

Michigan International Lawyer

INTERNATIONAL LAW SECTION

VOLUME XXIII, NO. 11, SPRING 2011

MIL Editorial Staff hosted by
Wayne State University Law School

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

The *Michigan International Lawyer* is published three times per year by the International Law Section, State Bar of Michigan, 306 Townsend Street, Lansing, Michigan 48933-2083.

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Dear Members and Colleagues:



Cameron DeLong

We had another well attended Council meeting and networking event on Wednesday, March 23. Thank you to those who braved the freezing rain and traffic to attend the meeting at the BlackFinn Restaurant in Royal Oak. Although we did not have a speaker or formal program, attendees enjoyed the opportunity to meet and network with other Section members after the Council meeting.

The Section is a co-sponsor with the University of Detroit Mercy School of Law and the SBM Alternative Dispute Resolution Section of a program entitled “Nuts and Bolts of International Commercial Arbitration” to be held in the Law School Atrium of the University of Detroit Mercy School of Law on April 14 from noon to 6:00 p.m. There is no cost for Section members to attend the program. Depending on the publication date of this issue, the program may have already been held by the time you read this letter. You should have earlier received details about the program through the Section’s listserv. I hope you took (or will take) advantage of the opportunity to attend the program. I would like to thank Professor Troy Harris of the University of Detroit Mercy School of Law, and a member of the Section, for organizing the program.

We are currently planning the details of another Council meeting and program to be held in May. We will announce the location, date, and time on the Section’s listserv in the near future. Please plan to join us for the final meeting before the summer break.

The Section’s 2011 annual meeting will be held in conjunction with the 2011 annual meeting of the State Bar of Michigan at the Hyatt Regency in Dearborn from September 14-16. Watch messages from the Section’s listserv later this summer for announcements of the exact location, date, and time of the Section’s annual meeting. Chairperson Elect Margaret Dobrowitsky has been working diligently with a subgroup of volunteers to plan the annual meeting program. The program is expected to include panels discussing issues to be addressed in the formation and dissolution of international joint ventures.

We have several new co-chairs of some of the five committees sponsored by the Section and renewed interest in the committees by a number of Section members. I encourage you to contact the chairperson of a committee of interest to you to see how you can become involved in the committee’s activities. See contact information for the committee chairpersons in this issue of the *Michigan International Lawyer* or on the Section’s page on the State Bar of Michigan website.

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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Michigan *International Lawyer*

Publication Deadline Dates

Fall Issue
Articles due August 15

Winter Issue
Articles due December 15

Spring Issue
Articles due April 1

Since this will be the last issue of the *Michigan International Lawyer* before the Section's annual meeting, I must take some time to thank the myriad of people who have supported me during the time I have been a Council member, Section officer, and now Chairperson of the Section. In particular, I especially appreciate the guidance and counsel of the Section's current officers: Margaret Dobrowitsky (Chairperson Elect), Jeff Paulsen (Secretary), and Reed Newland (Treasurer). I also wish to thank the Council members and committee chairpersons for their contributions of time and ideas to the activities of the Section.

As you read this issue of the *Michigan International Lawyer*, please consider the enormous effort that the student editors from Wayne State University Law School contribute to the solicitation and editing of articles and the planning for each issue. I am very grateful to Senior Editor, Melina Lito, and Student Editors Jennifer Gross, Siola Hashorva, and George Andon Ligorì for their support of this publication. Under Melina's leadership, we have published the Fall, Winter, and Spring issues on schedule. I must also express my appreciation to Professor Julia Qin from Wayne State University Law School, who is the Faculty Editor for the *Michigan International Lawyer*, for her continuing support and guidance to our student editors. Finally, I would like to welcome Natalia Santanna as the new incoming Senior Editor for the Fall 2011 issue of the *Michigan International Lawyer*. Natalia has begun the training process so she will be prepared to take over the Senior Editor responsibilities when Melina graduates.

We continue to hear through periodic surveys and otherwise that the *Michigan International Lawyer* is considered by Section members to be a valuable part of being a member of the Section. You might imagine that it is sometimes difficult for the student editors to constantly solicit articles for publication. Please consider writing and submitting an article on an international area of interest to you. We are also interested in republishing articles, with appropriate permission, that you may have written for other publications. You will find publication guidelines elsewhere in this issue or feel free to contact Professor Qin or one of the student editors. To those of you who have authored articles for the *Michigan International Lawyer*, please accept my grateful appreciation on behalf of the Section's members.

As recent world events have reminded us, activities in other parts of the world do have an impact economically or otherwise on our country and our state. I am confident that we will continue to be reminded that we are connected in many ways to other cultures and other lands. I firmly believe that lawyers will have an important role to play in shaping future international relationships as we continue to see the world become smaller and more connected. I also believe that membership in the International Law Section of the State Bar of Michigan will become an increasingly valuable asset to the legal practice of the Section's members.

Please enjoy this issue of the *Michigan International Lawyer* and I look forward to seeing you at the next Section event.

Best regards,

Cam DeLong, Chairperson

Transfer Pricing 101: How can one little section of the tax code cause so much trouble?¹

By Alex Martin – President, Productive Pricing, Plymouth, Michigan

In an increasingly globalized economy, transfer pricing regulations have emerged as the weapon of choice for tax authorities interested in raising revenues from multinational companies. In fact, transfer pricing is considered the number one tax issue for companies with international operations.² All multinational companies have intercompany transactions across borders, but many companies and advisors do not necessarily understand how to comply with transfer pricing rules and regulations.

What is transfer pricing?

Transfer pricing laws govern the prices charged on intercompany transactions across tax jurisdictions. Transfer pricing is a contentious tax issue in that the prices charged on intercompany transactions affect how much tax is paid by a multinational in each country.

Transfer pricing regulations determine how a company’s taxable income is allocated globally.

Diagram 1] presents an example of the dilemma multinational companies face when addressing transfer pricing issues. In this diagram, when Ford-U.S. sells vehicles to Ford-Canada for resale within Canada, the intercompany price charged between countries will drive the income tax payable by country.

Since intercompany transactions across borders involve two (or more) tax authorities, there is a natural tension over how a multinational company’s taxable income should be divided globally. As more companies have expanded globally, tax authorities have become increasingly concerned that multinationals are shifting profits offshore. The IRS has historically been the trendsetter in this area, but over 60 countries now enforce transfer pricing regulations.

What can happen if a company “gets it wrong?”



Alex Martin

Transfer pricing audits can be extraordinarily expensive to multinational companies, both in terms of the additional tax payable and wasted company time and resources.

To put the costs in perspective, Table X presents an example of IRS transfer pricing adjustments for a company that is currently paying tax.³

IRS Transfer Pricing Audit Example	
Income Tax Adjustment:	
Assuming a total <u>taxable income adjustment</u> of \$10 million:	
Additional Tax owed @ 35% =	\$3.5 million
<u>Plus penalties of 20% of add'l tax owed</u>	<u>\$700,000</u>
	\$4.2 million + interest + state tax + double tax
With a <u>taxable income adjustment</u> of \$20 million (or more):	
Additional Tax owed @ 35%	\$7.0 million
<u>Plus penalties of 40% on add'l tax owed</u>	<u>\$2.8 million</u>
	\$9.8 million + interest + state tax + double tax

- In the event of an adjustment, transfer pricing penalties are only waived if the company has prepared U.S. transfer pricing documentation by the time the tax return is due (Sept. 15 for 12/31 year-end companies)
- In addition, the company would need to apply for “competent authority relief” to receive a refund for the tax overpaid in the other tax jurisdiction.

Table X

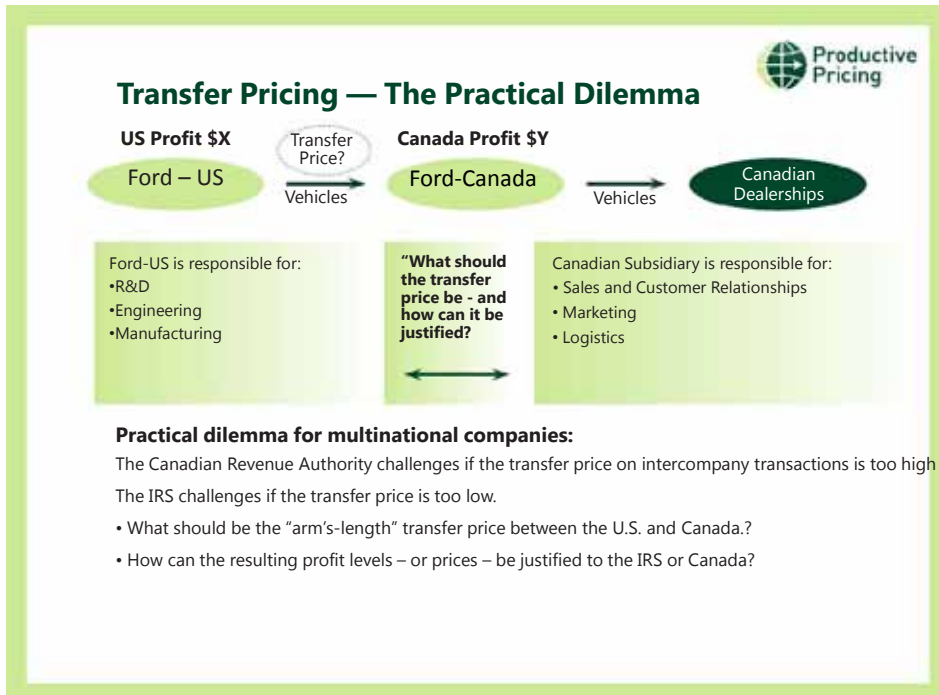


Diagram 1

Treas. Reg. Section 1.482-1(a)(2) empowers the District Director of the Internal Revenue Service to make “allocations between or among the members of a controlled group if a controlled taxpayer has not reported its true income.” These regulations apply to both U.S. and foreign-owned companies for all open tax years.

