediately investigate and verify the conduct in question and report the "relevant situations" to those chiefly in charge of the medical institutions.⁴⁶ The affected patients must be notified as well.⁴⁷ "In the event of medical malpractices" the medical institution itself must file a report with the local administrative departments in charge of health.⁴⁸ The time allowed for the filing of the report depends on the seriousness of the malpractice. If the

malpractice falls within category II or above (death or moderate disability),⁴⁹ or if three or more patients are injured, the medical institution has only 12 hours to file the report.⁵⁰ In the case of an unexplained death of a patient, a necropsy must be conducted with 48 hours.⁵¹ Because these injuries are so serious, the medical institution is required to act quickly.

Notice that the regulations place the burden and expectation of reporting, at least initially, on the medical institutions themselves. When the administrative department receives a report of serious medical negligence, it must order the medical institution to take the necessary preventive measures and judge whether the reported conduct is in fact malpractice, including, if necessary, initiating the technical appraisal process discussed, *supra*.⁵² In case of a dispute, an interested party can file a written application to the administrative department.

After an examination and verification, the regulations allow for settlement via mediation, so long as the parties make a written report and give a copy to the local administrative department within seven days.⁵³ These local administrative departments must also make reports to their regional supervisors.⁵⁴ The various reporting requirements of the Regulations demonstrate the PRC bureaucracy in progress: myriads of reports traveling up and down the various levels of administrative agencies and local governments.

The law in US states is often different. In the context of a medical malpractice claim (as opposed to general state and federal medical laws), it is the claimant who gives notice to the defendant medical institution and/or physician. Michigan law, for example, requires a claimant to give advance

written notice to a physician and/or hospital he intends to sue at least six months in advance.⁵⁵ Similar to the requirements in the PRC, the written notice must state the factual basis for the claim, the applicable standard of care, the manner in which that standard was breached, any mitigating measures that should have been taken, how the breach proximately caused the injury, and the names of all defendants.⁵⁶

IV. Compensation

As we have seen, the PRC malpractice regulations allow parties to settle or mediate their dispute. In fact they seem to encourage such a practice, given the proliferation of reports and technical appraisals that might otherwise result. The regulations list the relevant factors that should determine the amount of any award: the class of the malpractice, the extent of responsibility of the medical negligence for the malpractice, and the relationship between the adverse consequences of the malpractice and the diseases of the patient.⁵⁷ If a medical institution has not committed a malpractice, it is not to bear liability for compensation.⁵⁸ This provision seems to preclude a medical institution from paying a patient simply to “keep them quiet.” Rather, a medical institution which believes a patient’s case is weak will try to steer the case to mediation, hoping that the expert testimony group will determine that no malpractice occurred. Then the medical institution can say to the patient “we are truly sorry for your injuries, but the regulations prevent us from compensating you because there has not been a finding of malpractice.”

The regulations also specify the types of injuries that a compensation award should encompass, includ-

ing medical expenses, lost wages, and “consolation money for mental injury.”⁵⁹ The last category may be intended as a rough equivalent to the notion in US law of “pain and suffering.” However, unlike in US law, the “consolation” money is directly related to the average living cost in the place where the malpractice occurred.⁶⁰ It is also limited in that if the patient has died, only six years of such costs may be calculated; if the patient has become disabled, the compensation period cannot be more than three years.⁶¹

Many US states have enacted statutory limits on awards of “non-economic losses” to malpractice claimants. “Non-economic losses” include compensation for pain, suffering, inconvenience, physical impairment, and physical disfigurement.⁶² In Michigan, for example, the maximum allowed award for non-economic losses is set at \$280,000 or — for cases involving more than one defendant or a defendant who suffers total permanent functional loss of more than one limb⁶³ — at \$500,000.⁶⁴ Such limits substantially reduce the appeal of bringing all but the strongest malpractice suits because high expert fees would cut into the recovery.

