

# Michigan International Lawyer

INTERNATIONAL LAW SECTION

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## Dear Members and Colleagues:

The International Law Section's annual meeting and program was held in September, 2011 at the Hyatt Regency Dearborn during the State Bar of Michigan's annual meeting. At the Section's annual meeting, officers and Council members for the coming year were elected. Jeffrey F. Paulsen was elected to the office of Chairperson-Elect; A. Reed Newland to the office of Secretary; and David B. Guenther to the office of Treasurer. I look forward to working with the Section's officers and the Council members in the coming year.

The 2011 annual program was entitled "*Structuring International Joint Ventures and Resolving Disputes arising under Them.*" The program was structured as two panel discussions of in-house counsel and business people. In the first panel discussion, Past-Chairperson Richard Goetz of Dykema Gossett, formerly of Ford Motor Company, led panelists Colleen Freeburg of General Motors Company, Andrew Bos of Caraco Pharmaceutical Laboratories, Ltd., and Margaret Fukuda of Delphi Corporation in discussing the practical implications of establishing, maintaining and dissolving international joint ventures. In the second panel discussion, Section member John Wilson, formerly of General Motors Company, led panelists Kate Kozlowski of Ford Motor Company, Tom Miller of Matias Energy LLC and Sharon McIlroy of Matias Energy LLC in discussing the resolution of real disputes that arose within international joint ventures. A copy of the discussion slides for the program and the biographies of the moderators and panelists can be found online at the International Section's webpage. The 2011 program was well received by all who attended. I extend my personal appreciation to all who gave their time to participate and lent their expertise in organizing and presenting this event.

Also at the 2011 annual program, three articles written by law students were distributed that give an overview of the law regarding joint ventures in the countries of Russia, India and Brazil. The article on joint ventures in Russia was authored by Tim Kaufman, recently graduated from Michigan State University College of Law. Mr. Kaufman was mentored by Section member Randolph M. Wright of the law firm Berry Moorman, who has extensive experience in representing Russian companies and their Western joint venture partners in negotiations with the Russian government and the Russian Tax Inspection Service. The article on joint ventures in India was authored by Blake Nichols, currently attending Michigan State University College of Law. Mr. Nichols was mentored by Andrew Bos, Senior Director, Legal Services at Caraco Pharmaceutical Laboratories, Ltd., who has extensive corporate and transactional law experience covering a wide variety of issues. The article on joint ventures in Brazil was authored by Jordana Lück, Operations Specialist and



Margaret  
Dobrowitsky

## *Michigan International Lawyer* Submission 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 leading 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. An author is encouraged to submit a brief bio and a photograph for publication. An article, including footnotes, should contain between 1000 and 3000 words.

Articles can be submitted for consideration in hard copy or electronic format. Manuscripts and photographs cannot be returned unless accompanied by a \$5 check or money order made payable to Wayne State University Law School for shipping and handling.

The *Michigan International Lawyer* will consider articles by law-school students and may publish student articles as part of a regular column. A student should submit the article either through a law-school faculty member or with a law-school faculty member's recommendation.

Submissions should be forwarded to:  
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#### Publication Deadline Dates

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Articles due August 15

##### Winter Issue

Articles due December 15

##### Spring Issue

Articles due April 1

Business Development for ARZIKA, LLC, who was an advisor to the Minister and Civil Servant to the Head Chief of the Ministry of Justice and Citizenship for the State of Paraná, Brazil, and worked for the Pereira Dabul law firm in Curitiba, Brazil. Our special thanks to the talented International Law students who wrote the articles and to the Section member practitioners, who so graciously gave of their time and expertise to mentor the student authors through this complicated field of international law.

Let me also give special thanks to Cameron DeLong for his service to the Section as Chairperson during the past year, as well as his service for many years as a Section officer and Council member. His knowledge and experience in international business and general business law has proven invaluable to the Section. The Section encourages and values Mr. DeLong's continued support and active participation in the Section in his new position as *ex-officio* immediate Past-Chairperson. We look forward to receiving wisdom and guidance from each of the Section's Past-Chairpersons as *ex-officio* Council members in planning and presenting the Section's meetings and activities for the upcoming year.

The primary means by which the Section's officers communicate and distribute notices of meetings and programs is through the Section's "announcement only" listserv. If you have not received email notices of the Section's recent meetings and programs, please go to the Section's page on the State Bar of Michigan website or contact the State Bar of Michigan to sign up for the listserv. If your email address has changed, please sign up again with your current email address. This past year, however, the Section expanded its lines of communication when Section Council member, Sonia Salah, working with Section Chairperson-Elect, Jeffrey Paulsen, launched a Linked-In group for the Section. Details on how the Linked-In project is progressing and instructions on how to link in and participate in the group will be discussed at upcoming Section meetings.

The next International Law Section meeting will be held on Wednesday, November 16, 2011 at Ginopolis Restaurant, located at 27815 Middlebelt Road in Farmington Hills, on the northwest corner of 12 Mile and Middlebelt Road. The Section meeting for the Council will commence at 4:30 pm when the Council will plan activities and programs for the year 2012. All persons interested in the Section are invited and encouraged to attend Council meetings. If you have suggestions for programs or activities that you would like to be considered by the Council, I encourage you to attend the Council meeting, or if you are unable to attend, please feel free to contact one of the Section's officers or any Council member. The Section welcomes all suggestions.

At 5:30 pm, following the Section's business meeting of the Council, guest speaker Stephen P. Anway will present a program on International Arbitration focusing on recent developments in investment treaty arbitration. In particular, Mr. Anway will speak on the subject of international arbitrations brought by foreign investors under bilateral and multi-lateral investment treaties, one of the fastest growing areas of public international law. Mr. Anway is a partner at the international law firm of Squire, Sanders & Dempsey (US) LLP, where he has represented, among other international clients, The Republic of Ecuador and The Czech Republic in multi-billion dollar international investment treaty arbitrations, most notably, as lead counsel for The Czech Republic in the seminal case, *Phoenix Action, Ltd. v. Czech Republic*.

I hope to see you there. In the meantime, please enjoy this issue of the *Michigan International Lawyer*.

Best regards,

*Margaret Dobrowitsky*, Chairperson

# What Attorneys Should Know about International Financial Reporting

By Alan Reinstein and Natalie Churyk



## Abstract

The U.S. is expected to soon join over 120 countries in adopting International Financial Reporting Standards (IFRS), affecting virtually every financial statement account besides cash. Attorneys who develop contracts, such as loan covenants, escrow agreements, and stock option plans should be aware of the differences between the current and the new standards.

This article highlights key areas that will change under IFRS, including accounting for research and development costs, goodwill and other intangible assets, convertible bonds, equity financial instruments, pension and other post-employment costs and leases—as well as changes to the content and presentation of the financial statements.

## Introduction

The Securities and Exchange Commission (SEC) recently announced that the United States will soon join virtually all industrial and emerging countries (over 120) by requiring all publicly traded entities to report their financial information under International Financial Reporting Standards (IFRS) rather than under U.S. Generally Accepted Accounting Principles (GAAP).<sup>1 2</sup> In a recent progress report, October 2010, the SEC stated that it will determine soon when it will mandate this change, which should occur between 2014 and 2016.<sup>3</sup> The impetus follows the SEC's allowing foreign-domiciled entities to use either U.S. GAAP or IFRS (issued by the International Accounting Standards Board [IASB]), i.e., to no longer need to reconcile their financial statements from IFRS to U.S. GAAP via

Form 20-F.<sup>4</sup> SEC registrants must file a registration statement (S-1 if U.S. based or F-1 if foreign based) and an annual report (20-F for foreign-domiciled entities and 10-K for US based companies) with the SEC. Since Form 20-F standardizes foreign-based companies' reporting requirements, eliminating the 20-F requirement, the ruling, in effect, implies that IFRS is comparable to U.S. GAAP.

IFRS adoption will change publicly traded foreign entities' domestic subsidiaries' financial statements, as well as those of U.S. entities wishing to trade globally. Reporting effects include changes to reported net income, net worth, assets (except for cash), liabilities, and resultant financial ratios. IFRS also affects loan covenants, escrow agreements, stock option plans and all valuations that use the term "generally accepted accounting principles."

Attorneys should understand differences between U.S. GAAP and IFRS in order to help their clients draft proper loan, lease and management pay contract language. For example, a merger and acquisition contract should consider IFRS, as it allows more flexibility in measuring profits and net assets. Many merger and acquisition contracts contain earn-out provisions to be calculated using U.S. GAAP; wide payment fluctuations could occur under IFRS conversion. IFRS and U.S. GAAP accounting approaches result in dissimilar ratios summarized on an entity's financial statements affecting performance (e.g., returns on equity). While IFRS and U.S. GAAP focus on matching revenues and expenses in the proper periods, IFRS also considers an asset's "fair" value, the price that an entity would re-



Alan Reinstein



Natalie Churyk

ceive in an orderly transaction between market participants—a somewhat subjective appraisal. Table 1 on the next page summarizes some key issues and differences between these two methods of reporting financial results.

We discuss below examples of key financial changes under IFRS, including inventory valuation; research and development costs; goodwill and other intangible assets; debt and equity investments and other financial instruments; compound financial instruments, including convertible bonds; pension and other post-employment costs; and leases—plus changes to the content and presentation of the financial statements.