Beyond just the additional tax payable, late payment interest and additional state taxes due, a multinational company

can be assessed a nondeductible penalty of 20 or 40 percent of the additional tax payable depending on the size of the transfer pricing adjustment. The risk of a transfer pricing penalty being assessed can only be mitigated when a company prepares transfer pricing documentation on a contemporaneous basis, as addressed later in this article.

In the U.S., transfer pricing penalties are applied with a net taxable income adjustment of \$5 million or more as a “substantial valuation misstatement.”⁴ For a substantial misstatement of income the IRS can assess a nondeductible penalty of 20 percent of the additional tax payable.⁵ A net transfer pricing taxable income adjustment of \$20 million or more to the price claimed on the tax return is considered a “gross valuation misstatement” of income, with a penalty of 40 percent of the additional income tax payable.⁶ Please note that these taxable income adjustments can be applied over a multiple year period. In other words, a \$5 million transfer pricing adjustment over a three-year period attracts a 20 percent penalty.⁷

Many other countries have regulations in place with similar nondeductible transfer pricing penalties.

One additional complication of a transfer pricing audit is that a transfer pricing adjustment can create double tax on the same income for a multinational company. The tax authority on the other side of an intercompany transaction does not automatically refund taxes that have been overpaid in the other country after a transfer pricing adjustment. Taxpayers do have the opportunity to apply for double tax relief through the competent authority process specified in many international tax treaties. In the competent authority process, opposing tax authorities attempt to reach agreement on a taxable income adjustment to prevent double taxation of the same income. However, this competent authority process can add several additional years to the audit process and is no guarantee of double tax relief⁸.

Taxpayers are also able to challenge IRS transfer pricing adjustments through appeals and tax court, again a multi-year process.

Transfer Pricing Arm’s-Length Principle

Almost all countries⁹ that enforce transfer pricing regulations rely on the “arm’s-length” principle when auditing intercompany transactions. For intercompany transactions, *multinationals should use the same price as what would be charged if the companies were unrelated.*¹⁰ In our Ford example, Ford-US should charge the exact same price to Ford-Canada for vehicles that it would have charged if Ford-US sold to an unrelated distributor in Canada.

In the author’s experience while the arm’s-length principle is a great concept, tax authorities can adopt very different perspectives of what constitutes arm’s-length pricing in a given situation. For instance, if an overseas parent company develops a valuable new pharmaceutical that is sold in the U.S. market by a related subsidiary, tax authorities on both sides of the transaction may question the appropriate intercompany pricing and subsequent split of taxable income between countries. Interpretation of facts and circumstances related to the transaction is critical in determining the “arm’s-length” result.

From the taxpayer and overseas tax authority’s perspective, since the parent company developed the pharmaceutical, the parent company should earn the vast majority of profits. However, the IRS may conclude through an examination of facts and circumstances that since the subsidiary is performing essential sales and marketing activities required for the U.S. market, the subsidiary should share a significant portion of the profits. At a high level, the IRS applied this second approach for intercompany transactions involving GlaxoSmithKline’s Zantac antiulcer medication, resulting in a settlement of \$3.4 billion.¹¹

Another common transfer pricing dilemma in today’s economic environment is whether related companies should share operating losses. In a situation where a parent company is supplying products, providing services or licensing technology to a subsidiary, many tax authorities globally take the position that foreign-owned subsidiaries should not incur operating losses.

Under this scenario, subsidiaries that incur losses due to an economic downturn, changes in pricing of raw materials or major fluctuations in foreign exchange rates face the risk of transfer pricing adjustments. In other words, companies performing relatively routine functions and bearing fewer risks should continue to earn some profits even if the company as a whole is incurring a loss. From the tax authority’s perspective where the subsidiary is located, the parent company should manage intercompany pricing to insulate the subsidiary from losses.

What Can Companies Do – Transfer Pricing Documentation

Fortunately not every taxpayer faces a multibillion dollar tax risk from transfer pricing, but transfer pricing audits can still be an enormous drain on resources for a company of any size. That being said, taxpayers in the U.S. can defend themselves by preparing transfer pricing analyses to support their intercompany pricing results.¹²

Under Treas. Reg. Section 1.6662, taxpayers can mitigate the risk of a penalty by preparing a contemporaneous transfer pricing documentation report¹³. Perhaps just as important, transfer pricing documentation also serves as the first line of a defense during a transfer pricing audit.

A transfer pricing documentation report is not a guarantee that the IRS will agree with the taxpayer’s position. That being said, a company with a contemporaneous documentation will be far better positioned to defend itself during a transfer pricing audit.

Treas. Reg. Section 1.6662(e) lists ten required items to be included in transfer pricing documentation, but at a high level transfer pricing documentation includes the following information:

- Explain each company’s functions, assets and risks in detail, including corporate structure (Functional Analysis);
- Explain how recent industry developments affect the business (Industry Analysis);
- Describe the intercompany transactions and analyze relevant financial information and pricing. (Financial/Economic Analysis); and
- Select the “Best Method” for benchmarking transactions and demonstrate how the profitability or pricing is “arm’s-length” (Financial/Economic Analysis).

An analysis of transfer pricing is a fact-intensive exercise, and documentation reports of hundreds of pages are not uncommon. However, most of the factual information needed can be gathered through hour-long interviews with selected company management and readily available internal company materials, e.g. customer presentations and internally generated financial material. Ideally, a transfer pricing documentation report should include a straightforward assessment of the business and industry with a thorough analysis of the taxpayers’ transactions against independent benchmarks. It is important to note that the IRS is concerned with the *actual results* of intercompany transactions rather than the policy or approach adopted.¹⁴

Transfer pricing documentation needs to be updated on an annual basis for testing intercompany transactions. However, once the functional and industry analysis is prepared, most companies only need minor updates to the factual information every year unless there are major changes in the business. The financial and economic analyses do need to be updated every year to be contemporaneous.

The economic analysis is often the most misunderstood part of any transfer pricing exercise. The Treas. Reg. Section 1.482 Regulations specify five methods, plus one “unspecified” method for testing the arm’s-length nature of intercompany transactions for tangible property.^{15 16}

Taxpayers and advisors new to transfer pricing may struggle with the “Best Method” approach specified in the Regulations. But in essence, Section 482 Regulations require that a multinational taxpayer search for transactions between independent parties to benchmark the results of related-party transactions¹⁷. Frequently many transfer pricing studies involve a search for public companies with broadly “comparable” functions, assets and risks. These comparable searches are used to establish a range of “arm’s-length” profit margins to test the operating profitability of one of the counterparties to the intercompany transactions.¹⁸

Regardless of the methods applied in a transfer pricing analysis, from a practical perspective a person drafting a report needs to keep in mind the audience reading the analysis. In the author’s experience, the person evaluating the report is often an IRS economist who may not be familiar with the company and perhaps has limited knowledge of the industry. In addition, a transfer pricing report prepared for the IRS should also be consistent with any transfer pricing analysis prepared for other tax authorities. Tax authorities may exchange transfer pricing information under many international tax treaties.

Even if a company is too late to prepare a *contemporaneous* transfer pricing documentation report, a taxpayer would still be well advised to prepare an initial defense document to support their tax return positions for all open tax years. In the author’s experience, a company that submits a thorough transfer pricing report- even if it is prepared after the tax return is filed- is better placed strategically than one with no report at all. Again, transfer pricing penalties in the U.S. can

only be applied if there is a transfer pricing taxable income adjustment.

Why should U.S. companies be concerned about transfer pricing now?

Growing budget deficits are a primary driver of the increased emphasis on transfer pricing enforcement in the U.S.. Transfer pricing is a politically popular way of making sure that multinationals “pay their fair share of tax” and protect the U.S. tax base. Since over 60 countries now enforce transfer pricing regulations, the IRS now sees more competent authority requests from overseas tax authorities to negotiate over foreign-initiated transfer pricing adjustments. The IRS is not the only tax authority adjusting intercompany pricing to increase corporate tax receipts.

Several business periodicals have also documented instances where major U.S. multinationals have instituted complicated tax planning strategies, such as cost sharing, in order to lower company global effective tax rates.¹⁹ Transfer pricing audits are one way to combat such tactics.

Transfer pricing enforcement has been called inconsistent on occasion, but recent changes and several new strategic initiatives represent a renewed IRS interest in this subject. First off, the IRS is now required to request transfer pricing documentation as part of every tax audit, with a 30-day deadline irrespective of company size. These reports are usually reviewed by an IRS economist, rather than a field auditor. On October 1, 2010 the IRS initiated a restructuring of their Large Business & International group, which included centralizing transfer pricing expertise.²⁰ These changes, along with growing Congressional support for transfer pricing enforcement, may lead to some surprises for companies that have not considered transfer pricing an issue in recent years.

Further Thoughts

For multinational advisors, an internal transfer pricing review can be an ideal

opportunity to assess problems and identify improvements in a company's global operations. Beyond taking a proactive approach in complying with U.S. and international transfer pricing regulations, a transfer pricing documentation exercise can also uncover inefficiencies, such as duplicative activities, when reviewing critical functions, assets and risks across borders. From a practical perspective, tax directors have also used a transfer pricing engagement to learn more about the day-to-day activities of related companies - especially helpful after an acquisition of a new business. In the author's experience, company management and advisors can leverage these transfer pricing analyses, where information requests are required to complete a report for tax purposes, to assess other outstanding items such as customs or financial reporting issues.