VI. Conclusion

The PRC system of medical malpractice differs substantially from that of the United States. Aside from all the technical differences examined above, the PRC regulations exhibit some of the fundamental differences between Chinese and American culture. The PRC puts less stress on personal independence and privacy, especially in connection with medical records. The medical institution is allowed full control over the records while the patient is merely entitled

to access. The PRC system stresses administrative review (as evinced by the Supreme People’s Court rulings) and oversight while the US depends on grievances filed and pursued in court. Medical malpractice claims in the PRC are seldom successful.⁶⁵

At the same time, the malpractice regulations of the PRC and US states like Michigan share many similarities. Both legal systems treat medical malpractice claims very seriously and acknowledge the need to depend on medical experts rather than lawyers and judges. Recognizing the practical consequences of medical malpractice liability, both legal systems have limited awards in order to protect physicians and the medical industry as a whole. 🌐

Endnotes

- 1 *Locke v. Pachtman*, 521 N.W.2d 786, 789 (Mich. 1994) (citing Mich. Comp. Laws Ann. § 600.2912a (West 2004)).
- 1 Regulations on Handling Medical Malpractices, Decree No. 351 of the State Council of the People’s Republic of China, Isinolaw Reference ID: 315 2002956 (April 4, 2002). Hereinafter referred to as “the regulations.”
- 2 *Id.*
- 3 As of April, 2005. More specific estimates available at <http://www.cpirc.org.cn/en/eindex.htm> (last visited April 12, 2005).
- 4 More information available at <http://www.china.org.cn/english/Life/124576.htm> (last visited April 12, 2005).
- 5 *Id.*
- 6 See art. 2, Law of the People’s Republic of China on Maternal and Infant Health Care, Order of the President of the People’s Republic of China No.33, Isinolaw Reference ID: 264 131686 (October 27, 1994).
- 7 See generally, Samuel Saks, *Representative Payment and the Social Security Act of 2004*, 51 WAYNE L. REV. ___ (2005). For a discussion of the US regulations on emergency medical treatment see

Samuel Saks, *Call 911: Psychiatry and the New Emergency Medical Treatment and Active Labor Act (EMTALA) Regulations*, 32 J. PSYCHIATRY & L. 483 (2004).

8 Statistics available at <http://www.ssa.gov/pressoffice/basicfact.htm> (last visited April 12, 2005).

9 Regulations, art. 55.

10 *Id.*

11 *Id.*

12 See Regulations, art. 56.

13 Regulations, art. 55.

14 *Id.*

15 See 12 A.L.R. 4th 57 (1982) for a helpful overview of the development of the law.

16 *Id.*

17 698 P.2d 593 (Wash. App. 1985).

18 *Id.* at 595.

19 *Id.* at 596.

20 PRC interim measures, arts. 21-28.

21 PRC interim measures, art. 2.

22 See, e.g., *Locke*, 521 N.W.2d 786 (Mich. 1994).

23 *Id.* at art. 4.

24 *Id.*

25 See discussion in section IV, *infra*.

26 See discussion in section IV, *infra*.

27 Regulations, arts. 20 - 34.

28 *Id.* at art. 21.

29 *Id.*

30 *Id.*

31 *Id.* at art. 23.

32 Regulations, art. 24.

33 *Id.* at art. 27.

34 *Id.* at art. 31.

35 *Id.* at art. 31(8).

36 MICH. COMP. LAWS. ANN. § 600.2169(1)(a) (West 2004).

37 MICH. COMP. LAWS. ANN. § 600.2169(2) (West 2004).

38 MICH. COMP. LAWS. ANN. § 600.2169(1)(b) (West 2004).

39 597 N.W.2d 148, 155 (Mich. 1999).

40 MICH. COMP. LAWS. ANN. § 600.2169(4) (West 2004).

41 MICH. COMP. LAWS. ANN. § 600.2169(2) (West 2004).

42 Regulations, art. 40.

43 *Id.* at art. 35.

44 *Id.* at art. 12.

45 Regulations, art. 13.

46 *Id.*

47 *Id.*

48 *Id.* at art. 14.

49 See discussion in II.A, *supra*.

50 Regulations, art. 14.

51 Regulations, art. 18.

52 *Id.* at art. 36.

53 *Id.* at art. 43. The same rule applies for a mediation or court judgment. *Id.* at art. 44.

54 *Id.* at art. 45.

55 MICH. COMP. LAWS. ANN. § 600.2912b(1) (West 2004). In some cases, notice can be given only three months in advance. See MICH. COMP. LAWS. ANN. § 600.2912b(3) (West 2004).