## IFRS Effects Upon Specific Accounts

### *Inventory Valuation*

First, IFRS prohibits using the Last In First Out [LIFO] method of inventory valuation, allowing only specific identification, average cost or First In First Out [FIFO] methods. Thus, an entity whose inventory values have grown over time (e.g., due to inflationary price increases) will see increased asset values and higher reported income—and larger, reported state and federal income taxes upon IFRS adoption. Since taxpayers must value inventory identically for book and tax purposes, IFRS adopters can no longer use

**Table 1: Major Differences Between U.S. GAAP and IFRS**

Account	US GAAP	IFRS	Issue
Inventory	Allows : <ul style="list-style-type: none"> <li>• LIFO – Last in First Out</li> <li>• FIFO – First in First Out</li> <li>• Average cost</li> <li>• Specific Identification</li> </ul>	Similar except LIFO is prohibited.	Real (not paper) increases in tax payments to the IRS.
Inventory	LCM - Lower of Cost or Market <ul style="list-style-type: none"> <li>• Considers ceilings and floors.</li> </ul>	LCNRV – Lower of Cost or Net Realizable Value <ul style="list-style-type: none"> <li>• Considers ceilings only.</li> </ul>	LCNRV results in higher inventory values than does LCM.
Research and development costs	Expenses development costs as incurred	Capitalizes development costs after project is technically feasible	Assets and income are larger under IFRS than U.S. GAAP.
Intangible assets.	Intangibles can be written down/impaired, but not written above original value.	Intangibles other than goodwill can be revalued (upward and downward).	Assets and income could be larger under IFRS than U.S. GAAP.
Investments	Allows: <ul style="list-style-type: none"> <li>• Significant influence investments to be recorded by the equity method or fair value method.</li> </ul>	Allows: <ul style="list-style-type: none"> <li>• Significant influence investments to be recorded by the equity method only.</li> </ul>	Could result in significantly different investment values.
Compound instruments	Classifies convertible bonds as liabilities.	Bifurcates (divides) convertible bonds into equity and liability components.	Could potentially lead to debt covenant violations by affecting all ratios related to both debt and equity.
Pensions	Defers prior service cost to be amortized slowly into income.	Immediately recognizes prior service cost as an expense.	Pension expense is higher under IFRS than under U.S. GAAP
Leases	Must meet one of four criteria to be recorded as a capital lease (liability).	Examines substance of transaction to determine capital lease (liability).	Could result in larger liabilities under IFRS than U.S. GAAP

LIFO for tax purposes, thus incurring substantially increased income tax payments in future years following LIFO reserve reversals.<sup>5,6</sup>

U.S. GAAP also requires entities to reduce their inventory value to the lower of cost or market, in consideration of the concepts of “ceilings” and “floors” that include some “normal” profits. However, IFRS uses the lower of cost or net realizable value (NRV), which includes no such normal profit, which could result in higher inventory values compared to U.S. GAAP. For example, a widget that costs \$10 (including normal profit of \$2 and normal costs of disposal of \$1) and could be replaced for

\$9 would be valued at \$8 under U.S. GAAP but at \$9 under IFRS.

Also, IFRS often requires applying the lower of cost or NRV rules to measure inventory values at the individual inventory item or for a group of similar or related items, while U.S. GAAP allows using item-by-item, group-by-group or a total inventory basis. However, because most U. S. firms use the item-by-item basis, significant differences between IFRS and U.S. GAAP are not anticipated.<sup>7</sup> Moreover, IFRS (IAS 2.26) requires companies to use the same cost formula for all inventories with a similar nature and use. Thus, all worldwide subsidiaries should use con-

sistent inventory policies for all similar inventory classes. U.S. GAAP does not specifically address this issue, allowing entities to use different inventory measurement methods for each subsidiary, e.g., FIFO for U.S.-held inventories and weighted average elsewhere. Finally, unlike U.S. GAAP, IFRS requires disclosing both the amount of inventory write-downs recognized as expense and amounts of all write-down reversals.

*Research and Development Costs*

U.S. GAAP and IFRS (1) expense internal costs for the research phase of research and development; (2) recognize at fair value acquired in-

process research and development as an indefinite-lived intangible asset separate from goodwill at its acquisition date; and (3) expense (rather than capitalize) start-up costs. U.S. GAAP<sup>8</sup> expenses *development* costs as incurred, unless addressed by a separate standard since cash receipts from the expenditures are not assured. In contrast, IFRS<sup>9</sup> capitalizes development costs when a project's technical and economic feasibility can be demonstrated in accordance with such specific criteria as demonstrating technical feasibility, intent to complete the asset, and ability to sell the asset in the future. For example, under IFRS, General Motors could have placed the development costs of its forthcoming Chevy Volt on its balance sheet, rather than write off all such costs. Under this scenario, assets and income are larger under IFRS than U.S. GAAP. These large differences could lead to shareholder lawsuits for entities undergoing financial failure since investors rely on the financial statements to make investment decisions.

IFRS and GAAP have similar disclosure requirements for research and development; but unlike U.S. GAAP, IFRS's International Accounting Standard (IAS)38 includes many general disclosures for each class of intangible asset, e.g., to distinguish internally generated intangible assets from other intangible assets; to separate disclosure for intangible assets being amortized for over 20 years; for intangible assets carried using the allowed alternative treatment at revalued amounts; and for research and development expenditures. However, while U.S. GAAP does not comprehensively codify intangible asset disclosure requirements, SEC registrants must disclose identifiable intangible assets separately from unidentifiable assets and goodwill, and the methods to determine their respective amounts.

#### *Goodwill and Other Intangible Assets*

Goodwill arises when one entity (parent) buys another entity (target) for

a price that exceeds the target's separable net assets plus all expected cost savings of consolidating operations and eliminating duplicate functions. As an intangible asset, goodwill can include non-separately identified customer lists, patents and franchise rights, whose marketable values can increase or decrease with present market conditions. Unlike U.S. GAAP, IFRS permits periodic (upward and downward) revaluation of intangible assets (besides goodwill) to fair value. While both U.S. GAAP and IFRS recognize acquired intangible assets at fair value, U.S. GAAP capitalizes certain related intangible costs to maintain economic benefits (e.g., defending patents), while IFRS generally expenses them unless they improve future economic benefits.

#### *Debt and Equity Investments and Other Financial Instruments*

Entities often invest capital in debt, equity and compound (i.e., containing both debt and equity components) instruments. U.S. GAAP allows accounting for "significant influence" investments to be reported under the equity or "fair value" methods of accounting. But IFRS mandates using the equity method only unless the parent prepares separate financial statements.

While U.S. GAAP and IFRS mandate presenting financial instruments as debt or equity in the balance sheet, they use differing standards for that classification. For example, both sets of standards classify debt-like instruments as: (1) available-for-sale; (2) held-for-trading (which IFRS includes as part of fair value through profit or loss (FVPL); or (3) held-to-maturity.<sup>10</sup> Both sets of standards also measure these securities at (1) fair value for held-for-trading/FVPL with revaluations appearing in the income statement and available-for-sale investments with revaluations appearing in other comprehensive income (OCI) on the balance sheet; and (2) amortized costs for investments in the held-to-maturity category (unless

the fair value election is adopted). But while U.S. GAAP focuses on investments in marketable debt securities, IFRS financial instruments standards include marketable debt securities and such other instruments as loans and receivables, which need not be associated with marketable securities. Clients thus may need to reclassify major asset categories upon IFRS adoption.

Both U.S. GAAP and IFRS require detailed (qualitative and quantitative) note disclosures of investments and other financial instruments, e.g., credit and liquidity risks. But U.S. GAAP generally places such disclosures in publicly-traded companies' management discussion and analysis, following general "rules-based" standards; IFRS tends to allow more judgment in where to disclose, adhering to more general "principles-based" theory.

#### *Compound Financial Instruments, Including Convertible Bonds*

U.S. GAAP classifies convertible bonds and other compound financial instruments as liabilities, except for financial derivatives. But IFRS divides compound financial instruments into liability and equity components. IFRS entities should calculate the liability component as the net present value of all potentially contractual future cash flows at market interest rates at the time of issuance. The bifurcation could significantly change the reported liabilities and equity balances, leading to debt covenant violations.

#### *Pensions and Post-Employment Costs*

Pensions and other post-employment benefits (OPEB) (e.g., health care) costs often represent large underfunded entity obligations, especially for defined benefit plans. Both IFRS and U.S. GAAP include major components of such costs as service (normal) costs; interest costs; prior (past) service costs; actuarial gains and losses; actual return on plan assets; and affects of terminations, settlements, curtailments

and other similar expenses. However, while U.S. GAAP initially defers prior service costs in OCI, IFRS recognizes them immediately as a pension prior service cost expense for vested benefits.

Both U.S. GAAP and IFRS allow recognition or deferral through OCI of actuarial gains and losses for *active* employees over a corridor amount (calculated as 10% of the larger of the PBO/present value of the defined benefit obligation (PVDBO) or the fair value of plan assets determined at the beginning of the year). For *inactive* or retired employees, U.S. GAAP allows recognition of actuarial gains and losses as they occur or through OCI deferral under the corridor approach, but IFRS only allows recognition in income as gains and losses occur.

U.S. GAAP and IFRS differ in treatment of pension curtailments from transactions and events that significantly lower present employees' expected years of future service. U.S. GAAP recognizes curtailment losses when they are probable occurrences and to the extent they exceed net gains in OCI, and recognizes curtailment gains at the curtailment date, but only to the extent that they exceed net losses in OCI. IFRS recognizes both gains and losses when they occur, i.e., include a pro rata share of previously unrecognized past service cost and actuarial gains and losses. Also, U.S. GAAP and IFRS accrue OPEB over the service period. But U.S. GAAP bases all OPEB liability on an accumulated postretirement benefit obligation (APBO), while IFRS focuses on the PVDBO. The difference is that the PVDBO considers future compensation levels and the APBO does not. Thus, both U.S. GAAP and IFRS *pension* liabilities consider employees future compensation levels, but unlike IFRS, U.S. GAAP *OPEB* liabilities do not consider the employees' future compensation levels. Moreover, for pensions, U.S. GAAP recognizes a net balance sheet asset or liability for the difference between all projected benefit obliga-

tions (PBO), less the fair value of plan assets, but IFRS adds (subtracts) from these amounts all unrecognized actuarial gains (losses), less unrecognized prior service cost.

#### Leases

As a more rules-based financial system than the principles-based IFRS, U.S. GAAP often contains "bright lines" separating such items as capital and operating leases. For example, ASC 840 [Accounting for Leases] (SFAS No. 13) requires entities to capitalize (i.e., place on their balance sheet the leased asset and related liability) lease obligations whose net present value of required minimum lease payments exceeds 90% of the fair value of the leased asset. But IFRS allows much more flexibility and professional judgment in this matter, allowing the capitalization of some lease obligations that do not meet ASC 840's (SFAS No. 13) rigid criteria.

#### IFRS Disclosure Requirements

##### *Financial Statement Disclosures*

IFRS' financial statements often differ from those of U.S. GAAP. For example, its *Balance Sheets* place non-current assets ahead of current assets, but list current liabilities before non-current ones. IFRS uses the term *share premium account* instead of *additional paid-in capital* and shows net assets (i.e., assets less liabilities) rather than total equity. IFRS would not show total assets equaling total liabilities plus total (stockholders' or members') capital.

Some key IFRS *Income Statement* differences from U.S. GAAP are (1) using *turnover* rather than *sales*; (2) adding a separate column to list referenced footnotes; (3) excluding *extraordinary items*; (4) using *profit before taxation for the year* rather than *net income*; (5) using the terms *finance costs* and *finance income* to replace *interest expense* and *income*.