Given the globalization of companies in today's economy and enormous budget deficits in many countries, more tax authorities worldwide have turned to transfer pricing as a means of protecting their corporate tax base. Transfer pricing enforcement is a high return on investment activity for tax authorities. However, transfer pricing is not always a top time-sensitive priority because transfer pricing documentation is not submitted as part of the tax return. Multinational tax departments may not necessarily have the expertise to identify transfer pricing exposures and develop support for their intercompany transactions. Ultimately, a surprise 30-day deadline request to provide transfer pricing documentation may be the start of a decade-long tax dispute for the unprepared.

About the Author

Alex Martin is president of Productive Pricing LLC, a transfer pricing consulting firm based in Plymouth, Michigan. Alex formed the company after a 12 year career as a transfer pricing director and economist at PricewaterhouseCoopers LLP, working in the U.S. and internationally.

Productive Pricing works with mul-

tinational companies of all sizes, as well as company advisors, to develop practical strategies for addressing complicated transfer pricing issues.

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Endnotes

- 1 Please note that this article is intended to be a high-level summary of transfer pricing concepts and regulations specified under Treas. Reg. Section 1.482, with a particular focus on U.S. enforcement of transfer pricing. The author is a transfer pricing economist and not a lawyer.
- 2 Ernst & Young Global Transfer Pricing Survey, 2006, 2007, 2008, 2009, 2010
- 3 i.e. does not have a tax net operating loss to offset adjustments to taxable income. However, a transfer pricing adjustment does reduce a taxpayer's tax net operating loss, which can cause double taxation in any event.
- 4 See §1.6662-6(c)(2) also would apply with an adjustment of ten percent of gross receipts
- 5 See Treas. Reg. § 1.6662-6(b)(1) Or a 50 (or 200) percent adjustment to the price claimed on the tax return.
- 6 See §1.6662-6(c)(3) (also would apply with an adjustment of 20 percent of gross receipts). See also Treas. Reg. § 1-6662-6(b)(2) (Or 25 (or 400) percent adjustment to the price claimed on the tax return).
- 7 Note that in the U.S. a penalty would not be applied if the transfer pricing adjustment only reduces a company's tax net operating loss. In other words, the penalty is applied only to the additional tax payable.
- 8 Note that the Fifth Protocol to the United States Income Tax Convention, signed September 21, 2007 has an arbitration process that came into effect on December 15, 2010. This process allows for an arbitration process to settle disputes in case where the two competent authorities are unable to reach agreement on double taxation relief for taxpayers.

- 9 Except for Brazil, which has specified safe-harbor rules for transfer pricing.
- 10 See Treas. Reg. §1.482(1)(b)
- 11 On September 11, 2006, the IRS and GlaxoSmithKline Holdings (Americas) reached an agreement on a tax settlement payment of \$3.4 billion dollars to settle transfer pricing issues for 1989 through 2000. The Glaxo transfer pricing example cited here involved many other issues, but one of the fundamental factual questions involved the relative importance of research and development of Zantac versus the pharmaceutical detailing (sales) work required to persuade doctors to prescribe Zantac against other antiulcer medications such as Tagamet.
- 12 Companies can also apply for an Advance Pricing Agreement (APA) where taxpayers can reach agreement with tax authorities on intercompany pricing – either on a unilateral or bilateral basis. Once agreed, the taxpayer would not face the risk of a transfer pricing adjustment under an audit. However, for many taxpayers APAs may not be a practical solution as the IRS only executed 63 new APAs during 2009, which averaged 38 months to complete. Tax authorities also require substantial amounts of information from the company – usually more than what would be required in a most transfer pricing documentation reports.
- 13 Prepared by the filing of the U.S. company's income tax return, including extensions. For calendar year companies, this is usually September 15 of the following year. Note that in the U.S., the transfer pricing documentation report is not filed with the tax return, but submitted when requested under audit.
- 14 See §1.482-1(f)(v)(A) “. . . the district director will evaluate the result achieved rather than the method the taxpayer used to determine its prices.”
- 15 In the U.S., these methods are the Comparable Uncontrolled Price (“CUP”), Resale Price, Cost Plus, Profit Split and Comparable Profits

Method, as well as an “Unspecified” method. *See* § 1.482-3

- 16 There are three specified methods and one “unspecified” method for intangible property. *See* § 1.482-4. There is also a similar “Best Method” approach for services as well.
- 17 A full explanation regarding the approach to selecting and applying the “Best Method” for testing intercompany transactions is beyond the scope of this paper, however the “Best Method” economic analysis is an essential part of any transfer pricing analysis. *See* §1.482-8 for examples of selecting the “Best Method” rule.
- 18 In the Ford-U.S and Ford-Canada example, one typical approach is to benchmark the operating profits that Ford Canada earns on sales of Ford-U.S. manufactured vehicles against broadly comparable distribution companies— using the Comparable Profits Method. Under this method, the IRS would be concerned about Ford Canada earning too much operating profit, the Canadian Revenue Authority would be concerned about Ford Canada earning too little operating profit.
- 19 Cost Sharing Agreements involve, among other things, the sharing of research and development expenditures among related companies. A discussion of cost sharing agreements is beyond the scope of this analysis, but one major concern of the IRS is that U.S. companies are undervaluing intangible assets that are used by related parties in their business. *See also* Jesse Drucker, U.S. Companies Dodge \$60 Billion in Taxes With Global Odyssey, Bloomberg, May 13, 2010, *available at* <http://www.bloomberg.com/news/2010-05-13/american-companies-dodge-60-billion-in-taxes-even-tea-party-would-condemn.html>.
- 20 <http://www.irs.gov/newsroom/article/0,,id=226284,00.html>

Notary, *Notar*: A Note on Avoiding Cross-Border Confusion

By David B. Guenther

Practitioners not ordinarily engaged in cross-border transactions might find it easy to confuse the civil law notary with the U.S. notary public. Both are commonly described as “notaries” whose role consists in some sense in “notarizing” transaction documents. While the qualifications for becoming a notary public in the United States are easily met, however, and the notary public’s primary task is only to witness signatures, the notary in the civil law tradition is a fully trained, often highly regarded attorney charged with the exercise of broad public powers. Confusing the two “notaries” can be a pitfall for international practitioners.¹



David B. Guenther

This article examines the different qualifications, roles and legal status of the common law notary public in Michigan and the *Notar*, or civil law notary, in Germany. As one might expect, the practical differences between the two “notaries” ultimately reflect deeper historical differences between the common law and civil law traditions.

The Notary Public in Michigan

The notary public in the United States is a creature of state law. In Michigan, notaries are governed by the Michigan Notary Public Act (the “Notary Public Act”).²

Education

The Notary Public Act does not impose educational requirements, legal or otherwise, for notaries in Michigan. Applicants are required only to affirm that they have read the Notary Public Act³ and before performing any notarial act, notaries are required to obtain and read a copy of all current Michigan statutes that regulate notarial acts.⁴ More generally, notaries are supposed to learn Michigan’s notarial laws on their own initiative.⁵

Qualifications

Qualifications for becoming a notary under the Notary Public Act are comparatively few. Any person can apply to become a notary public. Generally speaking, an applicant is required to meet only the following criteria:⁶

- Be at least 18 years of age;
- Be a resident of Michigan or maintains a principal place of business in Michigan;
- Read and write in the English language;
- Be free of any felony convictions, misdemeanor convictions and certain other specified violations; and
- If not a licensed attorney in Michigan, have filed with the applicable county clerk a proper surety bond and taken the required oath.

The surety bond is required to be in the amount of \$10,000⁷ and generally costs from \$50 to \$100.⁸ The applicant is also required to declare that he or she is a citizen

of the United States or, if not a citizen, present proof of legal residence in the United States.⁹

Term of Appointment

The Michigan Secretary of State appoints all notaries for a term of six to seven years, depending where the appointee's birthday falls in relation the appointment date.¹⁰

Authority

Once appointed, the notary public's authority is quite limited. Under the Notary Public Act, a notary public may perform notarial acts that include but are not limited to:

- Taking acknowledgments;
- Administering oaths and affirmations; and
- Witnessing or attesting to a signature.¹¹

The most common function of the notary public in Michigan is to prevent fraud by attesting to the identity of a person signing a document.¹² Notaries are prohibited from claiming to have additional powers, qualifications, rights or privileges,¹³ from translating into another language written terms that imply the person is an attorney,¹⁴ and from using the term, "notario publico" or any non-English equivalent in certain forms of advertising.¹⁵

Fees

Under the Notary Public Act, fees cannot exceed \$10.00 for any individual transaction or notarial act.¹⁶ As a rule, notary public is not a primary occupation in Michigan.