56 MICH. COMP. LAWS. ANN. § 600.2912b(4) (West 2004).

57 *Id.* at art. 49.

58 *Id.*

59 *Id.* at arts. 50(1)-(11).

60 *Id.*

61 Regulations, art. 50(11).

62 See, e.g., MICH. COMP. LAWS. ANN. § 600.1483(3) (West 2004).

63 Due to injury to the brain or spinal cord. See MICH. COMP. LAWS. ANN. § 600.1483(1)(a) (West 2004).

64 MICH. COMP. LAWS. ANN. § 600.1483(1) (West 2004). These amounts are tied to the consumer price index and are adjusted accordingly. MICH. COMP. LAWS. ANN. § 600.1483(4) (West 2004).

65 See, e.g., Ching-Ching Ni, *Maladies of China's Medical System*, Seattle Times (Feb. 3, 2002).

Treasurer's Report

STATE BAR OF MICHIGAN **International Law Section** 08/15/05

	Current Activity	Activity to Date
	July	July
Income:		
International Law Section Dues		12,780.00
International Stud/Affil Dues		90.00
Total Income		12,870.00
Expenses:		
ListServ	25.00	250.00
Meetings	1,598.18	2,592.78
Annual Meeting Expenses		918.81
Newsletter		2,589.54
Printing		99.72
Postage		5.11
Miscellaneous	783.00	1,521.21
Total Expenses	2,406.18	7,977.17
Net Income	(2,406.18)	4,892.83
Beginning Fund Balance:		
Fund Bal-International Law Sec		26,674.28
Total Beginning Fund Balance		26,674.28
Ending Fund Balance	(2,406.18)	31,567.11

Minutes of Regular Section Meetings

Lois Elizabeth Bingham

April 19, 2005

On Tuesday, April 19, 2005, the Council of the International Law Section of the State Bar of Michigan held its Regular Meeting at the University of Detroit-Mercy Law School pursuant to notice duly circulated to all Section members.

The meeting was called to order at 4:15 p.m. by the Chair, Randolph M. Wright.

Section members and guests in attendance introduced themselves and their professional affiliations.

The Chair invited Mark Gordon, Dean of U of D-Mercy to make a few statements to the Council. Dean Gordon welcomed all in attendance to the law school and remarked on the various programs the law school offered in the area of international law, such as the Joint Degree Program with the University of Windsor and the NAFTA course taught by faculty in Mexico and the United States for both Mexican and American law students. Dean Gordon solicited comments from the Council on ways the law school could better approach the study of international law and further indicated that the law school was in need of adjunct professors.

Lois Elizabeth Bingham, Secretary of the Section, presented the Minutes of the Regular Meeting of the Council of the International Law Section held on January 18, 2005. She noted that the minutes should be corrected to indicate that the Section has an ending fund balance of \$37,375.27 as of December 31, 2004, instead of December 31, 2005. Upon motion duly made, seconded, and unanimously

carried, the Minutes were approved, as corrected, by all members of the Section in attendance.

Next, Scott Fenstermaker, Treasurer of the Section, presented the Treasurer's Report for the six (6) months ending March 31, 2005. The year-to-date income was \$12,715.00 and expenses were \$3,453.82, for a net income of \$9,261.18. When added to the beginning fund balance of \$26,674.28, the Section has an ending fund balance of \$35,935.46 as of March 31, 2005. Upon motion duly made, seconded and unanimously carried, the Treasurer's report was approved as presented. The Section engaged in some general discussion as to how best to spend the ending fund balance and the Chair indicated that the Council would welcome any proposals for programs.

Next, Randolph M. Wright, Chair of the Section, gave his report. He indicated that he had attended the Section Leaders Advisory Council meeting. He remarked that the focus of the meeting was to address ways sections of the State Bar can retain members and increase membership participation at section events. He remarked that the attendees exchanged ideas, best practices and success stories regarding section development such as the use of seminars, symposiums, journals, newsletters, and list serves, as well as collaborative initiatives with national counterpart organizations. He remarked that the following items were noted as action items for the Advisory Council: (1) identification of trends that influence member involvement in sections of

the State Bar; (2) a review of multidisciplinary practice; (3) review of lessons learned in successful practices; and (4) the possibility of using live video conferencing equipment at section meetings. The Chair noted that he and Bruce Birgbauer, Chair - Elect for the Section, would attend the next meeting for the Advisory Council scheduled on June 10, 2005 at Mackinac Island.