#### Summary and Conclusion

Attorneys should understand the rudiments of IFRS standards in order to

help their clients draft valid contracts. As discussed, many balance sheet and income statement accounts will change upon IFRS adoption, which could result in debt covenant violations, increased tax payments to the IRS, and recognized previously unrecorded liabilities. Attorneys should thus plan and craft carefully contracts to help their clients transition smoothly to IFRS. 🌐

#### About the Authors

**Alan Reinstein, CPA, DBA** is the George R. Husband Professor of Accounting, Wayne State University. He earned a BA and MS (in Mathematics) from the State University of New York (New Paltz), an MBA from the University of Detroit, and a Doctorate in Business Administration (in Accounting) from the University of Kentucky. He authored many articles for major academic and professional journals. The CPA Journal awarded Alan its Max Block Award for the best articles published in 2008 and 2010, and the Journal of Accountancy awarded him its John L. Lawler Award for the best article published in 2009.

Alan is Vice President of Education for the American Accounting Association and has served as a board member/officer for the Michigan Association of CPAs [MACPA] and Detroit Chapters of the Financial Executives Institute, Institute of Management Accountants and Institute of Internal Auditors—and on its National Board of Research Advisors. The MACPA awarded Alan its 2002 Distinguished Achievement in Accounting Education Award and its 2011 Distinguished Service Award. In 2008, the University of Kentucky honored Alan with its first Von Allmen School of Accountancy Outstanding Ph.D. Alumnus Award.

Formerly with an international CPA firm, Alan has served extensively as a consultant, expert witness, research analyst and arbitrator for public, private and governmental entities, attorneys, CPAs and other professionals.

**Natalie Tatiana Churyk, PhD** is the Caterpillar Professor of Account-

tancy at Northern Illinois University. She teaches in the undergraduate and M.A.S. programs as well as developing and delivering continuing professional education in Northern Illinois University's CPA and CIA Review programs. Dr. Churyk is a CPA and a member of the American Accounting Association, the AICPA, and the Illinois CPA Society. She serves on state and national committees relating to education and student initiatives, including the American Accounting Association's Teaching Learning and Curriculum (Treasurer, Membership Co-Chair, and Strategic Planning Committee Member) and Finance and Investigative Accounting (Membership Chair) Sections, Midwest Steering Committee, and KPMG's FDL Program. Dr. Churyk is a member of the editorial review boards of *Journal of Forensic & Investigative Accounting* and *Journal of Accounting Education*. She is a co-author on two textbooks,

*Accounting and Auditing Research: Tools and Strategies* and *Mastering the FASB's Codification and eIFRS: A Case Approach*.

#### Endnotes

- 1 Qun Liu and Kenneth Hildebeitel, IFRS Adoption in the U.S.: Why the Postponement, *The CPA Journal*, November 2010, pp. 26-30.
- 2 See SEC Release No. 33-9109 (February 24, 2010), Commission Statement in Support of Convergence and Global Accounting Standards ("2010 Statement").
- 3 See 10/29/10 progress report to SEC Release No. 33-9109 (February 24, 2010), Commission Statement in Support of Convergence and Global Accounting Standards ("2010 Statement").
- 4 SEC Release No. 33-8879 (Final Rule: Acceptance From Foreign Private Issuers of Financial Statements

- Prepared In Accordance With International Financial Reporting Standards Without Reconciliation To U.S. GAAP) (12/21/07)
- 5 LIFO Conformity rule, 20 CFR 1.472-2(e)
- 6 IFRS allows entities to remove their LIFO reserves over a four-year period. Robert Bloom and William Cenker, "The Death of LIFO?" *Journal of Accountancy*, January 2009, pp. 44-48.
- 7 <https://eyonline.ey.com/eyssso/mainframe.aspx> (Intermediate I Accounting - Inventory)
- 8 Statement of Financial Accounting Standards No. 2 [Accounting for Research and Development Costs] (Accounting Standards Codification [ASC] 730, Research and Development)
- 9 International Accounting Standard [IAS] 38
- 10 Fair value election is permitted for held-to-maturity securities.

## Detention and Due Process: The Inter-American Commission on Human Rights pays a visit to our immigration detention system

By Andrew Moore, Professor, University of Detroit Mercy School of Law

It is hard to overstate how dramatically the immigration detention system has grown in this country. By immigration detention, I am referring to the choice of our government to jail non-citizens caught in our admissions and deportation system and charged with violating our immigration law. By growth, I am referring to the 470% increase in the size of detained population between 1994 and 2008.<sup>1</sup> This move toward incarceration is part of a larger move to make our civil immigration system function more like a criminal justice system, even though legally we do not treat most immigration violations as criminal offenses, thereby

avoiding the constitutional protection afforded to criminal defendants.<sup>2</sup> This trend means that each year thousands of people who are seeking admission or facing deportation, many of whom have not committed any crimes are shackled, forced to wear prison jump suits, and placed into a decentralized network of federal holding facilities, federal prisons, local and state jails and privately operated detention facilities.<sup>3</sup>

At the end of last year, the international implications of our immigration detention policy manifested themselves with a report from the Inter-American Commission for Human Rights (IACHR).<sup>4</sup> The

IACHR is the primary investigating human rights body of the Organization of American States (OAS). The OAS serves as the regional inter-governmental body that promotes cooperation among nations on the American continents. The United States, as a founding member of the thirty-five nation OAS, has a significant interest in maintaining its good relations with those nations with which it shares borders and has significant trade. Thus, the visit by the IACHR and its report should draw notice from our domestic



Andrew Moore

policy makers of the systemic human rights violations that were found.

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***... there lies at the core of the report a fundamental disagreement between the IACHR and the United States over the extent to which jailing is relied upon for a wide array of those entering or present in the United States.***

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The IACHR sent a delegation to the United States in 2009 to visit detention facilities and consulted with experts on our system. The IACHR also met with the Department of Homeland Security officials in the Bureau of Immigration and Customs Enforcement (ICE) charged with operating this massive detention system. The report covers the full gamut of detention operations, from the initial arrest, through bond hearings, to detention conditions and their impact on the due process of rights of those charged with immigration violations.<sup>5</sup> The comprehensive evaluation produced a one hundred and fifty page report with nearly sixty recommendations to remedy the violations found in this sprawling system.

The bulk of the report is filled with the IACHR's observations and concerns about our immigration system, broken down into general categories of immigration enforcement and detention, conditions of detention, the detention of families and children, and the impact of detention on due process rights. It describes the use of workplace or home raids by federal enforcement officials,<sup>6</sup> and the use of local law enforcement to identify undocumented immigrants and finds these practices problematic.<sup>7</sup> The IACHR also noted its serious concern about the United States' policy of mandatory detention for whole classes

of immigrants,<sup>8</sup> including asylum seekers,<sup>9</sup> placing them in the criminal detention system in which they are handcuffed, forced to wear jump suits, and subjected to repeated searches.<sup>10</sup> Other aspects of detention raising due process human rights issues were length of detention,<sup>11</sup> limited access to medical care (both physical and mental)<sup>12</sup> and limited access to legal representation.<sup>13</sup> These are some highlights, of course. The IACHR report raises many more issues both concerning detention conditions and impairment of due process rights.

On several topics, there is already agreement between United States and the IACHR on needed changes. The United States identified problems during its own comprehensive review of the immigration detention system in October of 2009.<sup>14</sup> In fact, the IACHR report includes responses by the United States to the concerns expressed, with some detailed descriptions of changes the United States plans to make.<sup>15</sup> For example, the United States plans to consolidate the far flung system that is heavily reliant on state and local jails and contract facilities, moving detainees to more centralized centers closer to major cities.<sup>16</sup> This move will alleviate to some degree the problem of inadequate medical staff and improve access to legal assistance. Further, a new performance-based evaluation of contract detention facilities is intended to address concerns of poor detention conditions and abuse by guards.<sup>17</sup> These changes will, to some extent, lead to a detention system more in conformity with human rights norms.

However, there lies at the core of the report a fundamental disagreement between the IACHR and the United States over the extent to which jailing is relied upon for a wide array of those entering or present in the United States. The IACHR strongly urged the United States to consider alternatives to criminal detention for those who do not represent a genuine threat to

public safety in the United States and those who request the protection of asylum. The United States has made it clear that it will continue mass detention as a regular practice.<sup>18</sup> This foundational disagreement is rooted in the United States' disengagement in the American human rights system. The IACHR asserts the United States is legally bound under international law to seek alternatives and use detention as a last resort; and the United States government has consistently denied that we are legally bound to the standards cited by the IACHR.<sup>19</sup>

The United States has not yet ratified the foundational human rights treaty of the American system, the American Convention on Human Rights, and it rejects the IACHR's assertion that the United States is legally bound to human rights obligations found in other international documents that it cited, such as the 1948 American Declaration on the Rights and Duties of Man. While the Declaration is not a binding instrument under international law, the IACHR has articulated the view that the Declaration captures basic human rights obligations that that OAS members (i.e. the United States) must fulfill.<sup>20</sup> Under Article XXV of the Declaration, every human being has the right to liberty and detention prior to the adjudication of one's status can only be used on an exceptional basis that requires case-by-case consideration. Because the United States rejects the notion that the IACHR can identify binding law, it responded in the IACHR report that there is no presumption of liberty for those in a country in violation of that country's laws.<sup>21</sup>

Therefore widespread incarceration of those charged by ICE with being deportable from the United States, and, as part and parcel, expanded use of state and local law enforcement officers will continue. In short, the United States will continue to use a criminal detention model for its immigration system. These policy choice raises very impor-

tant the questions about cost effectiveness of this approach and whether it is driven more by business interests than by genuine security concerns. As noted by the IACHR, immigration detention has become big business in the United States, earning the two major private businesses hundreds of millions of dollars in profit.<sup>22</sup> But the focus of this brief summary is about international human rights norms and the interest the United States has in fully participating in this system.