Regulation

Regulatory oversight of notaries in Michigan is comparatively light. The Secretary of State may, on his or her own initiative or in response to a complaint, investigate alleged violations of the Notary Public Act or related rules or orders.¹⁷

In short, the notary public in Michigan as contemplated by the Notary

Public Act is an untrained, unspecialized, largely unpaid and unregulated witness. The notary public's role is ancillary and ministerial; the basic function of "notarization" is only to prevent identity fraud in the execution of documents. Most adults in Michigan would likely qualify to become notaries public, and large numbers have indeed done so. According to the Secretary of State, there are more than 127,000 notaries currently commissioned in the State of Michigan.¹⁸

The *Notar* in Germany

The German *Notar* bears little resemblance to its Michigan counterpart. German notaries are subject to rigorous educational, professional and even personal qualifications and exercise broad powers on behalf of the German State in transactions between private parties.¹⁹

Education

In stark contrast to the Michigan notary public, German *Notare* must be fully educated attorneys (*Volljuristen*), meaning that each applicant must be qualified to become a judge under the German Judiciary Act (*Richtergesetz*).²⁰ Qualifications to become a judge include not only a university-level legal education of at least four years, but also a passing score on the First State Examination, successful completion of compulsory practical training (*Referendarzeit*) of two years, and a passing score on the Second State Examination. The First and Second State Examinations include both written and oral components and cover all aspects of German law.²¹

Professional Qualifications

Applicants for the position of *Notar* in Germany are also required to meet rigorous professional qualifications. Depending on the German state in which appointment is sought, two categories of German *Notar* exist: the single-profession notary (*Notar* or *Nurnotar*) and the attorney-notary (*Rechtsanwaltsnotar*). Single-profession notaries practice solely as notaries and are active, for example,

in Bavaria, Saxony, Rheinland-Pfalz and most of the former East German states.²² Single-profession notaries accounted for approximately two-thirds of the notaries in Germany in 2011.²³ Attorney-notaries practice as notaries in addition to their activities as attorneys and are active in Hessen, Lower Saxony and other states in the northwest of Germany.²⁴

To become a single-profession notary, applicants are required to complete a three-year apprenticeship as a notary assessor and to be apprenticed in the same German state in which they seek appointment.²⁵ To become an attorney-notary, applicants are required to have been admitted to practice law for at least five years, to have been engaged primarily in the practice of law for at least three years without interruption in the state in which appointment is sought, and to have taken special training classes in various areas of notarial practice.²⁶ After May 1, 2011, applicants for the office of attorney-notary will also be required to pass a grueling multi-day notarial examination on all aspects of notarial law.²⁷

Additional Qualifications

In addition to strict educational and professional qualifications, German *Notare* are required to demonstrate personal suitability for the office, including, for example, social competence in difficult negotiating situations (e.g. the conclusion of divorce proceedings).²⁸ Applicants are also required to be German citizens.²⁹

Term of Appointment

German notaries are selected and appointed by the Ministry of Justice of the applicable German state. The Ministry of Justice fixes the number of *Notare* in the state.³⁰ Where there are multiple applicants, the Ministry appoints *Notare* on the basis of personal and professional merit, with particular attention to the results of the State Examinations.³¹ Single-profession notaries are appointed for life, subject to retirement at age 70.³² Attorney-notaries are appointed for the

duration of their membership in the relevant attorney's chamber (*Rechtsanwaltskammer*).³³ German *Notare* are usually selected among the top law graduates.³⁴

Authority

The German *Notar* differs most dramatically from the Michigan notary public in the *Notar's* role and authority in transactions. Like the Michigan notary public, the German *Notar* is required to be independent and impartial and is charged with attesting signatures, manuscripts and copies.³⁵ Unlike the Michigan notary public, however, the German *Notar* plays a central substantive role in drafting transaction documents, providing legal advice to the parties, and exercising the sovereign power of documentary authentication delegated to him or her by the German State.

German law requires the use of a *Notar* in important transactions with long-term effects and a particular economic or personal significance for the parties concerned, including many real estate, marriage and family law, estate and business transactions.³⁶ In a business transactions context, a *Notar* is required for corporate contracts (such as merger agreements), share transfers and changes of status of legal entities, among other things.³⁷ Failure to follow notary requirements results in legal invalidity.³⁸

The *Notar's* particular notarial duties are set forth in the German Notarial Recording Act (*Beurkundungsgesetz*).³⁹ The *Notar* is required to determine the intent of the parties, explain the facts and circumstances, advise the parties as to the legal implications of the transaction, draft the relevant transaction document, and reiterate the parties' declarations clearly and unambiguously therein.⁴⁰ The *Notar* verifies that the parties have capacity to enter into the transaction and ensures that the transaction documents' provisions are in compliance with law.⁴¹ Significantly, the transaction document must be read aloud to, approved, and executed by the parties in the physical presence of the *Notar*⁴² – a requirement

that may catch U.S. practitioners by surprise, particularly where the transaction involves lengthy U.S.-style documents and time is running short. Original notarized documents are generally required to remain in the possession of and be maintained by the *Notar*.⁴³

Documents established by a German *Notar* have special authority under German law. Such "notarized" or authenticated documents have binding evidentiary force in German courts⁴⁴ and are generally immediately enforceable (*Vollstreckungstitel*), comparable to the judgment of a court or a writ of execution in the United States.⁴⁵

The *Notar* in this respect, far from being a mere witness of signatures, is an independent representative of the German State in the administration of justice. It is not coincidence that the German *Notar's* office sign traditionally bears the coat of arms of the relevant German state.⁴⁶ As the representative of the State, the German *Notar* wields the State's sovereign power of authentication. The *Notar* provides impartial legal advice to all of the parties to the transaction, protects inexperienced or unskilled participants in the legal process against disadvantage, and provides legal and evidentiary certainty in the event of future disputes.⁴⁷ The underlying idea is to establish a preventive legal control at the front end of the system in order to avoid costly and time-consuming litigation.⁴⁸ The German *Notar* has in this regard been seen as exercising a complementary function to that of the German judge, as a preventative counterpart to judicial dispute resolution.⁴⁹

Fees

The German *Notar* is paid by the parties to a transaction.⁵⁰ Fees are fixed by law under the Fee Regulation (*Kostenordnung*) and generally depend on the value of the case.⁵¹

Regulation

German *Notare* are heavily regulated under German federal law, including, in

particular, the Federal Notary Regulation (*Bundesnotarordnung*), the Notarial Recording Act (*Beurkundungsgesetz*) and the Fee Regulation (*Kostenordnung*), and by additional state and local regulations.⁵²

Under the Federal Notary Regulation, the German *Notar*, whether a single-profession notary or an attorney-notary, cannot have any other paid office or occupation.⁵³ The *Notar* is allocated a particular location as his or her seat of office and must have his or her business office in that location.⁵⁴ The territorial extent of the *Notar's* office is the same as that of the local district court (*Amtsgericht*).⁵⁵ Single-profession notaries are permitted to practice and share office space only with other single-profession notaries.⁵⁶ Lesser restrictions on practice and office space restrictions also apply to attorney-notaries.⁵⁷

German notaries within the jurisdiction of each regional appellate court belong to a *Notarkammer*, or chamber of notaries. The *Notarkammer* is a public law body charged with representing notaries' common interests, guarding over the "honor and regard" of its members and providing support to oversight authorities.⁵⁸ The various regional *Notarkammer* are charged under the Federal Notary Regulation with issuing guidelines and bylaws to clarify the official duties of their members under German law.⁵⁹ Each *Notarkammer* is regulated by the applicable State Ministry of Justice. The various *Notarkammer* are in turn regulated by the *Bundesnotarkammer*, or federal chamber of notaries, which is subject to further oversight by the Federal Ministry of Justice.⁶⁰

German notaries are subject to regulation by the president of the district court (*Landsgericht*), the president of the regional district court (*Oberlandsgericht*) and the applicable State Ministry of Justice.⁶¹ Regulation consists of regular examination and monitoring and institution of disciplinary proceedings.⁶²

As the foregoing suggests, the German *Notar* occupies a fundamentally dif-

ferent office, and plays a fundamentally different legal role, from the Michigan notary public. Rather than being a mere witness of signatures, the German *Notar* is a highly educated, trained and regulated attorney, a “preventative judge” with delegated State powers serving the administration of justice at the front end of the German legal system. Becoming a *Notar* in Germany is understandably far more difficult than becoming a notary public in Michigan. The difficulty is evident from the numbers: whereas in 2011, approximately 127,000 notaries public were active in Michigan alone, a total of approximately 8,000 notaries were active in all of Germany.⁶³ If Michigan were representative of the other 49 U.S. states, there would be approximately 800 U.S. notaries public for every one German *Notar*. In comparison to the Michigan notary public, the German *Notar* belongs to a very small legal elite. U.S. practitioners engaged in cross-border transactions involving a German component would do well to keep the differences between the two notaries in mind.

Historical Differences Between the Two Traditions

Despite their contemporary differences, the Michigan notary public and the German *Notar* arose from a common historical tradition. Historians commonly trace this tradition back to the ancient Roman *notarius*, a person skilled in shorthand writing.⁶⁴ Under Germanic influences, which tended to commingle the notarial and judicial functions, the Roman *notarius* in the early medieval era assumed the essential form of today’s civil law notary: an individual with the power to authenticate documents, not as a judicial officer, but as a private professional empowered by the State.⁶⁵ This form, with its continuing separation of notarial and judicial functions, was definitively established in northern Italy in the thirteenth century and has survived into the present in civil law jurisdictions.⁶⁶

In England, the first notaries arrived in the thirteenth century on imperial or

papal authority and never had the same prominence in the English legal system as in continental Europe.⁶⁷ In the North American colonies, there was little use for a notary of the Continental sort. Most agreements relating to real estate, for example, were made in open court before a judge or other court official, who would make the agreement public and give it full force and effect simply by recording it in the court record.⁶⁸ This practice may reflect older Germanic traditions, where an uncontested judicial proceeding was used to publicly record private agreements, and the notarial and judicial functions remained commingled.⁶⁹ In any case, when the notarial and judicial functions formally separated in the United States, the notarial power to attest – but not the State’s sovereign power to authenticate – was assigned to a private person, and the U.S. notary public became a ministerial or clerical office.⁷⁰

Deeper differences between the two traditions may be adduced. The severely limited role of the common law notary public may suggest a greater willingness in the common law to rely on the individual parties to a transaction without the advance assistance of public powers, or more broadly, to countenance the historical trial by battle that we today call litigation, with its emphasis on oral testimony. The German *Notar*, by contrast, reflects a greater faith in the possibility of legal impartiality, authenticated writings and the power and wisdom of the paternalistic State.