In response to the Chair's report, Professor Mogk mentioned that the potential existence of an International Law Section within the Metropolitan Detroit Bar Association. He suggested that we contact the local bar associations to determine if they have organized international law sections and that the Section consider collaborations with such local international law sections. The Chair indicated that he would send a letter to the local bar associations to ascertain whether such bar associations have international law sections. It was also suggested that the Section consider a networking lunch session similar to that sponsored by the State Bar's Computer Law Section.

The Chair then asked for a report from John Mogk on the *Michigan International Lawyer*. Mr. Mogk indicated that the Spring issue would be available in May. He further noted that Professor Julia Qin will be responsible for the journal the upcoming academic year, and that Christi Patrick will become the lead student editor. He remarked that there would also be three new student editors. The deadline for the Fall 2005 edition of the journal is August 1, 2005 and it

will contain the article submitted by the Section's 2004 winner of the Law Student Scholarship. The Chair asked Professor Mogk if the Section had any information on the number of members who have elected to review the journal on-line instead of receiving a hard copy. It was suggested that the Chair follow-up with Carla Machnik as she is the primary contact for the Section's web site.

Reporting on behalf of Howard Hill, the Chair provided a status on the 2005 Law Student Scholarship Program. He remarked that the Section had received three (3) student submissions that had been forwarded to the respective judges for review.

The Chair reminded the Council that the next meeting scheduled for June 14, 2005 is the Section's annual strategic planning session. He indicated that he had not yet secured a location, but that he would inform the Council and members of the Section when the meeting notice was circulated.

Next, Mr. Wright requested that Fred Smith comment on the proposed Metro Airport tour. Mr. Smith solicited input from those present on potential areas of interest such as the broker process, cargo, and supply chain approval. He indicated that the number of attendees could not exceed 40 persons. Mr. Smith indicated that he would inquire about the scheduling of an event that would not coincide with the Section's June 14th meeting.

Mr. Wright then asked Mr. Birgbauer to discuss the upcoming Annual Meeting of the Section. Mr. Birgbauer indicated that the Annual Meeting would be held on October 6, 2005 at the Sheraton Hilton. The topic for the program to be presented in conjunction with our Section's Annual Meeting will address the business

and legal challenges for automotive suppliers in China and India.

In connection with the Annual Meeting, the Chair reminded everyone that the Section presents the Outstanding Section Award to a member of the Section. The Chair welcomes all recommendations.

Mr. Wright then asked Mr. Birgbauer to address the International Bar Association. Mr. Birgbauer indicated that the current dues owed by the Section to the IBA equals 100 G.B.P. He remarked that there is no charge to the Section to have Section members at their expense register for IBA meetings, and that the IBA will assist its members with suggestions for speakers. Upon motion duly made, seconded and unanimously carried, the Section approved the payment of membership fees to the IBA.

The Chair then solicited input on whether the Section should increase the section membership fees. After general discussion, the Section took no action to increase the fees. The Chair also noted that a sufficient number of articles were secured for submission to the State Bar of Michigan Journal – International Law Section to be published in December 2005.

There being no further business, the Chair adjourned the meeting at 5:24 p.m., and invited everyone to remain and participate in the educational program on the Foreign Corrupt Practices Act to be presented by Stuart Deming, Esq., of Deming PLLC.

June 14, 2005

On Tuesday, June 14, 2005, the Council of the International Law Section of the State Bar of Michigan held its Regular Meeting at the Detroit Athletic Club pursuant to notice duly

circulated to all Section members.

Call to Order. The Chair, Randolph M. Wright, called the meeting to order at 4:15 p.m.

Introductions. Section members and guests in attendance introduced themselves and their professional affiliations.

Approval of Minutes. The Minutes of the Regular Meeting of the Council of the International Law Section held on April 19, 2005 were presented for review and approval. Two necessary corrections were noted—the annual meeting will be the Sheraton Detroit Novi Hotel and Professor Qin's name needs to be corrected. Upon motion duly made, seconded, and unanimously carried, the Minutes were approved, as corrected, by all members of the Section in attendance.