One main reason for the United States to fully adopt the recommendation of the IACHR is tied to our identity as a nation based upon the rule of law. It is true that we stand out as nation that receives large numbers of immigrants (although there are nations with higher percentages of immigrants in their populations) and therefore has the burden of receiving many, some of whom violate our law to arrive here. However, one reason for the popularity of the United States as a destination for so many is our commitment to certain fundamental human rights principles. We embrace the principles found in the American Declaration on the Rights and Duties of Man and the American Convention on Human Rights. The right to liberty means that there is a presumption against government incarceration and that there should be an individualized assessment of the need in each case until one's status is finally determined. If someone is to be detained, it should be in conditions commensurate with the level of danger he or she may represent to the community. Due process is essential for an effective system of justice and it means determinations of the need for incarceration are made by a neutral adjudicator after a fair opportunity for both the government and the individual to present their side. We hold these things to be true not simply for citizens, but for all human beings because it is in our human nature which these basic principles find their root.

Part of the reason for the growth in the detention system is a perception by some in this country that immigration matters are different and that the rights protections we expect as citizens do not apply to those who are not fully members of our society. This is a dangerous proposition when it comes to basic human rights protections like liberty and due process. We as a nation do have an obligation to be responsible in deciding how many migrants we can accept and our government's responsibility is to protect us from those who pose a genuine danger. But we must never lose sight of the fact that they are human beings, and that, as such, they deserve certain minimum standards of treatment. The IACHR report reminds us of this fact and we are strong enough as a nation to heed that reminder. 🌐

#### About the Author

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*Professor Moore is licensed to practice in the States of Michigan and Ohio.*

#### Endnotes

- 1 Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 44-45 (2010). In 1994 a total of 81,000 non-citizens were detained at some point during their involvement in the immigration system. In 2008 that number had grown to 380,000.
- 2 Stephen Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469 (2007).
- 3 For a list, visit the U.S. Department of Homeland Security, Bureau of Immigration and Customs Enforcement website at <http://www.ice.gov/detention-facilities/index.htm>. It is the case that many who are subject to mandatory detention have committed criminal acts in the past. 8 U.S.C. § 1226(c) However, immigration detention is not a replacement for criminal punishment and many who are detained are not subject to mandatory detention. See Kalhan, *supra* note 1, at 2.
- 4 *Report on Immigration in the United States: Detention and Due Process*, INTER-AM. COMM'N ON HUMAN RIGHTS, <http://cidh.org/pdf%20files/ReportOnImmigrationInTheUnited%20States-DetentionAndDueProcess.pdf> (hereinafter *Detention and Due Process*).
- 5 *Detention and Due Process*, *supra* note 4.
- 6 *Id.* at 48-9.
- 7 *Id.* at 61-2.
- 8 *Id.* at 34. In fairness it should be noted that U.S. immigration law does provide for opportunity for release on bond for many who are charged with being deportable. See 8 U.S.C. §1226(a). However, both as a matter of law and policy, the U.S. has greatly increased the numbers subject to incarceration.
- 9 *Id.* at 43. Under U.S. immigration law those arriving in the United States who a U.S. immigration officer determines

# Michigan International Lawyer

## Book Review

By James W. Pfister



### **Homeland Security: Assessing the First Five Years** By Michael Chertoff University of Pennsylvania Press, 2009



James W. Pfister

#### Introduction

This is a review of the international law and relations aspects of Michael Chertoff's book, *Homeland Security: Assessing the First Five Years*, published by University of Pennsylvania Press, Philadelphia, 2009. The book is based on speeches and articles in connection with the commemoration of the fifth anniversary of the Department of Homeland Security. The international law part is based on an article Chertoff wrote in *Foreign Affairs*, "The Responsibility to Contain: Protecting Sovereignty under International Law." In addition to an argument for a new framework in international law, Chertoff argues in the book for the advantages of "soft power" in American foreign policy, based on the work of Joseph Nye, a Harvard University professor of government.<sup>1</sup>

Michael Chertoff was the second United States Secretary of Homeland Security under President George W. Bush and co-author of the United States Patriot Act. A former judge of the United States Court of Appeals for the Third Circuit, Chertoff graduated Harvard Law School in 1978 and clerked for Supreme Court Justice William Brennan from 1979 to 1980. After leaving government, he has worked as Senior of Counsel at the Washington, D.C. law firm of Covington & Burling and co-founded the Chertoff Group, a risk management and security consulting firm.

In this review, I shall describe Chertoff's approach to international law, with his emphasis on sovereignty and the reciprocal obligation to contain dangerous actors within states, which leads to an advocacy of a new framework of international law. I shall also describe his advocacy of soft power, with its emphasis on doing good deeds and on American values and universal values. In the process of describing these things, I shall, with great deference and respect, critique his approach.

My point will be that we do not need a new framework of international law. Chertoff's approach will fit just fine into the institutions created at the end of World War Two largely by the United States, including a Security Council with Chapter VII vertical authority over states and economic institutions which have led to the World Trade Organization, also with vertical authority over states. Chertoff's own analysis of Security Council Resolution 1373 regarding combating terrorism seems to demonstrate such a fit. These institutions have created, "...an open and rule-based international order" which can accommodate the rising powers of this century, such as China, India, and Brazil.<sup>2</sup> Chertoff's approach to international security law, I believe, might lead to a world structure of regionalism, balance of power, and spheres of influence. Regarding soft power, its likely outcome for our foreign policy might be an emphasis on universal values in the mold of the Universal Declaration of Human Rights and other derivatives of the American experience. This approach does not respect the diverse cultures and political systems of the rising states and of other states. It might make them less likely to accommodate to the current, stable,

to be present without documents or possesses fraudulent documents is subject to mandatory detention. See 8 U.S.C. § 1225(b)(1)(A). Often those seeking asylum arrive without documents.

10 *Id.* at 85-7.

11 *Id.* at 35.

12 *Id.* at 97-107.

13 *Id.* at 130-4.

14 DEPARTMENT OF HOMELAND SECURITY, IMMIGRATION AND CUSTOMS ENFORCEMENT, IMMIGRATION DETENTION OVERVIEW AND

RECOMMENDATIONS (2009), available at <http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf>.

15 See e.g., *id.* at 8.

16 *Id.* at 120.

17 *Id.* at 122-123.

18 Although many of the changes in the detention system are occurring under the Obama administration, the current director of I.C.E. John Morton is quoted in the IACHR's report: "This is not about whether or not we detain people, this is about how we detain them." *Id.* at 123.

19 *Id.* at 7-8.

20 *Id.* at 10. This interpretation was adopted by the other major human rights enforcement body in the American human rights system, the Inter-American Court of Human Rights in an advisory opinion to all members of the OAS. See Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. (ser. A) No. 10 (1989).

21 Detention and Due Process, *supra* note 4, at 7.

22 The vast majority of detainees are held in privately operated facilities. In fact, ICE only operates eight out of the 350 detention facilities. Two of the largest private companies earned billions of dollars in gross revenue. For further details see Detention and Due Process, *supra* note 4 at 87; see also <http://detentionwatchnetwork.org/node/2393>.

international order. This universalism probably has its roots in the fatuous concept of American exceptionalism, a concept which more reflects American ethnocentrism than a mature approach to international legal stability.

### Chertoff's Approach to International Law: The search for a new framework

Chertoff's main concern is the threat of terrorism. He believes the threat of terrorism makes international law essential for the real security needs of states in the support of a shared, common goal, since states are interdependent in the pursuit of this goal.<sup>3</sup> Also, he sees a global consensus emerging for the means of achieving this goal in a forward strategy of attacking terrorism at its source, partnerships, and the management of risk instead of a futile attempt to eliminate it. This common goal, which requires interdependence and a consensus on the means of achieving the goal, provides fertile ground for the development of meaningful and functional international law.<sup>4</sup>

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***... the most serious threats regarding terrorism come from states which are unwilling or unable to contain the deadly non-state threats within their borders ...***

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Chertoff believes this development of a real international law is threatened by a contamination by liberal judges and professors who would use international law to perpetuate their personal or some group's policy and value agenda. This contamination would even include the decisions of international courts.<sup>5</sup> These judges and professors are not states; Chertoff believes states should make international law. Chertoff would no doubt agree with my former professor Inis L. Claude's old line that the prob-

lem with international organization is not the abuse of power; it is the abuse of weakness. Chertoff writes that "...those who seek to forcibly impose abstract concepts of universal values on purely domestic decisions are placing the legitimacy of international law at risk." He develops the concept of "nonsubordination," whereby states should not defer to foreign norms; states should control their own internal affairs and protect their own people as a domestic matter. International agreements should deal with truly transnational matters, such as, regarding terrorism, the "seams" between state jurisdictions where states are most vulnerable.<sup>6</sup>

The key concept is sovereignty of states and the belief that states should make "consent-based international law." Consent-based international law should be based on, "...drafting and updating reciprocal, consent-based legal instruments". An example of a bilateral agreement would be the 2007 agreement between the European Union and the United States on sharing airline passenger name records; such an agreement would, "...synchronize U.S. security policies with those of other nations". Note this is a concrete, practical agreement between states. Another such agreement, this time multilateral, is the Convention on Civil Aviation. Chertoff suggests adding provisions to it to collect and share basic information about passengers. These are what Chertoff believes international law should be; it should deal with "inherently transnational issues" between states. Other examples of such issues include international criminal law, the Law of the Sea, and the Convention on Cybercrime. He writes: "These international agreements recognize that the unbounded nature of many illicit activities obliges individual states to cooperate to contain emerging threats and that the agreements themselves will only be successful if they are adopted with the consent of those states". He also believes that the requirement of the consent of states is

consistent with democratic legitimacy, pursuit of national interests, and cultural/legal diversity.<sup>7</sup>

This emphasis on sovereignty and on concrete, functional consent-based international law leads to, I believe, Chertoff's most innovative concept: sovereign states have a responsibility to protect the sovereignty of *other* states. This is called an "obligation of reciprocal sovereignty". Regarding his main concern of terrorism, states have a responsibility to contain terrorists within their borders. This is seen to be analogous to the common-law concept of nuisance – the obligation of a property owner to prevent activities on his property from injuring his neighbors. This involves the concept of "containment through reciprocity." An example of an agreement here might be drafting a convention to provide screening procedures for cargo transported internationally: "The fundamental goal of these new agreements would be to achieve containment through reciprocity. By agreeing to screen for outgoing threats originating within their own borders, individual countries would gain assurance that similar measures would be taken against incoming threats originating outside their borders".<sup>8</sup>

Chertoff states that the most serious threats regarding terrorism come from states which are unwilling or unable to contain the deadly non-state threats within their borders, especially when these threatening organizations actually control territory or the states themselves.<sup>9</sup>