About the Author

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Endnotes

- 1 Confusion between the civil law notary and the U.S. notary public has also created problems for members of the public seeking legal advice, particularly in Spanish-speaking parts of the United States. See, e.g., Anne E. Langford, *What’s in a Name? Notarios in the United States and the Exploitation of a Vulnerable Immigrant Population*, 7 HARV. LATINO L. REV. 115,136 (2004); Jonathan A. Pikoff and Charles J. Crimmins, *Lost in Translation: Texas Notary Public v. Mexico Notario Publico*, TEXAS SECRETARY OF STATE, <http://www.sos.state.tx.us/statdoc/notariopublicoarticle.html> (last visited March 4, 2011).
- 2 Michigan Notary Public Act, MICH. COMP. LAWS ANN. §§ 55.261-.315 (2010).
- 3 §55.275.
- 4 §55.283.
- 5 *What is a Notary Public?*, MICHIGAN SECRETARY OF STATE (March 8, 2011, 4:35 PM), [://www.michigan.gov/sos/0,1607,7-127-1638_8736-85744-,00.html](http://www.michigan.gov/sos/0,1607,7-127-1638_8736-85744-,00.html).
- 6 MICH. COMP. LAWS ANN. § 55.271 (2010)..
- 7 §55.273(2)
- 8 *Surety Bond Information*, MICHIGAN SECRETARY OF STATE (March 8, 5:27 PM), http://www.michigan.gov/sos/0,1607,7-127-1638_8736-85763-,00.html.
- 9 MICH. COMP. LAWS ANN. § 55.275(1) (f) (2010).
- 10 §55.269(2).
- 11 §55.285(1)(a)-(c). It should be noted that section 55.265(d) of the Michigan Notary Public Act defines “notarial act” in substantially the same terms as §55.285(1)(a)-(c).

- 12 MICHIGAN SECRETARY OF STATE, *supra* note 5.
- 13 MICH. COMP. LAWS ANN. §55.291(3) (2010).
- 14 §55.291(4); *see also* §55.291(5) (requiring, if a notary advertises in a language other than English, an affirmative statement that the notary public is not an attorney and has no authority to give advice on immigration law).
- 15 § 55.291(6). *See also* Langford, *supra* note 1, at 129..
- 16 §55.285(7).
- 17 §55.300(1).
- 18 MICHIGAN SECRETARY OF STATE, *supra* note 5.
- 19 *See, e.g.,* Olaf Hermann, *Die Inäquivalenz des amerikanischen Notars*, 10 German-American L.J., available at <http://www.amrecht.com/notary.shtml> (last visited March 7, 2011). For a comparative analysis of the notary in Latin civil law systems, *see* Pedro A. Malavet, Counsel for the Situation: The Latin Notary, a Historical and Comparative Model, 19 *Hastings Int'l and Comparative L. Rev.* 389 (1996) .
- 20 Bundesnotarordnung (BNotO) [Federal Notary Regulation], BGBl. III at 303-1, Dec. 22, 2010; BGBl. I at 2255, §5. Qualifications to become a judge are set forth in the Deutsches Richtergesetz (DRiG) [German Judiciary Act], Apr. 19, 1972; BGBl. I at 713, Feb. 5, 2009; BGBl. I at 160, §5(1).
- 21 German Judiciary Act §5d.
- 22 *Notarstatistik*, BUNDESNOTARKAMMER <http://www.bnotk.de/Notar/Statistik/index.php> (last visited March 8, 2011).
- 23 *Id.*
- 24 *Id.* Certain notaries are also in the direct employ of the State of Baden-Wuerttemberg. *Id.*
- 25 BNotO §7(1).
- 26 BNotO §§6(2)(1), 6(2)(2), 6(3); *see also* *Admission to the profession and disciplinary control*, BUNDESNOTARKAMMER <http://www.bnotk.de/en/admission.php> (last visited March 8, 2011).
- 27 BNotO §§6(2), 6(3) FN 3. For the notarial examination requirements, *see* BNotO §7a.
- 28 *Dienstrechtliche Stellung des Notars*, BUNDESNOTARKAMMER <http://www.bnotk.de/Notar/Stellung/index.php> (last visited March 9, 2011); *see also* BNotO §6(1).
- 29 BNotO §5.
- 30 BUNDESNOTARKAMMER, *supra* note 26.
- 31 BNotO §7(2).
- 32 BNotO §3(1) (with respect to life appointment); BNotO §48a (with respect to retirement at 70).
- 33 BNotO §3(2).
- 34 BUNDESNOTARKAMMER, *supra* note 26.
- 35 BNotO §14(1) (with respect to independence and impartiality); BNotO §20 (with respect to attesting signatures, manuscripts and copies).
- 36 *What do you need a notary for?*, BUNDESNOTARKAMMER http://www.bnotk.de/en/what_for.php (last visited March 9, 2011); *see also, Der Notar: Ihr Berater and Vertragsgestellter*, BUNDESNOTARKAMMER <http://www.bnotk.de/Notar/Taetigkeiten/index.php> (last visited March 9, 2011).
- 37 DR. ROLF GAUPP, THE IMPARTIALITY OF THE NOTARY: A GUARANTEE IN CONTRACT LAW, Section D.I.2 (December 15, 2003), available at http://www.bundesnotarkammer.de/downloads/UIINL_Kongress/Mexico/THEME_I_GAUPP_EN.pdf .
- 38 *Id.* at D.I., citing Bürgerliches Gesetzbuch (BGB) [Civil Code] §125.
- 39 Beurkundungsgesetz (BeurkG) [Notarial Recording Act], Aug. 28, 1969, BGBl. I at 1513, Dec. 22, 2010, BGBl. I at 2255.
- 40 BeurkG §17(1).
- 41 BeurkG §§11(1), 17(2); *see also* BUNDESNOTARKAMMER, *supra* note 36.
- 42 BeurkG §13(1).
- 43 BeurkG §45(1).
- 44 *Der Notar*, BUNDESNOTARKAMMER, <http://www.bnotk.de/Notar/index.php> (last visited March 9, 2011), citing Zivilprozessordnung (ZPO) [civil procedure statute], Dec. 5, 2005, BGBl. I at 302, 2006 I at 431, 2007 I at 1781, Dec. 22, 2010, BGBl. I at 2248, §§415 ff.
- 45 BUNDESNOTARKAMMER, *supra* note 44; *see also* BUNDESNOTARKAMMER, *supra* note 36.
- 46 BUNDESNOTARKAMMER, *supra* note 28.
- 47 BUNDESNOTARKAMMER, *supra* note 36; *see also* BeurkG §17(1).
- 48 BUNDESNOTARKAMMER, *supra* note 36.
- 49 BUNDESNOTARKAMMER, *supra* note 44; *see also* BUNDESNOTARKAMMER, *supra* note 36.
- 50 An exception to this rule is that notaries in Baden-Wuerttemberg may be employed and paid by the State. BUNDESNOTARKAMMER, *supra* note 26.
- 51 BNotO §17(1); Kostenordnung (KostO) [Fee Regulation], July 26, 1957, BGBl. I at 960, Dec. 22, 2010, BGBl. I at 2255.
- 52 For the Bundesnotarordnung, *see supra* note 20; for the Beurkundungsgesetz, *see supra* note 39; for the Kostenordnung, *see supra* note 52; for local regulations, *see, e.g.,* Berufsrichtlinien der Notarkammer Frankfurt [Practice Guidelines of the Frankfurt Chamber of Notaries], July 14, 1999 and Nov. 24, 1999, Justiz-Ministerial-Blatt for Hessen, Feb. 1, 2000, Nr. 2, at 65.
- 53 BNotO §§8(1), 8(2).
- 54 BNotO §§10(1), 10(2).
- 55 BNotO §10a.
- 56 BNotO §9(1).
- 57 BNotO §9(2).
- 58 BNotO §67(1).
- 59 BNotO §67(2).
- 60 BNotO §77.
- 61 BNotO §92.
- 62 BNotO §§93(1), 94, 95ff.
- 63 Bundesnotarkammer, *supra* note 22; *see also* BUNDESNOTARKAMMER, *supra* note 26.
- 64 MALAVET, *supra* note 19, at 409.
- 65 *Id.* at 414, 415.
- 66 *Id.* at 418, 421.
- 67 *Id.* at 426, citing N.P. READY, BROOKE'S NOTARY I (11th ed. 1992) at 1.
- 68 MALAVET, *supra* note 21, at 426-427, citing Raymond C. Rothman, *Notary Public Practices and Glossary* (1978) at 2-3.
- 69 *See, e.g.,* MALAVET, *supra* note 21 at 427, FN 185; MALAVET, *supra* note 21 at 429.
- 70 *Id.* at 427, 429.

Reflections on the Universal Period Review as seen through the Human Rights Review of the United States

By Luis E. Avila

The Universal Periodic Review (“UPR”) is the only process under which the human rights record of all 192 member states of the United Nations (“UN”) is reviewed. The UPR was established on March 15, 2006 by the UN General Assembly.¹ However, it took over a year and much heated backroom debate over the objectives, modalities and process, for the Human Rights Council (“HRC”) to adopt the framework and structure of the UPR.² The overall structure of the UPR is simple: review all UN members equally, every four years, with the goal of improving the human rights situation in every country.³ Despite the equal treatment and universal coverage, however, some countries’ reviews have generated more interest than others among the international community.⁴ The United States (“US”), one such country, underwent its UPR on November 5, 2010, with much of the world anticipating both the process and outcome. However, as has been the case with the majority of reviews, the UPR of the United States underwhelmed. While it certainly highlighted some of the positive aspects of having such a review, it also brought to the fore some of the UPR’s largest shortcomings, as well as design defects of the institution itself. With both the Human Rights Council and the UPR themselves under review in 2011, now is a fitting time to take a closer look at this innovative institution. Thus, this is a brief analysis of the UPR, as seen through the UPR of the United States of America.