Treasurer's Report. Next, Scott Fenstermaker, Treasurer of the Section, presented the Treasurer's Report for the six (6) months ending March 31, 2005. The year-to-date income was \$12,750.00 and expenses were \$4,297.57, for a net income of \$8,452.43. When added to the beginning fund balance of \$26,674.28, the Section has an ending fund balance of \$35,126.71 as of March 31, 2005. Upon motion duly made, seconded and unanimously carried, the Treasurer's report was approved as presented.

Chairman's Report. Next, Randolph M. Wright, Chair of the Section, gave his report. He indicated that he and Bruce Birgbauer, the Chair-Elect of the Section, attended the 2005 Bar Leadership Forum on June 10, 2005 at Mackinac Island. A major policy issue discussed was the proposed application of the Michigan Single Business Tax to legal services. The Bar Association will lobby to oppose such imposition. Mr. Wright also

reviewed other issues discussed at the Forum, and briefly reviewed Representative Assembly vacancies and the multi-disciplinary practice issue.

Michigan International Lawyer.

Julia Qin will be chiefly responsible for assisting, on behalf of the Wayne State Law School faculty, the student editors of the *Journal*. Professor Qin introduced Christi Patrick, who will be the student editor.

Committee/Programs Report.

a. Law School Scholarship Program / Summer Intern Program. Howard Hill reported on the law-student-essay scholarship competition. The \$1,000 scholarship will be awarded to Terrance Finneran. The two professors who judged the contest will critique the essay in order to assist in the preparation for its publication in the *Michigan International Law Journal*.

Mr. Hill then presented a proposal for the Section to fund a public-international-law summer internship grant. The cost was estimated at between \$5,000 and \$7,000. Following discussion, it was decided that the Scholarship Committee will review the proposal and will report its conclusions at the next Council meeting.

b. Metro Airport Tour. Fred Smith reported that airport management is reluctant to allow a group larger than 10 in the airport secure area at any one time. Any airport tour will have

to be done early in the morning on a weekday. Messrs. Wright and Smith will work on setting up a tour of the secure and non-secure areas of the airport this summer.

c. Annual Meeting. Bruce Birgbauer reported as follows: The Annual Meeting will be held on October 6, 2005, from 2:00 p.m. to 5:00 p.m., at the Sheraton Detroit Novi Hotel. The topic for the program to be presented in conjunction with the Annual Meeting will address the business and legal challenges for automotive suppliers in China and India. Mr. Birgbauer has arranged the speakers.

d. Web Site. Fred Frank reported on the Section's web site, including the number of hits. The usage rate is considered satisfactory and continued improvements to the web site will be made.

Planning Session.

a. Dates and Locations of Future Meetings. Tentative dates and locations were discussed.

b. Additional Presentations at the 2005 Bar Leadership Forum. Mr. Wright summarized some of the presentations made at the Forum, including the challenge of working with the different perspectives and values of different generations of lawyers, and the need to use videoconference, phone conference, webinar or other alternate meeting tools to increase meeting participation.

c. Review of Committee Structure. Mr. Wright initiated a discussion of the advantages and disadvantages of our current committee structure. Messrs. Wright and Birgbauer will contact committee chairs to define roles and responsibilities of the committees.

d. Increase Law Student Participation in Section Activities. Ideas were proposed to increase law student participation in Section activities including brown bag lunch discussions at area schools by practicing attorneys, and mentorship programs.

e. Creation of Section Participation Form. There was general discussion over the need to create a form whereby section members could indicate their interest to serve on designated committees and/or areas of expertise within the international law practice. The ILS home page on the website, along with the use of the Section list serve, was considered as potential methods to disseminate the form.

There being no further business, the Chair adjourned the meeting at 6:30 p.m. 🌐

Respectfully submitted for approval
by the Section
Lois Elizabeth Bingham,
Secretary, International Law Section,
State Bar of Michigan

***Michigan International Lawyer* is Looking for New Section Editors!**

If you are interested in publishing a short report on events or activities related to international law that are taking place in your area, please contact Christi Patrick, capatrick@gmail.com.