The big question is what to do if a state is unable or unwilling to control these dangerous intrastate actors. Chertoff asserts a sovereign right to "protective action." Protective action would include the right to use force against said states. This would be force beyond the right of self-defense in Article 51 of the UN Charter, and it would not need Security Council authorization. He believes this use of force is consistent with the principle of sovereignty: it protects the sovereignty

of other states from being attacked by terrorist forces within the subject state. Chertoff insists this would not really be “unilateral” use of force: “Far from signaling a retreat to unilateralism, this approach would require cooperation in building a new legal framework.”<sup>10</sup>

Thus, Chertoff believes we need a new legal framework in international law. He believes the alternative is, “. . . an ad hoc regime that either encourages a go-it-alone approach or results in international paralysis”. He believes the current legal order which produced the institutions at the end of World War II, “. . . is often exploited by ideologues and antagonists of the United States who are bent on waging ‘lawfare’ against United States interests.” He also complains that the interpretation of Article 51 “self-defense” has been too narrow for current self-defense needs. Much of this seems to boil down to a mistrust of the Security Council as being adequate for current security needs. Interestingly, he has absolutely nothing to say about the veto principle of Article 27. He says nothing about Security Council Resolution 1373’s reference to Article 51 “self-defense” which seems to authorize the offensive use of force against terrorists and those who harbor terrorists.<sup>11</sup>

But, Chertoff does discuss Security Council Resolution 1373. Although he does recognize 1373 directed all states to refrain from providing support to terrorists, he does not acknowledge how far 1373 went, consistent with Article 2 section 7, in intruding on the sovereignty of states by providing that all states shall alter their domestic criminal codes to criminalize terrorist activity and other things, such as creating structure to monitor states behavior and to require reports from states. Instead, he focused on that part of 1373 which supported his own approach, which encouraged states to develop bilateral and multilateral arrangements to combat terrorism. Clearly, Chertoff did not do justice to the significance of 1373 in the development on international security law as

one of the most far-reaching uses of the Security Council’s vertical authority under Chapter VII of the Charter.

Chertoff’s main concern is a distrust of the Security Council. His key sentences justifying a new legal framework are:

It is not enough for a group of nations, such as the Security Council, to pass resolutions that prohibit states from supporting terrorists. If states fail to contain transnational threats, there must be an international legal regime that subjects them to potential sanctions or even, if necessary, military intervention aimed at neutralizing those threats.<sup>12</sup>

Chertoff recognizes that the development of a new legal framework will take time. In the meantime, “the United States and its partners” can make consent-based agreements, building law from the bottom up, which can contribute to the development of, “. . . a new, legitimate body of customary international law. . . But, Chertoff does not say what is wrong with Security Council Resolution 1373. He does not discuss the veto principle which would allow the great powers, including the United States, to use force unilaterally, or with partners, in the event the Security Council does not authorize action as it did do in 1373. Would not the veto principle defeat Article 2 section 4 limitations on the threat or use of force? At the conference at San Francisco in 1945 which created the United Nations, “. . . each of the five permanent members . . . issued individual public warnings to the lesser states saying that if the formula on the veto was not adopted . . . there was going to be no organization.”<sup>13</sup>

Chertoff’s approach to create a new legal framework based on customary-law evolution of agreements made by “the United States and its partners” seems extremely United States-centered with little empathy for the other great powers or for other states gener-

ally. What about the accommodation of the rising states of China, India, and Brazil to a stable world legal structure? Would not Chertoff’s approach drive them away from the established, stable security and economic order to create a competing order? Would not Chertoff’s approach to international security law most likely lead to regionalism, balance of power, and spheres of influence? It seems the United States should work through the Security Council legal process; as Resolution 1373 shows, Chertoff’s approach can be accommodated to that process. If not, there is always the veto principle.

### “Soft Power” and the Battle for “Hearts and Minds”

Chertoff believes the battle against terrorists involves a strategic battle for allegiance of the hearts and minds of a critical mass of Muslims.<sup>14</sup> The terrorists are similar to the totalitarian ideologies of communism and fascism. We can fight this by an appeal to freedom, liberty, dignity, the rule of law, and democracy. Chertoff devotes Chapter 5 to the importance of the power of words and ideas and looks to nation-building as a bottom-up process based on these values, good works demonstrating our values such as fighting malaria and HIV/AIDs, and the use of hard power demonstrating commitment. Chertoff goes back to our Declaration of Independence, I think: “. . . it would be sheer folly to neglect the power of words to explain our actions and defend our message . . . Policymakers must do a better job in countering (extremist propaganda’s) distorted narrative by telling the story of a nation whose founding document declares that freedom and hope are not for a privileged few, but for the whole of humanity”.<sup>15</sup>

Whether the Declaration of Independence said that or not, the point seems to be that there are certain universal values which the United States should cultivate in various parts of the world, which, of course, happen to be

United States' values. This seems to be in the genre of the Universal Declaration of Human Rights; the idea that Western values (especially American ones) are applicable to all humanity. This does not do much justice to cultural and political diversity, such as the Muslim and Asian diverse approaches to humanity. A country like Singapore, for example, might reject much of American law and values, even though it shares the English common law tradition. There is the great weight of Chinese tradition and the past personal leadership of Lee Kuan Yew.

Does Chertoff know anything about Lee Kuan Yew? Should Lee's philosophy stand in the way of American proselytizing? In his new book on China, Henry Kissinger writes: "Throughout its history, the United States has often been motivated by visions of the universal relevance of its ideals and of a proclaimed duty to spread them. China has acted on the basis of its singularity; it expanded by cultural osmosis, not missionary zeal." Kissinger wonders whether the two can find "some congruence with the other's historic regional role."<sup>16</sup>

There is no question that Chertoff's approach to soft power is consistent with traditional American foreign policy. The question is whether it is consistent with a structure of international peace and stability which will accommodate the rising powers under a stable international law. For this, I would bet on a Security Council-centered world, not on an American-centered one. 🌐

#### About the Author

*James W. Pfister received his Ph.D. degree in political science in 1972 from the University of Michigan, with an emphasis on international politics, and international organization, comparative politics, and Southeast Asia; he received his J.D. degree from the University of Toledo College of Law in 1981. He has been a member of the State Bar of Michigan since November 1981. He practiced law, with an emphasis on real estate, from 1982 to 2006. He has taught in the political science department at Eastern Michigan University since Fall 1967, where in recent years he has taught criminal law and international law.*

#### Endnotes

- 1 Michael Chertoff, *The Responsibility to Contain: Protecting Sovereignty under International Law*, FOREIGN AFFAIRS, Jan./Feb. 2009, Vol. 88. No. 1.
- 2 John Ikenberry, *The Future of the Liberal World Order: Internationalism After America*, FOREIGN AFFAIRS, May/ Jun. 2011, Vol. 90, No.3 at 67.
- 3 MICHAEL CHERTOFF, *HOMELAND SECURITY: ASSESSING THE FIRST FIVE YEARS* 154, 170, 173, 174 (2009).
- 4 *Id.* at 153-155, 161, 173.
- 5 *Id.* at 161, 164, 166, 167, 175, 177.
- 6 *Id.* at 161, 169-171, 173, 177.
- 7 *Id.* at 153-178.
- 8 *Id.* at 162, 168, 173, 179.
- 9 *Id.* at 170, 179.
- 10 *Id.* at 169, 174, 176.
- 11 *Id.* at 162, 167, 175.
- 12 *Id.* at 176.
- 13 STEPHEN C. SCHLESINGER, *ACT OF CREATION* 222 (Cambridge: Westview Press, 2003).
- 14 MICHAEL CHERTOFF, *HOMELAND SECURITY: ASSESSING THE FIRST FIVE YEARS* 16, 55 (2009).
- 15 *Id.* at 20, 21, 22, 34-36, 55, 66, 67.
- 16 HENRY KISSINGER, *ON CHINA* 529 (New York: The Penguin Press, 2011).



# Colgate-Palmolive v. Procter and Gamble: A comparative view of advertising and legal systems

By Tiffany A. Fidler, PhD

Colgate-Palmolive (Colgate) has sales of over 15 billion USD in over 200 countries, including the U.S., China, and the E.U., and is the maker of the Colgate brand of products, which includes a teeth whitening line.<sup>1, 2</sup> Colgate's competitor, Procter and Gamble (P&G), has sales of approximately 80 billion USD with operations in over 80 countries (with sales in more), including the U.S., China, and the E.U.<sup>3</sup> P&G is the maker of Crest brand products which also includes a teeth whitening line.<sup>4</sup> Advertising is an important part of the marketing strategy for both companies and their respective brands. For example, in 2009 P&G spent 7.5 billion USD on advertising alone.<sup>5</sup>

In the early 2000s, Colgate launched a teeth whitening product called Simply White. In order to use this product, consumers should paint the whitening agent onto their teeth over a series of days. The whiteness of teeth is measured using a color based scale called shades. In 2003, P&G launched a competitive teeth whitening product called Crest Whitestrips. In order to use P&G product, consumers need to place plastic strips containing a whitening agent over their teeth for a period of time per day, and the strips should be used for a series of days. P&G then began advertising its new Crest Whitestrips product in the U.S; and in China, and the advertisements compared the Whitestrips to other whitening methods, including the paint-on whitening products in general. No mention of the Colgate product by name was made in the advertisements. Colgate sued P&G in civil court in the U.S. and in China claiming false advertising and seeking damages. This case study will discuss

the differences between the American and Chinese systems in handling false advertisement claims while providing useful insight regarding Chinese civil procedure for companies pursuing multinational strategies.