Archaic modalities often unnecessarily restrict a potentially meaningful dialogue between the state under review and the reviewing states and stakeholders. As a poignant example, the list of speakers⁵

has been a sore spot of the UPR for a few years now. In an effort to maintain equality throughout the process, the Human Rights Council Secretariat, an office within the Office of the High Commissioner for Human Rights, has adopted a first-come first-serve approach to the list’s registration.⁶ Theoretically, this approach would ensure that any country, regardless of size or international influence, can secure a spot on the list. Practically, and this is particularly so with regards to the review of controversial countries, it ensures that only the most interested and well staffed delegations can secure a spot on the list. As was the case with Iran during the 7th Session where the United States secured the first speaker’s slot, it came as no surprise that Cuba, Venezuela, the Russian Federation, the Islamic Republic of Iran, and Nicaragua were the first five states to speak at the review of the United States.⁷ These countries

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accomplished this by sending Mission staff, interns and even diplomats to wait in line outside the Palais de Nations for an entire night, in the cold Geneva winter, in order to be the first in the door and at the speakers’ list registration desk. Similarly, an oversubscribed list of speakers, 80 speakers in the case of the US, often forces countries to deliver their statements in writing only. Yet, the real

criticism should not rest on the states, but in the Secretariat who has not instituted a new, more malleable, system. Over the past few years, the Secretariat has drafted and recommended three alternative systems to the one currently in place,⁸ and while all delegations can provide feedback, final approval lies with the President of the Human Rights Council.

Among the most frustrating aspects of any institution are the inherent limitations that may prevent it from fully accomplishing its objectives. One such limitation of the UPR is that it does not have a post-review follow-up mechanism. Since the first round of reviews will not conclude until late this year, there has been no follow-up with countries that have already undergone a review.⁹ This has led to uncertainty as to whether the UPR is actually accomplishing what many perceive to be the main purpose of the UPR: improving human rights situations on the ground. When placed in the context of the US, the UPR has no practical mechanism for holding the US accountable for its commitments made during the review or for doing more than simply recommending that the US take steps to ratify the core international treaties to which it is not yet a party,¹⁰ remove reservations from the plethora of international treaties to which it is a party,¹¹ or establish a national, independent, human rights institution to ensure implementation of human rights throughout the country,¹² to name a few.

The UPR of the United States also highlighted the significant difficulty involved in implementing recommen-



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dations made by the UPR 's Working Group,¹³ even assuming, *arguendo*, that the state under review has the best intentions. For example, the US was recommended no less than 30 times that it place, consider or move closer towards, a moratorium on the death penalty.¹⁴ In the US, the Supreme Court has ruled that capital punishment is not "cruel and unusual punishment,"¹⁵ thus allowing states to implement capital punishment as part of their sentencing scheme without running afoul of the Constitution. Therefore, short of a Supreme Court decision overturning the ruling in *Gregg v. Georgia*, or a Constitutional amendment, any unilateral commitment made by the US Department of State¹⁶ to abolish capital punishment would simply lack domestic applicability and enforceability.

Perhaps the largest shortcoming of the UPR is the gap between what the Human Rights Council envisioned for the UPR and what states will actually allow the UPR to be. There is often significant disparity between what the Human Rights Council commissioned the UPR to do and the degree of influence that the member states will allow the UPR in their domestic and foreign policy. For example, the Department of State explains that the UPR, as a forum, "provides a unique avenue for the global community to discuss human rights around the world,"¹⁷ while the US report to the UN High Commissioner for Human Rights in Conjunction with the UPR explains that the UPR's objective is to "enhance the protections for and enjoyment of human rights." In sharp contrast, the Human Rights Council understands the objective of the UPR as one of "improvement of the human rights situation on the ground" and "fulfillment of the State's human rights obligations and commitments..."¹⁸ Any jurist knows that not only do "enhancing", "improving" and "fulfilling" not mean the same thing, but they can lead political actors to strikingly dissimilar conclusions and policy. As it is currently structured, then, the UPR can only have as much teeth as

the member states will allow it.¹⁹ In line with this view, the US made it clear that they welcomed dialogue regarding the human rights situation in the US, but also left it abundantly ambiguous as to what they will do with such dialogue.²⁰

However, despite its many flaws, the UPR has many inherent positives that cannot be trivialized or overlooked. Much effort has been made to ensure that some of the key elements of the review process remain universal. The first and most important of these is the participation of all 192 UN member states in a public review of their human rights record. Big or small, rich or poor, east or west, capitalist or socialist, they are all scheduled for review, and so far none has declined to participate. In fact, most states, including the US, have taken the UPR very seriously.²¹ The US, for example, undertook extensive consultations with civil society, over many months, in preparation of both its national report and interactive dialogue, and then sent a first-class delegation of no less than 40 members to Geneva for the review itself.²² Forcing states such as China, Russia, Iran and the United States to publicly justify and defend their human rights record is no small feat. Critics who claim that states do not take the UPR process seriously need simply look towards the size and importance of delegations, the resources invested in both the national reports and the presentation on review day, and the ratifications, removal of reservations and human rights commitments made *a priori* of the actual review.

The UPR is a political institution created by an international council acting on behalf of sovereign states. It is also almost universally seen as a politicized process.²³ For example, during the UPR of the US, many countries departed from addressing traditional human rights issues and instead used this opportunity to further their particular agendas by strongly criticizing the US on a number of highly political issues, such as the economic blockade on Cuba²⁴ or the impact that capitalism has on climate change.²⁵

However, politicization should shed its pejorative reputation and be seen as a necessary, and perhaps even desirable, component of the UPR. The moment that states lose their ability to bargain, lobby, or negotiate their interests, the process will become state-less. Since a UPR devoid of state participation would simply not be worth having, then the alternative must allow for states to openly balance often-competing interests while still using the review process as a vehicle for pressuring states to increasingly make human rights a priority.

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Establishing the UPR was a drastic step in the right direction for the Human Rights Council and the UN as a whole.²⁶ The degree of participation by UN member states and the thoroughness under which their human rights record has been reviewed is unprecedented. There is hope in what the institution can become.²⁷ Currently, though, the process has faced harsh criticism for being too politicized and not sufficiently impactful.²⁸ However, this criticism should not be aimed at the institution itself, but at the expectation that the international community has placed on it. How can anyone expect a political body to be depoliticized? How can an institution lacking an enforcement mechanism be expected to enforce its mandate? If the US review taught us anything, it is that most states including the larger ones, do not take this process lightly and are willing to join the discussion. Another important lesson is that the review process, in and of itself, achieves the valuable goal of having a state-driven international dialogue regarding the human rights records

of all UN member states. Sometimes, the dialogue even pushes states to inch closer towards stronger human rights protections for their people. For example, in its review, the US discussed the possibility of establishing an independent national human rights institution and expressed its commitment to ratifying the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of Persons with Disabilities.²⁹ The UPR provided a forum to discuss these issues; a forum that may not otherwise have existed. However, while there is inherent value in having a system that periodically reviews the human rights records of all UN member states, we know that that the UPR *can* do more. We will have to wait until the follow-up reviews, and the examination of the institution itself, to see whether states finally decide that the UPR *will* do more.

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Endnotes

- 1 G.A. Res. 60/251, ¶22, U.N. Doc. A/RES/60/251 (April 3, 2006).
- 2 H.R.C. Res. 5/1, pg. 1, U.N. Doc. A/HRC/5/21 (June 18, 2007).

- 3 *Id.*, at 2-4.
- 4 E.g., the Democratic People's Republic of Korea, Islamic Republic of Iran, and the United States of America.
- 5 The list of speakers is exactly what the name implies. It is the physical sheet on which states and stakeholders place their names, on a first-come first-serve basis, in order to secure a place to speak during any given state's UPR. Because there is only a short 3-hour segment in which member states, observer states, and civil society can deliver their two-minute speeches, it is of paramount importance to be placed as high on the list as possible. Interested parties can only sign up the day before the review, in person, and at the designated desk in or around Room XX in the Palais de Nations. Office of the High Commissioner for Human Rights, *Procedures for the List of Speakers*, at 1, (2008).
- 6 *Id.*, at 1.
- 7 UN Webcast: Human Rights Council, Ninth Session of the Universal Periodic Review, <http://www.un.org/webcast/unhrc/archive.asp?go=101105> (last visited Mar. 19, 2011).
- 8 Perhaps the most compelling alternative modality for inscription to the UPR speakers list includes having delegations email their inscription to the HRC Secretariat within a two-day inscription period. Once the inscription period is closed, the Secretariat would draw up a list of all inscribed speakers in alphabetical order. Numbers would subsequently be allotted determining their position. The President of the HRC would then draw one number corresponding with the point of departure for that particular list of speakers. The list would continue from the that number onwards. Office of the High Commissioner for Human Rights [OHCHR], *Communication from the Bureau of the Human Rights Council*, at 3, (May 16, 2010).
- 9 Office of the High Commissioner for Human Rights [OHCHR], *Draft Paper on OHCHR's Approach to follow-up on outcomes from the Universal Periodic Review*, at 2, (Mar. 2010).