Current openings:

- Northern Michigan Editor
- Western Michigan Editor
- Upper Peninsula Editor

Section Tours Detroit Airport

Nathaniel Schmidt, Wayne State University Law School



Most travelers arriving at the international terminal at Detroit Metropolitan Airport have just one thought in mind; “Get me out of here as fast as possible.” On September 15, 2005, members of the International Law Section (ILS) of the State Bar of Michigan couldn’t stay long enough.

Frederick Smith, Assistant Chief Counsel of Customs and Border Protection (CBP) of the Detroit office and ILS member, and Randolph M. Wright, Chair of the ILS, organized a tour of the international arrival section at the McNamara Terminal. The tour was led by Robert Tartt, Assistant Port Director and Randy Dyer, Supervisor Inspector.

CBP officers process approximately 8,500 passengers each day with as many as 2,000 passengers inside the terminal at one time. The layout of the terminal and the structure of CBP operations are designed to process all arriving passengers as efficiently as possible. This is especially important given that 95% of passengers arriving from abroad to Detroit take connecting flights to other destinations across the country. Tartt and Dyer walked tour attendees through the various sections including where passengers are inspected for immigration purposes as well as where passengers pick up luggage and present for customs inspections.

Tartt and Dyer also explained how the Customs Department, Immigration and Naturalization Services (INS), and the Department of Agriculture previously operated as separate entities at U.S. airports. The three departments’ operations were merged together under CBP with the creation of the Depart-

ment of Homeland Security in 2002. Thanks to specialized cross training, all CBP inspectors today are qualified to inspect and process both passengers and their baggage. One major benefit for arriving passengers is that they now deal with “one face” when arriving in the United States.

Questions asked by both immigration practitioners and international business practitioners focused on what advice foreign clients and colleagues should receive to ensure no complications arise at the airport. The answer was simple: “Tell them to be honest.” CBP officials reiterated that their purpose is to ensure foreign visitors to the U.S. have a valid reason for coming, whether it is for business, pleasure or study.

The tour was an excellent way for both CBP staff and the attending attorneys to meet and to get to know each other. Putting a familiar face on what is usually a distant relationship serves to maintain and deepen the professional relationships between CBP and Michigan practitioners.

Following the tour, members of the International Law Section enjoyed two presentations given by Metro Detroit Airport officials. Michael Conway, Director of Public Affairs and Environment, briefly introduced the history of the Metro Detroit Airport and its plans for future improvement and expansion. He announced that Metro Detroit is an important economic engine in the region, employing thousands of workers each year. In addition, Tart stated that the newly built McNamara terminal currently overshadows Chicago’s O’Hare Airport in landing capacity.

Thereafter, Barbara Hogan, Deputy Director of Public Affairs and Environment, presented Metro Detroit’s plans for NFL SuperBowl XL 2006. Hogan stated that the SuperBowl is now the biggest sporting event on Earth with nearly 800 million viewers in 180 countries. She noted that because the airport will be the first and last impression of Detroit for the many of the SuperBowl visitors, it is important that the airport be fully prepared. 🌐



Event Calendar 2004 -2005: Meetings, Seminars, & Conferences of Interest

S = Section **M** = Michigan **N** =National **I** =International ☎ =Teleconference