## Colgate vs P&G – United States Civil Case

Colgate sued P&G in the Southern District of New York claiming that the Crest advertisements violated the Lanham Act<sup>6</sup>, and requesting 79 million USD in damages.<sup>7</sup> The complaint was filed on November 24, 2003 under federal question jurisdiction. A jury trial was requested by the plaintiff, Colgate. Colgate claimed that “P&G’s television and radio commercials for Crest WhiteStrips and Crest Night Effects portrayed Colgate tooth-whiteners as “ineffective and essentially worthless.” Colgate also disputed P&G’s claims that its products are “clinically proven” to be superior and whiten teeth “two times better” and “five times better” than Colgate’s products, Simply White and Simply White Night.”<sup>8</sup>

In June 2004, both parties filed motions in limine to exclude evidence submitted by the other party. Both motions were denied in July 2004. Colgate then challenged P&G’s use of the color space measurements alone. As a result, P&G was permitted to present “instances of Colgate’s similar reliance to support numerical superiority claims.” Colgate wanted to exclude photographs and teeth treated with the whitening products; however, these were allowed because the objections challenging the accuracy of the color renditions went to the weight to be given to the images by the jury. Testimony by Dr. Li, an expert

witness for Colgate was denied because he refused to disclose to scientific procedures used in his study due to a confidentiality agreement, and the court stated that this material could have been subpoenaed from a third party. An NAD-DenMat decision (DenMat is the manufacturer on competitive product Rembrandt) was allowed into trial because the degree and extent of P&G’s reliance on the decision was “better decided at trial.”<sup>9</sup> The jury trial lasted 12 days and was completed on July 29, 2004 when the jury found for P&G. The unanimous decision for P&G meant that in the U.S., “P&G may still show the ads, even though most of them are no longer used by P&G, and continue to use a digital-imaging camera system for its comparisons of products.”<sup>10</sup>



Tiffany A. Fidler

## Chinese Comparative Advertising – A Brief Overview

The history of the advertisement industry in China is very distinct from the U.S. In China, commercial advertising largely disappeared during the cultural revolution of Mao, and did not reappear until the early 1980s, with further growth in the 1990s along with the Chinese economy. Indeed, with the growth of the economy and interaction with the global marketplace, China had the fifth largest advertising market in 2004, and over 30 billion USD was spent on advertising in 2005.<sup>11</sup>

Advertisements in China are regulated by the State Administration of Industry and Commerce (SAIC) through a decentralized system. The Chinese

definition of advertising is broad and can include traditional advertisements, as well as packaging, labeling, as well as public notices from companies. A deceptive advertisement, which includes fraud, deception, or misleadingness, can be challenged in China by the government, competitors, and consumers through both the legal and administrative systems. The Chinese advertising law places liability on the advertiser, advertising companies, as well as retailers, the media, and social institutions, leading to a large potential number of defendants in a lawsuit. For the administrative system, the local SAIC office monitors advertisements in its area and can impose fines. The scope of the operation is massive, with the Beijing branch of the SAIC monitoring approximately 3.8 million advertisements in 2006 alone. An administrative regulator has the ability to make a broad interpretation regarding unfair competition and misleading advertisements. Due to the decentralized structure, an advertisement that is banned by an administrative regulator in one region or city may be allowed in another location. A civil or criminal action may be brought in the Chinese court system. The criminal system uses criminal laws for disrupting the market order; however, the criminal system is not used as frequently, and enforcement is not as consistent. The burden of proof changes based on whether the case is brought before the administrative or court system. For the court system, the plaintiff usually bears the burden of proof and has to prove falsity. For the administrative system, the burden of proof is placed on the defendant or requires no verification at all.<sup>12</sup>

## Colgate v. P&G – China Civil Case

### *Civil law*

Colgate also sued P&G in China for unfair competition. The lawsuit was filed with the Shanghai Second Intermediate People's Court in February 2004 and named Procter & Gamble (China)

Co., Ltd., Guangzhou Procter & Gamble Co., Ltd., and Guangzhou Hao Lin Trading Co., Ltd. as co-defendants.<sup>13</sup>

The Civil Procedure Law of China was initially adopted in 1991 and revised in 2007, and provides the rules for parties acting within the court system as well as evidentiary rules. The purpose of the law is to “protect the exercise of the litigation rights of the parties . . . protect the lawful rights and interests of the parties, educate citizens to voluntarily abide by the law, maintain the social and economic order, and guarantee the smooth progress of the socialist construction.”<sup>14</sup> Article 5 provides that foreign parties enjoy the same “litigation rights and obligations” as domestic parties and that the “people’s courts of the People’s Republic of China shall follow the principle of reciprocity regarding the civil litigation rights of the citizens, enterprises and organizations of that foreign country.”<sup>15</sup>

The Civil Law outlines the jurisdiction of the Chinese court system, with the basic people’s court being the court of first instance in civil cases under Article 18, unless the case falls within a category outlined by Article 19 wherein the intermediate people’s court has jurisdiction as a court of first instance including “major cases involving foreign element”, “cases that have major impact on the area under their jurisdiction, and “cases as determined by the Supreme People’s Court to be under the jurisdiction of the intermediate people’s courts.”<sup>16</sup>

Personal jurisdiction is also outlined in the Chinese Civil Law with the civil lawsuit being brought under the jurisdiction of where the defendant has its domicile.<sup>17</sup> This is narrower than, but similar to U.S. law where personal jurisdiction is governed by the Federal Rules of Civil Procedure and common law requiring minimum contacts with the forum.<sup>18</sup> This also corresponds with venue in U.S. law, which typically has the trial where the defendant resides.<sup>19</sup> A Chinese civil trial is heard and de-

cided by an odd-numbered panel of judges, which may also include judicial assessors.<sup>20</sup> This is different from the U.S. law where the right to a jury trial is preserved for civil lawsuits under the Seventh Amendment of the Constitution.<sup>21</sup> In China, a court of second instance (an appeal) is also heard by an odd-numbered panel of judges.<sup>22</sup>

The civil law has a version of standing and jurisdiction where:

...[T]he plaintiff must be a citizen, legal person or any other organization that has a direct interest in the case, there must be a definite defendant, there must be specific claim or claims, facts, and cause or causes for the suit, and the suit must be within the scope of acceptance for civil actions by the people’s courts and under the jurisdiction of the people’s court where the suit is entertained.<sup>23</sup>

Under U.S. law, standing requires injury-in-fact, a causal connection, and redressability.<sup>24</sup> Under U.S. law and subject matter jurisdiction, a federal court can hear federal question matters and diversity issues.<sup>25</sup> If there are more than two persons in a party, the action can be combined as a joint action and “[i]f a party of two or more persons to a joint action have common rights and obligations with respect to the object of action and the act of any one of them is recognized by the others of the party, such an act shall be valid for all the rest of the party”.<sup>26</sup> The availability of a joint action exists under Rule 20 of U.S. law, where the parties may be joined for the same transaction and under the same question of law or fact.<sup>27</sup> The action of one party does not affect the rights of the other parties under the Due Process clause of the U.S. Constitution though.<sup>28</sup>

### *Complaint*

Colgate claimed that they had established foreign-invested enterprises in China, mainly producing and selling

“Colgate” and “Palmolive” brand of oral care products and personal care products. Colgate launched their teeth whitening products in the U.S., and in March 2003, began to distribute the product in the Chinese market. The Colgate product was the only paint-on style of teeth whitening products available to Chinese consumers. Colgate stated that two of the defendants began marketing a Crest deep white tooth paste products in November 2003 and the third defendant sold the product in China. The three defendants sold, marketed, distributed handbills and advertisements on the Internet and other methods, and publicly disseminated information, stating that “deep white crest tooth paste is three times as effective as the liquid tooth whitening products,” that teeth whitening products in general (such as whitening toothpaste, teeth whitening solution) contact only part of the tooth surface to remove stains, and that the teeth whitening solution is often washed off in a few minutes with saliva and is therefore ineffective. Colgate stated that the defendants were making false statements, and disparaging the effects of liquid products on teeth whitening. Colgate then requested that the Court confirmed that the three defendants improperly used comparative advertising practices. Colgate also asked for injunctive relief, and required that the three defendants made a public apology in various new sources to eliminate the effect of the unfair competition, and for damages of RMB 50 million. The three defendants did not submit a written defense, but responded to the court’s summary of the focus of the case after an August 2004 hearing. P&G China argued that they posted the plaintiff’s allegations on their website, that they did not distribute the Crest product and did not distribute the ads alone. P&G Guangzhou argued that they did not distribute the Crest product or the ads, that Guangzhou Trading distributed the product and disseminated the ads alone, and that the contents of the ads were true.<sup>29</sup>

#### *Evidentiary and Court Proceedings*

Evidence in Chinese court falls within several classifications such as documentary, material, audio-visual, witness testimony, statements, expert conclusions, and records of inspection.<sup>30</sup> It is the parties’ duty to collect and provide evidence; however, the court can step in and collect evidence if it is deemed necessary.<sup>31</sup> The court “verif[ies] the authenticity, examine and determine[s] the validity of the certifying documents provided by the relevant units or individuals.”<sup>32</sup> The rules for submitted documents are clearly defined and appear to be enforced.

Any document submitted as evidence must be the original. Material evidence must also be original. If it is truly difficult to present the original document or thing, then reproductions, photographs, duplicates or extracts of the original may be submitted. If a document in a foreign language is submitted as evidence, a Chinese translation must be appended.<sup>33</sup>

In the U.S., certain forms of evidence need to be authenticated, while other forms of evidence, including printed publications (which can include the scientific studies in a journal article or the like), are self authenticating.<sup>34</sup>

In the present case, both parties submitted evidence to the court. Colgate produced evidence to show that P&G China and P&G Guangzhou were related through business licenses, FIE approval certificates and trademark notices. Colgate also submitted evidence of purchase of goods, notarized invoices to show distribution of flyers, and notarized proof that P&G China had posted the disputed advertising on their website. Evidence was presented that the Colgate product was the only on the market in early 2004. The Crest toothpaste packaging with Chinese and English descriptions that are “seriously

inconsistent and [have an] exaggerated description of the product results” was submitted. The defendants attacked the Colgate’s evidence for relevance. They also claimed that the website postings were not advertising, that some of the evidence was not notarized or did not have a Chinese translation of the English evidence to meet the formal requirements of evidence, and that the Chinese market only had three brands of whitening goods. The defendants also submitted evidence, some of which was taken from the U.S. case, that a majority of which was clinical studies and reports regarding the effectiveness of the Crest product to show that the disputed advertising content was true.<sup>35</sup>

Colgate objected to a majority of the defendants’ evidence as not having a Chinese translation and not meeting the formal requirements of evidence. The defendants later submitted the Chinese translation by courier to the court, along with additional studies from the U.S. trial. The additional studies were certified and stated that Colgate recognized the truth of the advertisements in the US. Colgate objected to the studies on the grounds that they had withdrawn their evidence that P&G was rebutting with the studies, that the certification was not translated into Chinese, and an original copy in English was not submitted.<sup>36</sup>

The basic procedure for debate within the court is outlined in Article 127.<sup>37</sup> The first requirement is an oral statement by the plaintiff. The second step is a defense by the defendant. The third step is any oral statement by a third party, if one exists. The two sides then debate, and then each give a final opinion. At the end of the debate, the court makes a judgment according to law and without delay.<sup>38</sup> The structure of the judgment is outlined to include the “cause of action, the claims, facts and cause or causes of the dispute”, the “facts and causes as found in the judgment and the basis of application of the law”, “the outcome of adjudication

and the costs to be borne”, and “the time limit for filing an appeal and the appellate court with which the appeal may be filed.”<sup>39</sup>