- 10 Such treaties include the Convention on the Rights of the Child, the Convention on the Elimination of all Forms of Discrimination Against Women, and the *International Covenant on Economic, Social and Cultural Rights, and its Optional Protocol. Report of the United States of America Submitted to the U.S. DEPARTMENT OF STATE, U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS IN CONJUNCTION WITH THE UNIVERSAL PERIODIC REVIEW 26* (2010).
- 11 For example, the Convention Against Torture or the International Convention on the Elimination of All Forms of Racial Discrimination. *Report of the United States of America Submitted to the U.S. DEPARTMENT OF STATE, U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS IN CONJUNCTION WITH THE UNIVERSAL PERIODIC REVIEW 26* (2010).
- 12 A measure directly recommended by approximately 11 countries and indirectly by many more. U.N. Human Rights Council, *Report of the Working Group on the Universal Periodic Review*, pg. 17-18, U.N. Doc. A/HRC/16/11 (Jan. 4, 2011).
- 13 Officially, the reviewing body of the UPR is called the Working Group ("WG"). The WG is composed of the 47 member states of the HRC and is chaired by the President of the HRC. H.R.C. Res. 5/1, pg. 4, U.N. Doc. A/HRC/5/21 (June 18, 2007).
- 14 U.N. Human Rights Council, *Report of the Working Group on the Universal Periodic Review*, pg. 16, 21-22, U.N. Doc. A/HRC/16/11 (Jan. 4, 2011).
- 15 *Gregg v. Georgia*, 428 U.S. 153 (1976) (holding that the imposition of the death penalty does not, automatically, violate the Eighth and Fourteenth Amendments).
- 16 Charged with carrying out the President's foreign policies, the US Department of State ("DOS") acts as the US representative to the various UN organs. Department of State, <http://www.state.gov/secretary/index.htm> (last visited Mar. 19, 2011).

- 17 Department of State, <http://www.state.gov/g/drl/upr/index.htm> (last visited Mar. 19, 2011).
- 18 H.R.C. Res. 5/1, pg. 2, U.N. Doc. A/HRC/5/21 (June 18, 2007).
- 19 For a short discussion on how the HRC has focused primarily on *addressing* human rights violations, rather than *preventing* violations, see JAN WOUTERS & SUE BASU, *THE 2011 REVIEW OF THE UN HUMAN RIGHTS COUNCIL: TEN RECOMMENDATIONS*, 4, (Leuven Centre for Global Governance Studies, K.U. Leuven, 2010).
- 20 *Report of the United States of America Submitted to the U.S. DEPARTMENT OF STATE, U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS IN CONJUNCTION WITH THE UNIVERSAL PERIODIC REVIEW 3* (2010). See also U.N. Human Rights Council, *Report of the Working Group on the Universal Periodic Review*, pg. 4, U.N. Doc. A/HRC/16/11 (Jan. 4, 2011).
- 21 A notable exception was the almost cynical approach that the Democratic People's Republic of Korea and some of its ally states took during its UPR. UN Webcast: Human Rights Council, Sixth Session of the Universal Periodic Review, <http://www.un.org/webcast/unhrc/archive.asp?go=091207> (last visited Mar. 19, 2011).
- 22 Department of State, <http://www.state.gov/r/pa/prs/ps/2010/11/150322.htm> (last visited Mar. 19, 2011).
- 23 Throughout the years, countless states have referred to the "highly politicized" nature of the UPR and the need to "depoliticize" the process in order to make it more effective.
- 24 U.N. Human Rights Council, *Report of the Working Group on the Universal Periodic Review*, pg. 4, U.N. Doc. A/HRC/16/11 (Jan. 4, 2011).
- 25 *Id.*, at 28.
- 26 The Human Rights Council replaced the now defunct Human Rights Commission, which still echoes in institution building circles as the poster-child of a highly ineffective and less than credible intergovernmental human rights institution.
- 27 Canada provides a good example of desirable UPR interventions. According to the controversial group UN Watch in a recently published report, Canada is the only country ranked as "Very Constructive" in that it is the most consistent in vigorously challenging countries on specific human rights issues. Following close behind, and ranked as "Constructive", are France, Germany, Mexico, Netherlands, Slovenia, Switzerland, the United Kingdom and the United States. UN WATCH, *MUTUAL PRAISE SOCIETY: COUNTRY SCORECARD AND EVALUATION OF THE UNIVERSAL PERIODIC REVIEW SYSTEM OF THE UN HUMAN RIGHTS COUNCIL*, 3-5(2009).
- 28 Joanna Harrington, *Canada, the United Nations Human Rights Council, and Universal Periodic Review*, *Constitutional Forum*, Vol. 18, No.2, 3-8 (2009).
- 29 *Report of the United States of America Submitted to the U.S. DEPARTMENT OF STATE, U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS IN CONJUNCTION WITH THE UNIVERSAL PERIODIC REVIEW 9* (2010); Harold Hongju Koh, Legal Advisor US Department of State, *Response of the United States of America to Recommendations of the United Nations Human Rights Council* (Nov. 9, 2010).



The Paradox at the Crossroads of U.S. Corporate Law, and the African Harmonized Business Law (OHADA)

By Zachee Pougá

Corporations, regardless of the political, economic, or cultural climate in which they exist, are most of the time placed under the responsibility of a group in charge of their operation. The corporate law, regardless of its sources or characteristics, aims among other things, to create the scope within which managers of corporations fulfill their duties. From Africa to the United States, people who invest their money and other property to create business ventures need protection against the people they entrust to manage the business and fructify their investments. U.S. law fundamentally conceptualizes fiduciary duties to enhance corporate governance, and protect the interests of shareholders. Similarly, the Organization for Harmonization of Business Law in Africa (OHADA)¹ relies on fiduciary duties to hold the management responsible. Both systems therefore, place fiduciary duties at the heart of their strategies to protect shareholders who own the business but lack the knowledge or time to oversee its management. OHADA, which is based on the treaty signed in Port-Louis, Mauritius, on October 17, 1993², aims to facilitate business creation through harmonization of all business related aspects of the Laws across the continent. The pace of expansion of OHADA is remarkable; in less than twenty years of existence, OHADA is already the applicable business law within sixteen African countries.³

Viewed from an angle of fiduciary duties, one would be amazed of how regulation of corporate governance under OHADA is similar to U.S. corporate law. To the issue of how to keep directors or the management in general under control while not diminishing the chances

of the corporation to grow, expand, and give maximum returns, both U.S. law and OHADA respond mainly through fiduciary duties.⁴

Under an old corporate law doctrine,⁵ there is an agency relationship between managers and shareholders where the former are seen as agents and the latter are considered principals. Echoing that line of thoughts, U.S. law and OHADA extend the principles of the ordinary law of agency to the shareholder/directors relationship. The roads of U.S. law and OHADA clearly cross on the grounds of duties of care, loyalty, and disclosure. Nevertheless, the reality reveals a paradox of quite similar duties but totally opposite corporate impact. What explanation could be given to the paradox of quite similar duties under U.S. and OHADA law, but totally different realities concerning corporate productivity and economic power?

First, both U.S. corporate law and OHADA provide the duty of care. Under both legal systems, this duty requires directors to be informed and follow adequate procedures in carrying on their duties. In the U.S., this requirement, contained in the Restatement Third of the Law of Agency,⁶ has been reproduced and reinforced in the Model Business Corporation Act,⁷ compelling directors to act with due care. U.S. courts have regularly held that although directors are not required to know all, they must inform themselves and reasonably obey the process in fulfilling their duties.⁸ In Africa, OHADA uses quite the same model, and quite the same obligations are imposed on directors. The notion that best describes the duty of care under OHADA is the “bonus pater familia”. OHADA considers managers as “good

fathers”; therefore, they are expected to act diligently and carefully in the way a reasonable head of a household would take decisions concerning the household. The standard of care is therefore, similar to U.S. law, that of a “Homo juridicus”, an average person, reasonably informed and competent, under the same circumstances.⁹



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From Africa to the United States, people who invest their money and other property to create business ventures need protection against the people they entrust to manage the business and fructify their investments.

Next, both U.S. law and OHADA enounce the duty of loyalty.¹⁰ Loyalty is under both systems, the backbone of fiduciary duties. When faced with issues of self-dealing¹¹ or corporate opportunity, U.S. courts have progressively developed a strong duty of loyalty to assure that directors defend the corporate interest first and foremost.¹² Under OHADA, a similar emphasis is put to assure loyalty of directors. Article 891 of the Uniform Act OHADA on Commercial Companies, for example, prohibits directors from engaging in self dealing transactions, as well as corporate waste.¹³

Finally, similar to U.S. law, OHADA provides strong duties of good faith and disclosure. Under both legal systems, the duty of good faith is imposed on directors, and overrides duties of loyalty and care. Disclosure is an essential compo-

ment of these systems. In the U.S., since the *Enron*-like corporate scandals of the early 2000's, the disclosure requirement has called tremendous attention.¹⁴ Major events in the life of the corporation must be disclosed faithfully regardless of whether they are positive or negative. Under OHADA, the disclosure requirement is maintained through the institution of the Commercial Register.¹⁵ The Commercial Register is comparable to the Securities and Exchange Commission (S.E.C) in the U.S because all the changes and events in the life of the corporation shall be disclosed therein. Therefore, similar to U.S. law through the S.E.C, any failure to disclose, as well as any disclosure of untrue or misleading information is subject to sanctions under OHADA.¹⁶

As seen above, the young African Harmonized Business Law contains provisions similar to U.S. corporate law. Under each structure, the need to hold directors accountable, as fiduciaries, is well established. Nevertheless, the aptitude of managements and, the economic capacities of companies under the two systems, are not the same. How to understand the fact that managements upon which similar duties are imposed sparkle in the U.S and struggle in Africa? Three main reasons help us understand this contradictory situation.