- I** **Sunday, September 25, 2005**
Conference of the International Bar Association
Prague, Check Republic
http://www.ibanet.org/conferences/Conferences_home.cfm
- N** **Wednesday, September 28, 2005**
The World Trade Organization at 10 and the Road to Hong Kong
Washington, DC
<http://www.abanet.org/intlaw/meet/home/html>
- I** **Thursday, September 29, 2005**
Customary International Law; Challenges, Practices Debates
Montreal, Canada
<http://www.abanet.org/cle/compca.html>
- I** **Thursday, September 29, 2005**
Forum on Air and Space Law
Montreal, Canada
<http://www.abanet.org/cle/compca.html>
- N** **Thursday, September 29, 2005**
Going International: Fundamentals of International Business Transactions
Chicago, IL
<https://www.ali-aba.org/aliaba/crs1st2.asp#D>
- S** **Thursday, October 06, 2005**
International Law Section Annual Meeting, Business and Legal Challenges in China and India for Automotive Suppliers
<http://www.michbar.org/international/events.cfm>
- N** **Thursday, October 06, 2005**
AILA Fundamentals of Immigration law Conference
Scottsdale, AZ
<http://www.aila.org/content/default.aspx?docid=12489>
- ☎ **Tuesday, October 18, 2005**
Is Time Standing Still? Retrogression and AC21
<http://www.aila.org/content/default.aspx?docid=12489>
- I** **Friday, October 21, 2005**
9th Annual Competition Conference
Fiesole, Italy
http://www.ibanet.org/conferences/Conferences_home.cfm
- ☎ **Tuesday, October 25, 2005**
Web Conference: Basic Immigration Court Procedure For Newer Practitioners
<http://www.aila.org/content/default.aspx?docid=12489>
- I** **Wednesday, October 26, 2005**
Section Fall Meeting
Brussels, Belgium
<http://www.abanet.org/intlaw/meet/home/html>
- I** **Wednesday, October 26, 2005**
Fragmentation: Diversification and Expansion of International Law
Ottawa, Canada
<http://www.asil.org/events/calendar.cfm>
- I** **Thursday, October 27, 2005**
AIJA International Finance Forum 2005
Toronto, Canada
<http://www.abanet.org/intlaw/meet/home/html>
- I** **Monday, October 31, 2005**
Energy in Latin America – New Trends
Buenos Aires, Argentina
http://www.ibanet.org/conferences/Conferences_home.cfm
- ☎ **Tuesday, November 01, 2005**
Web Conference: Best Practices For Gathering Documentation For PERM
<http://www.aila.org/content/default.aspx?docid=12469>
- N** **Friday, November 04, 2005**
The CISG and the Business Lawyer: The UNCITRAL Digest as a Contract Drafting Tool
Pittsburgh, PA
<http://www.asil.org/events/calendar.cfm>
- ☎ **Tuesday, November 08, 2005**
Ethical Issues For The Business Practitioner
<http://www.aila.org/content/default.aspx?docid=12469>
- S** **Tuesday, November 08, 2005**
Council Meeting
TBD
<http://www.michbar.org/international/calendar.cfm>
- I** **Thursday, November 10, 2005**
Global Immigration Conference
London, England
http://www.ibanet.org/conferences/Conferences_home.cfm
- M** **MFriday, November 11, 2005**
Detroit Bankruptcy Conference: Practice Under the New Bankruptcy Law
Novi, Michigan
<http://www.michbar.org/news/calendar.cfm>
- N** **Monday, November 14, 2005**
National Institute on Economic Sanctions
Washington, DC
<http://www.abanet.org/intlaw/meet/home/html>
- ☎ **Tuesday, November 15, 2005**
Ethics And The Litigator
<http://www.aila.org/content/default.aspx?docid=12469>
- I** **Tuesday, November 15, 2005**
Customs Valuation: Managing the Transaction Value
Brussels, Belgium
<http://events.wcoomd.org/cal2005.htm>
- ☎ **Thursday, November 17, 2005**
Ethical Conflicts in Your Immigration Practice (Newer Practitioner)
<http://www.aila.org/content/default.aspx?docid=12469>
- I** **Thursday, November 24, 2005**
Asia Pacific Mergers & Acquisitions Conference
Hong Kong, China
http://www.ibanet.org/conferences/Conferences_home.cfm
- I** **Thursday, November 24, 2005**
Aviation Conference – Perspectives of the Latin American Market
Sao Paulo, Brazil
http://www.ibanet.org/conferences/Conferences_home.cfm
- N** **Thursday, December 01, 2005**
1st Annual NYU/IBA - International Tax Institute Conference
New York, NY
http://www.ibanet.org/conferences/Conferences_home.cfm
- I** **Tuesday, December 06, 2005**
Energy & Natural Resources Law: Focus on the Middle East
Dubai, UAE
http://www.ibanet.org/conferences/Conferences_home.cfm