*Court Decision and Relevant Chinese Law*

The court cited China’s Anti-Unfair Competition Law, the Advertising Law of the People’s Republic, and the General Principles of Civil Law. The court also stated that “comparative advertising should follow the law of fairness, good faith and the accepted business ethics, comparative advertising should follow a code of conduct, that is, the content should be compared to the specific facts that can be proved ... the comparison made in advertisements must be within certain limits and can only be an objective statement of facts, not exaggerated, not belittling the other operators, goods or services.” The court also reasoned that the damages were difficult to calculate, and that for compensation the court should look to social impact of the circumstances of infringement, the time and scope of the infringement, the defendant’s subjective degree of fault, the plaintiff’s business reputation and product reputation, as well as the reasonable costs of investigation by the plaintiff.<sup>40</sup>

The Anti-Unfair Competition Act was adopted by the National People’s Congress and went into effect in 1993. Article 1 states that “[t]his Law is formulated with a view to safeguarding the healthy development of socialist market economy, encouraging and protecting fair competition, repressing unfair competition acts, and protecting the lawful rights and interests of business operators and consumers.” Article 9 prohibits false advertising by stating that “[a] business operator may not, by advertisement or any other means, make false or misleading publicity of their commodities as to their quality, ingredients, functions, usage, producers, duration of validity or origin...” Article 14 extends protection to competitors with “[a] business operator shall not fabricate or spread false information to injure his competitors’

commercial credit or the reputation of his competitors’ commodities.” Finally the law provides for damages under Article 20, which states, a party who

... violates ... and thus causes damage to the infringed business operators, shall bear the liability of compensation for the damage. If the losses ... are difficult to estimate, the damages shall be the profits derived from the infringement .... And the infringer shall also bear the reasonable expense paid ... for investigating the infringer’s unfair competition acts violating his lawful rights and interests. A business operator whose lawful rights and interests are infringed ... may bring a suit in a people’s court.<sup>41</sup>

Alternatively, the supervision and inspection department may impose an administrative fine under the law of between 10,000 and 200,000 yuan under Article 24, with the opportunity to appeal the department’s decision to higher levels of administrative departments and to the courts under Article 29.<sup>42</sup>

The Chinese Advertising Law went into effect in February 1995 “to regulate advertising activities, promote the sound development of advertising business, protect the legitimate rights and interests of consumers, maintain the socio-economic order, and enable advertisements to play a positive role in the socialist market economy.” Article 2 states that “[a]n advertisement shall be true to facts, lawful, and in compliance with the requirements for the socialist cultural and ideological development.” Article 4 states that “[a]n advertisement shall not contain any false information, and shall not cheat or mislead consumers.” The law goes further in Article 10 and includes that “[d]ata, statistical information, results of investigation or survey, digest and quotations used in an advertisement shall be true to facts and accurate, and their

sources shall be indicated.” Advertisers are additionally limited by Article 21, stating that “[a]dvertisers, advertising agents and advertisement publishers may not engage in unfair competition of any form in their advertising activities.<sup>43</sup> China additionally has Regulations on Control over Advertisements enacted in 1987 by the State Council, and state that “[m]onopoly and unfair competition shall be prohibited in advertising operations.”<sup>44</sup>

On December 9, 2004, the court decided that P&G China and Guangzhou Hao Lin Trading committed acts of unfair competition, that the plaintiff was damaged, and that the acts of unfair competition should stop. P&G China was to compensate Colgate with 150,000 yuan for economic losses. Guangzhou Hao Lin Trading was to compensate Colgate for 250,000 yuan of economic losses. Both P&G China and Guangzhou Hao Lin Trading were to publish apologies subject to court approval within thirty days in various publications.

The Chinese court issued what appear to be mainly equitable remedies. By issuing a permanent injunction in ordering the advertising to stop, equitable relief was granted to Colgate. Additional equitable relief was granted in requiring public apologies, which could equate to specific performance or a form of restitution for loss of brand reputation and goodwill.<sup>45</sup> The public apologies relate to a loss of face or potentially affecting their *guanxi*, which is very important in China. The damages are restitution compensating for economic losses borne by Colgate, or could be viewed as unjust enrichment caused by what the court found to be unfairly competing ads. Alternatively, the damages could be compensation as a legal remedy and not equitable in form. Under U.S. law, courts can grant judgments under both law and equity; however equitable remedies, concerned with fairness and justice, are typically not issued where there is a remedy at law available.

The costs of the court fees were to be split between Colgate, P&G China, and Guangzhou Hao Lin Trading. The party filing a lawsuit in China is typically responsible for the court costs for a civil lawsuit under Article 107.<sup>46</sup> Conversely, under U.S. law, each party is responsible for their own legal costs, known as the American Rule, although the court may award attorney fees as a part of the judgment. Under the English Rule, the losing party is responsible for the legal fees of both parties as well as any court fees.

### P&G v. Colgate – China Appeal Case Review

P&G China and Guangzhou Hao Lin Trading appealed the decision to the Shanghai High Peoples Court of Appeal.<sup>47</sup> According to the court, in the process of adjudicating the case, the parties reached a settlement agreement in July 2005 and applied to withdraw the appeal, which the court permitted. The parties are allowed to reach a compromise (or settle) of their own accord, and if the parties settle, the “content of the settlement agreement shall not contravene the law.”<sup>48,49</sup> The court fees were to be halved between the plaintiff and defendants.

An appeal is allowed to the next higher court within 15 days of the written judgment from the court of first instance.<sup>50</sup> Only one opportunity for appeal is given, as the “judgment and the ruling of the people’s court of second instance shall be final.”<sup>51</sup> In the U.S. federal court system, a party has 30 days to file an appeal as a matter of right under Federal Rules of Appellate Procedure 3 and 4.<sup>52</sup> A party can appeal beyond a court of second instance in federal courts; however, this is not a matter of right, as certiorari must be granted by the Supreme Court of the United States in order for the case to be heard.

### Conclusions

The U.S. allows puffery, comparisons and statistics in advertising, which are restricted or forbidden under Chinese law.<sup>53</sup> In contrast, the Chinese law seems to allow some level of comparative advertising, as long as truthful. However, it appears that, due in part to the broad definitions of advertising as well as the laws for unfair competition, comparative advertising is difficult to use in China as administrative or legal enforcements against it are likely to occur. This discrepancy in laws, in conjunction with the Chinese and U.S. courts not having reciprocity, leads to potential difficulties for a multinational corporation to launch a global marketing campaign with a single advertisement or advertising theme. Additionally, if a judgment is reached in one country’s jurisdiction, it is not enforceable in the other country due to a lack of treaties and agreements, which can lead to high legal costs. Therefore, close attention needs to be paid to the laws of each country and the advertisements need to be tailored based on the laws in the national market they are targeting.

China’s laws will continue to evolve over time, and likely at a rapid pace, given their history of economic and legal growth over the last 30 years. For example, comparative advertising was illegal in Germany from approximately 1900 with the adoption of an Unfair Competition Law until 2000. In 2000, Germany adopted E.U. directive 97/55/EC regarding misleading advertisements.<sup>54</sup> Before the adoption of the E.U. directive, negative comparative advertisements criticizing competitors were unfair competition, even if true.<sup>55</sup> Seeing that both the U.S. and the E.U. have comparable laws permitting comparative advertising, a change in laws towards a more liberal policy for advertising in China is foreseeable in the future. 🌐

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[http://www.ibanet.org/Article/Detail.  
aspx?ArticleUid=0F2DBE69-E98D-4C34-  
8BEA-1FF7138700E8](http://www.ibanet.org/Article/Detail.aspx?ArticleUid=0F2DBE69-E98D-4C34-8BEA-1FF7138700E8)

**April 13, 2012**

Africa and International Law: Taking  
Stock and Moving Forward  
Albany, NY  
[http://www.albanylaw.edu/sub.  
php?navigation\\_id=2067](http://www.albanylaw.edu/sub.php?navigation_id=2067)

**April 17-21, 2012**

2012 Spring Meeting  
New York, NY  
[http://apps.americanbar.org/intlaw/calendar/  
home.html](http://apps.americanbar.org/intlaw/calendar/home.html)

**April 22-25, 2012**

Biennial Conference of the Section  
on Energy, Environment, Natural  
Resources and Infrastructure Law  
Santiago, Chile  
[http://www.ibanet.org/Article/Detail.  
aspx?ArticleUid=972EEF64-F614-41DD-  
8A26-85EDFB7A09FC](http://www.ibanet.org/Article/Detail.aspx?ArticleUid=972EEF64-F614-41DD-8A26-85EDFB7A09FC)

**May 20-22, 2012**

18th Annual Global Insolvency and  
Restructuring Conference  
Helsinki, Finland  
[http://www.ibanet.org/Article/Detail.  
aspx?ArticleUid=4254BD07-4586-4846-  
B3C0-22F361D122B9](http://www.ibanet.org/Article/Detail.aspx?ArticleUid=4254BD07-4586-4846-B3C0-22F361D122B9)

**June 13-16, 2012**

AILA Annual Conference  
Nashville, TN  
[http://www.aila.org/content/default.  
aspx?docid=29443](http://www.aila.org/content/default.aspx?docid=29443)

**October 16-20, 2012**

2012 Fall Meeting  
TBD  
[http://www.americanbar.org/groups/  
international\\_law/events\\_cle.html](http://www.americanbar.org/groups/international_law/events_cle.html)

**Other ABA Section of International Law Events**

[http://www.abanet.org/intlaw/calendar/  
home.html](http://www.abanet.org/intlaw/calendar/home.html)

**Other AILA events**

[http://www.aila.org/content/default.  
aspx?bc=1010](http://www.aila.org/content/default.aspx?bc=1010)

**Other ASIL Events**

<http://www.asil.org/events/calendar.cfm>

**Other IBA Events**

[http://www.ibanet.org/conferences/  
Conferences\\_home.cfm](http://www.ibanet.org/conferences/Conferences_home.cfm)

# Section Council Meeting Minutes



A meeting of the Council (“**Council**”) of the International Law Section (“Section”) of the State Bar of Michigan (“State Bar” or “SBM”) was held on March 23, 2011, at the Black Finn Restaurant - 530 South Main Street, Royal Oak, Michigan 48067.

The following voting members of the Council were present in person: Cameron S. DeLong, Margaret A. Dobrowsky, Jeffrey F. Paulsen, Linda Armstrong, Debra Clephane, and David Guenther. Student Council Members in attendance: Sam Saif. Immediate Past Chair Richard Goetz and past chairs Fred Frank and Randolph Wright were in attendance. SBM Board of Commissioner Liaison Margaret Costello was also in attendance.

Other Members of the Section also attended the meeting. Names and contact information for each of the attendees will be filed with these meeting minutes.

## Call to Order

Cameron DeLong, Chairperson of the Section, called the meeting to order at approximately 5:30 pm.

## Approval of Agenda

The Chairperson circulated an agenda for the meeting, which was approved as presented.

## Introductions

At the Chairperson’s request, attendees introduced themselves and described their professional affiliations and interest in international law matters.

## Notice and Quorum

The Secretary presented a written notice of the meeting that was mailed or delivered to all members of the Council

and to Members of the International Law Section in accordance with the Section’s Bylaws. The Secretary said that the notice will be filed with the minutes of the meeting.

**Approval of Meeting Minutes** The Secretary circulated a draft of the minutes of the Council meeting held on January 18, 2011. After discussion, upon motion made and supported, the Council approved of the minutes without correction. The Secretary reported that approved minutes of the Section Council meetings as well as presentations given at the Section programs, including the programs presented at the November 16, 2010 and January 18, 2011 Council meetings, would be posted on the International Law Section website at [www.michbar.org](http://www.michbar.org).

## Treasurer's Report

The Treasurer, A. Reed Newland, was unable to attend the meeting and Cameron DeLong presented the financial statement of the Section for the five months ended February 28, 2011 and the related detailed trial balance for the same period, prepared by the Finance & Administration Division of the State Bar. As of the five months ending February 28, 2011, the revenues of the Section were \$12,310.00. The Chairperson reported that revenue is solely generated from membership dues. As of December 31, 2010, there were 441 members of the Section. Expenses for the same time period were \$7,441.68 resulting in a Net Income of \$4,868.32. With anticipated expenses related to the March and May 2011 Council meetings and the Michigan International Lawyer newsletter still to be incurred, it was anticipated that most of the positive net income through February 2011 would be spent.

The Section fund balance as of February 28, 2011 equaled \$26,391.70. Upon motion made and supported, Council approved of the financial statement.

## Michigan International Lawyer

Cameron DeLong provided a report on behalf of Melina Lito, Senior Editor, who was unable to attend the meeting and gave a status report on the Section’s publication entitled *Michigan International Lawyer* (“MIL”). Mr. DeLong reported that the winter edition of the MIL was published and that the editors were currently working on the spring issue. Mr. DeLong thanked Ms. Lito for her service and noted that, as she will be graduating, Natalia Santanna had been named as the incoming Senior Editor for handling forthcoming issues of the MIL.

## Annual Meeting & Program

Chair-Elect Margaret Dobrowsky provided a handout and updated the Council and Section members on the draft program for the Section’s Annual Meeting to be held on September 15, 2011 in conjunction with the SBM 2011 Annual Meeting in Dearborn at the Hyatt Regency. The Chair-Elect provided a draft agenda detailing information on the two proposed panels, panel moderators and panel participants and she requested input on the remaining panelist openings for in-house counsel representatives. The Chair-Elect noted that she hoped to have real world materials, such as sample agreements, available for attendees and that the focus of the discussions would be practical implications and real world disputes. She invited Section members to provide agreement samples and ideas. The Chair-Elect reported the names of the volunteer members of the Annual Meeting Planning Committee and welcomed others

to join the next call scheduled for Friday, April 1, 2011.

### SBM-ILS LinkedIn Group

The Secretary, Jeffrey Paulsen, reported that he was working with Sonia Salah and Priya Doornbos to gather information related to SBM Sections that have a social media strategy and/or a Facebook page and/or LinkedIn Group. It was reported that to date only two to three other SBM Sections have a social media strategy. The Secretary reported that he had spoken with the Real Property Law Section and that they have an extensive social media strategy in which it is estimated that \$15,000 to \$20,000 was spent annually by that Section on marketing and social media for its 3200 members. Ms. Salah reported that she had spoken to the Environmental Law Section about their Facebook and LinkedIn strategy and that this section was also devoting a paid administrator to handle the maintenance of the social media sites. It was noted that the International Law Section was much smaller in membership and that its revenue generation opportunities was much more limited than the Real Property and Environmental Law Sections. It was suggested by Mr. Paulsen that the current social media plan of the International Law Section be limited to a LinkedIn Group. Ms. Salah volunteered to help establish and maintain the Section LinkedIn Group site. The Chairperson requested that Mr. Paulsen provide a written proposal about how the Section should proceed for consideration by the Council at the May 2011 meeting. Ms. Salah offered to provide a short tutorial for the members at that meeting.

### Chairperson's Report

The Chairperson reported that he was pleased with the attendance at the first two Section meetings as well as today's meeting. He encouraged members to continue to attend and to invite other members to also attend.

*Joint International Arbitration Program with UDM School of Law and SBM Dispute Resolution Section:* The Chairperson updated the Council and Section members on the event that the Section had previously approved to sponsor and noted that the event was scheduled for Thursday, April 14, 2011 at U of D/ Mercy Law School from noon to 6pm. The Chairperson noted that attendees had already reserved spots for the program. Ms. Costello noted that the planning committee was still looking for a few panelists with in-house counsel experience and that if anyone had recommendations to let her know.

*Master MIL Authors and Publications Schedule:* The Chairperson provided an update on the good progress in getting the large Michigan based law firms to commit to at least one article per year and/or at least one program speaker per year. He noted that he was still following up with a couple of the larger law firms. The Chairperson also reminded the committee chairs that article writing and speaking by the committees were part of the committee chairs commitments under the Section's By-Laws. He also noted that articles are generated by program speakers and students. It was noted that article writers might be available from the recent Wayne State University-China event that was well attended.

### Committee Reports

The Chairperson reported that the International Business and Tax committee chair Michael Domanski could not attend this evening's meeting due to a conflict, but that this committee has been active. He reported that Colleen Freeburg, Tax Counsel- GM International, had agreed to co-chair this committee with Mr. Domanski. The Chairperson reported he is in the process of appointing a chair/co-chairs of the International Trade committee and that the new committee chair/co-chairs would be announced shortly. Richard Goetz, the chair of the Emerging Na-

tions committee, requested and it was agreed by the Council that the Section should publicize an upcoming African Symposium at the Regis Hotel sponsored by Tech Town. Debra Auerbach Clephane noted a renewed interest in the International Employment Law and Immigration committee by new members and requested clarification on the independence of the committees. The Chairperson noted that committees were free to discuss and implement programming, but that, prior to spending Section funds, the request for funds had to be approved by the Section Council or if needed the Section Executive Committee due to the timing of a funding request. It was also noted that Section committees do not have separate standing and that they operate under the auspices of the Section and the SBM. Andrew Moore, chair of the International Human Rights committee, was not in attendance and no report was given. The Chairperson again encouraged members of the Section to join the committees to assist the committee chairs.

*2010-2011 Council Meeting Schedule and Program Planning:* The Chairperson provided a hand out of the proposed Council meeting scheduled for May 17, 2011. The Chairperson solicited input on the preferred location of that meeting and other meetings. The members in attendance appeared to favor having meetings in restaurants as opposed to law firms and suggested many locations on the Metropolitan Detroit area, including Automation Alley, Oakland Hills Country Club, MGM Grand Casino, Townsend Hotel, the Reserve, the Detroit Athletic Club and others. A representative of Clark Hill offered the use of its office in Birmingham and a representative of Butzel Long offered the use of their office in Detroit. Members also expressed an interest in a networking only meeting. The Chairperson presented potential topics and

requested further input on the topic(s) to be presented at the May Council meeting. Ideas about immigration (which had recently been presented) and inviting in-house counsel and/or business personnel was discussed as a potential topic of interest to Section members.

### New Business/Adjournment

There being no further business to come before the Council, the Chairperson adjourned the meeting.

### Post-Meeting Food, Beverages and Reception

Food and beverages were provided by the Section and a networking reception was held for all members in attendance immediately after the adjournment of the Council Meeting. 🌐

Respectfully submitted,

*Jeffrey F. Paulsen*, Secretary  
International Law Section  
State Bar of Michigan

# Treasurer's Report

For the eleven months ending August 31, 2011

	Current Activity August	Year-to-date August
<b>Revenue:</b>		
International Law Section Dues	30.00	12,270.00
International Stud/Affil Dues		140.00
<b>Total Revenue</b>	<b>30.00</b>	<b>12,410.00</b>
<b>Expenses:</b>		
ListServ	25.00	275.00
Meetings		2800.09
Annual Meeting Expenses	1,000.00	1,030.00
Travel Expenses		4,030.42
Telephone		56.83
Newsletter		3,442.72
Postage		5.00
Misc.		93.94
<b>Total Expenses</b>	<b>1,025.00</b>	<b>12,547.30</b>
<b>Net Income</b>	<b>(995.00)</b>	<b>(137.30)</b>
<b>Beginning Fund Balance:</b>		
Fund Bal- International Law Sec		21,523.38
<b>Total Beginning Fund Balance</b>		<b>21,523.38</b>
<b>Ending Fund Balance</b>	<b>(995.00)</b>	<b>21,386.08</b>

## State Bar of Michigan Dues Statements

Dues statements were mailed September 20, 2011.

Dues payments must be postmarked by November 30, 2011, to avoid a late payment charge of \$50.

Read the Supreme Court rules concerning the State Bar of Michigan, which includes the rules for dues at <http://www.michbar.org/generalinfo/pdfs/suprules.pdf>.

For additional information concerning your dues, please refer to the dues instructions at <http://www.michbar.org/generalinfo/pdfs/duesinstructions.pdf>.

### Paying Your Dues Online

You can pay your dues online by visiting [e.michbar.org](http://e.michbar.org)

If you are changing your status to active, inactive, emeritus, or resignation, you cannot pay your dues online and must use the paper dues statement. We have added a feature which allows you to print out a paper invoice if needed. After logging in, click on print dues invoice.

If you don't have or forgot your password, click on the "Forgot Your Login Information?" link and follow the directions to reset your password.

STATE BAR OF MICHIGAN

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