- ☎ Tuesday, December 06, 2005**
Web Conference: J-1 Trainees vs. H-3 Trainees -- Options & Strategies For Employers
<http://www.aila.org/content/default.aspx?docid=12455>
- ☎ Tuesday, December 20, 2005**
Advanced Topics And Trends In Consular Processing
<http://www.aila.org/content/default.aspx?docid=12455>
- N Friday, January 20, 2006**
2006 Midyear CLE Conference
San Juan, Puerto Rico
<http://www.aila.org/content/default.aspx?docid=17134>
- I Sunday, January 29, 2006**
African Regional Conference
Lagos, Nigeria
http://www.ibanet.org/conferences/Conferences_home.cfm
- N Wednesday, February 01, 2006**
ABA/ Section Midyear Meeting
New Orleans, LA
<http://www.abanet.org/intlaw/meet/home/html>
- N Saturday, February 04, 2006**
AILA Business Immigration Ski Conference
Vail, CO
<http://www.aila.org/content/default.aspx?docid=15521>
- I Tuesday, February 07, 2006**
Harmonized System Training Workshop on Chemical Products
Brussels, Belgium
http://events.wcoomd.org/cal2005_cal2006.htm
- I Monday, February 20, 2006**
International Arbitration and China: Recent Developments and Current Issues
Shanghai, China
http://www.ibanet.org/conferences/Conferences_home.cfm
- I Sunday, February 26, 2006**
7th Annual Private Investment Funds Conference
London, England
http://www.ibanet.org/conferences/Conferences_home.cfm
- I Monday, March 06, 2006**
A Mid Year Conference – Maritime Law
Dubai, UAE
http://www.ibanet.org/conferences/Conferences_home.cfm
- I Monday, March 06, 2006**
International Wealth Transfer Practice
London, England
http://www.ibanet.org/conferences/Conferences_home.cfm
- I Monday, March 13, 2006**
Creating Business Through World Patent Enforcement
London, England
http://www.ibanet.org/conferences/Conferences_home.cfm
- I Friday, March 24, 2006**
6th Latin American Regional Conference
Caracas, Venezuela
http://www.ibanet.org/conferences/Conferences_home.cfm
- N Wednesday, March 29, 2006**
American Society of International Law Annual Meeting
Washington, DC
<http://www.asil.org/events/annualmeeting.html>
- N Wednesday, March 29, 2006**
100th ASIL Annual Meeting: A Just World Under Law
Washington, DC
<http://www.asil.org/events/calendar.cfm>
- I Thursday, March 30, 2006**
5th Annual Corporate Counsel Conference
Budapest, Hungary
http://www.ibanet.org/conferences/Conferences_home.cfm
- I Sunday, April 02, 2006**
Section on Energy, Environment, Natural Resources and Infrastructure Law
Rome, Italy
http://www.ibanet.org/conferences/Conferences_home.cfm
- N Wednesday, April 05, 2006**
Section Spring Meeting
New York, NY
<http://www.abanet.org/intlaw/meet/home/html>
- I Friday, April 28, 2006**
2nd Annual Antitrust Spring Conference
Sydney, Australia
http://www.ibanet.org/conferences/Conferences_home.cfm
- N Thursday, May 04, 2006**
Immigration Law: Basics and More
Washington, DC
<https://www.ali-aba.org/aliaba/crslst2.asp#D>
- N Friday, May 12, 2006**
Immigration Law: Basics and More
Washington, DC
<https://www.ali-aba.org/aliaba/crslst2.asp#D>
- I Monday, May 22, 2006**
17th Annual Communications and Competition Law Conference
Istanbul, Turkey
http://www.ibanet.org/conferences/Conferences_home.cfm
- I Wednesday, May 31, 2006**
23rd International Financial Law Conference
Edinburgh, Scotland
http://www.ibanet.org/conferences/Conferences_home.cfm
- N Thursday, June 01, 2006**
5th International Mergers and Acquisitions Conference
New York, NY
http://www.ibanet.org/conferences/Conferences_home.cfm
- I Thursday, June 08, 2006**
3rd World Women Lawyers Conference
London, England
http://www.ibanet.org/conferences/Conferences_home.cfm
- N Thursday, August 03, 2006**
ABA/ Section Annual Meeting
Honolulu, HI
<http://www.abanet.org/intlaw/meet/home/html>
- N Sunday, September 17, 2006**
IBA 2006 Conference
Chicago, IL
http://www.ibanet.org/conferences/Conferences_home.cfm
- S S TBD**
Security Procedures Related to Air Travel
TBD
<http://www.michbar.org/international/events.cfm>

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