First, in Africa, social and cultural norms tend to trump legal provisions.¹⁷ Corporations seem to be managed more in accordance with the cultural norms than according to what OHADA provides. The law is inspired and created from cultural norms and habits.¹⁸ In places such as the U.S., laws have adapted to culture, and the differences between cultures, habits, and laws, have almost disappeared. However, in Africa, the effort to adapt the law to cultures is still in progress,¹⁹ with an additional difficulty under the OHADA context, due to the presence of multiple cultures.²⁰ When there is a conflict between OHADA provisions and local cultural norms, priority seems to be accorded

to old habits. In these circumstances, OHADA encounters enormous difficulties in implementing its well intended and advanced thoughts, policies, and norms of corporate management. As a consequence, the intent of OHADA to create security and legal predictability is endangered. In Africa, the study of OHADA provisions remains insufficient to understand the business environment as a whole because cultural norms remain a decisive source of conducting business.²¹ Under this atmosphere, notions of corporate governance and other fiduciary duties may still carry a meaning, but their meaning cannot be understood only from reading the statutes. The existence of hundreds of different cultures makes it difficult to anticipate the way these cultures will shape in practice, notions related to corporate governance in general, and fiduciary duties specifically. This apparent conflict between the law and some cultures contrasts with the U.S. where there is at least a great amount of certainty that laws apply and command the creation and existence of businesses.²² Security and predictability are very important in business creation and promotion. Therefore, OHADA has yet to seek its primacy and enforceability over cultural norms and traditions specific to its member countries.

Secondly, the reality of the conduct of business in Africa reveals a lack of expertise within managements of corporations. The economic success, or lack thereof, of corporations under OHADA cannot be tied solely to the application or non-application of fiduciary duties.²³ In fact, the adequate application of fiduciary duties is very dependent on the knowledge of the outstanding duties by the management, or, at the very least, the willingness of managers to discover these duties and put them into use. In Africa, family ties and business ownership are sometimes preferred in selecting the managing team of a corporation, rather than expertise. In addition, corporations are deemed a family affair, and managers are often either family members, or they

claim important ties with the family or group owner. It is therefore not surprising that some managers are not aware of the duties imposed on them, and are not mindful of the need to apply OHADA provisions.

Viewed from an angle of fiduciary duties, one would be amazed of how regulation of corporate governance under OHADA is similar to U.S. corporate law.

For example, Pr. Dickerson reveals in her writings,²⁴ the case of a manager who was unaware of the legal form of the corporation he was managing. There are different corporate forms under OHADA, and duties can be different from one form of corporation to the other. Therefore, the knowledge of the corporate form by managers is the premise for the application of corporate governance principles in general, and fiduciary duties specifically. Courts could have been very helpful in enforcing OHADA laws. Unfortunately, set aside the fact that most actions are not brought to courts, but even when they are tried in courts, judges sometimes do not apply OHADA law.²⁵ Here again, weak judicial activity, coupled with the lack of appropriate training into OHADA matters by some judges, leads to important barriers to the application of OHADA. Once again, OHADA seems to be pushed back, and its interesting and ambitious provisions hit strong barriers to their application. This situation contrasts with the U.S. corporate environment. In the U.S., the main and ultimate criterion in selecting the management remains expertise.²⁶ The knowledge of directors' duties or their willingness to apply them remains one of the determinative principles in choosing management.²⁷ Not that all managers of U.S. corporations are competent, but the extreme mobility and instability in corporate management shows the

permanent lookout for a better team. This contradicts with the permanence and longevity of managements of corporations in Africa. Fiduciary duties, which are designed to enhance the management of corporations, and to protect shareholders' interest, would appear ineffective if management is not afraid of being removed by shareholders, for their eventual misbehavior. Fiduciary duties are the heart of corporate governance standards, and their observance affects the health of the entity as a whole.²⁸

In Africa, governments do their best to create good legal constructions and very appealing laws, but surprisingly, these same governments entertain, and sometimes encourage, practices that lead to a complete disregard of these legal "niceties."

Thirdly, and not negligibly, political pressures impact largely the economic performance of corporations in Africa.²⁹ OHADA law was born in an environment which is hampered by regrettable practices of corruption and the like. Corporate managers, in some instances, feel they may get away with any kind of behavior as long as the political atmosphere of bribes allows them to do so. Sometimes, corporate managers intentionally disregard the fiduciary obligations imposed by OHADA, and engage in illegal behavior, which remain unpunished. Political pressures give rise to the need to satisfy the "political" instead of the "legal". In Cameroon, Senegal or Cote d'Ivoire for example, it is not surprising to have businesses engage in bribery practices toward tax collectors, instead of filling regular tax returns. The case of the Cameroonian Air fare Agency that entertained a suspiciously close relationship with the government, and key political figures, and yet, went unpunished, notwithstanding the alleged illegal behavior that the management engaged

into, offers a telling example.³⁰ The reality within OHADA countries still shows a very blurry line between the political power and the economic power. In fact, the "political" seems to have subordinated the "economic", and there is a feeling within the business community that as long as the political appetite is satisfied, the law, and compliance with the applicable legal exigencies, is worthless. In the U.S. however, the separation between the "political" and the "economic" seems to have been established. On the one hand, business operators in the U.S. do not seem to be subordinated by political power and those who exercise it. On the other hand, the support to a certain political organization, or any political personality, does not imply that the rule of the law can be thrown out the window. In this context, the political power at most, creates an appropriate environment for the best expression of business entities. The business environment in Africa, however, seems to be oriented toward satisfying (sometimes personally) political power. In Africa, governments do their best to create good legal constructions and very appealing laws, but surprisingly, these same governments entertain, and sometimes encourage, practices that lead to a complete disregard of these legal "niceties."³¹

In this context, nevertheless, business still gets done, and there are some large companies operating within OHADA countries. The idea is not to seek to implant U.S. law in Africa: not only because every environment has its own exigencies; but also, when it comes to the conception and application of fiduciary duties, any idea of transplantation is impractical.³² Still, the urgency of OHADA is to position itself as the real and exclusive regulator of business operations in Africa, and seek supremacy and enforcement of its laws. The struggle to attract businesses in Africa, and the poor corporate economic performances are certainly not because OHADA failed to enact well conceived provisions, but only because OHADA has not yet taken total

command of the practice of business in Africa. The principles posed by OHADA remain considerably unknown within the ordinary public, and, shockingly, within the legal community of the member countries. Principles of corporate governance in general, and fiduciary duties in particular, contained in OHADA's provisions remain superseded by local realities and a regrettable lack of judicial activism. The declaration of the Democratic Republic of Congo³³ to join OHADA is proof, if needed, that OHADA will expand across the continent of Africa. However, OHADA's success as a tool of development in general, and on the field of corporate governance specifically, will depend on how well it manages its dissemblance with local laws and cultures. But again, similar to U.S. law, maybe OHADA just needs time to grow and figure out the best way to deal with its uniquely complex diversity.

About the Author

Zachee Pouga holds a LL.M in Corporate and Finance Law from Wayne State University Law School. He further holds a LL.B (second of his class), and a first Masters Degree in Business Law (with a focus on African Harmonized Business Law) from the University of Douala school of law. Zachee is an internationally published author on U.S. and African business law issues.

Endnotes

- 1 French Acronym for Organisation pour l'Harmonisation du droit des Affaires en Afrique meaning the Organization for Harmonization of Business Law in Africa.
- 2 The OHADA Treaty was signed in Mauritius between its 14 initial member-countries: Benin, Burkina Faso, Cameroon, Central African Republic, Comoros, Congo, Ivory Coast, Gabon, Equatorial Guinea, Mali, Niger, Senegal, Chad and Togo. These fourteen initial countries were

- subsequently joined by Guinea, and Guinea Bissau.
- 3 There are presently 16 members States: Benin, Burkina Faso, Cameroon, Central African Republic, Comoros, Congo, Ivory Coast, Gabon, Guinea, Guinea-Bissau, Equatorial Guinea, Mali, Niger, Senegal, Chad and Togo.
 - 4 Zachee Pouga Tinhaga, *Fiduciary Duties of Corporate Directors: A Comparative Study of U.S. Corporate Law, and The Organization for Harmonization of Business Law in Africa (OHADA)*, Wayne State Univ. L. Sch. LLM Paper (Dec. 2010) available Wayne State Univ. L. Library (on shelves).
 - 5 See, Moldoveanu and Martin: Agency Theory and the Efficient Design of Governance Mechanisms (Feb. 2, 2001). See also Joseph Stiglitz (1988). "Principal And Agent". Princeton, Woodrow Wilson School - Discussion Paper (12). <http://ideas.repec.org/p/fth/priwdp/12.html>. Retrieved 2009-06-14
 - 6 See Restatement (Third) of Agency, §8.08 (2006).
 - 7 See Model Bus. Corp. Act § 8.30 (1999).
 - 8 See *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985).
 - 9 The term *Bonus pater familia* is encountered in the comments to the OHADA text. It is an extension of the general notion of *Homo Juridicus*, a prototype of a human being, reasonable and taking care of the common good in good faith and for the benefit of all.
 - 10 See Zachee Pouga, *supra* note 4.
 - 11 See Model Bus. Corp. Act § 8.61 (1999).
 - 12 The duty of loyalty has been progressively constructed by courts. Judicial efforts have been to make that duty more concrete and more practical. Therefore, the main criterion to examine a potential breach of loyalty seems to be self dealing, corporate opportunity, corporate waste, and inappropriate distribution of dividends.
 - 13 Uniform Act OHADA on Corporations and Interest Groups (1997).
 - 14 See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.). The bill was signed into law on July 30, 2002.
 - 15 See Uniform Act OHADA on General Commercial Law, Art. 19-50 (1997) (organizes the role and procedures for the Commercial Register).
 - 16 *Id.* at 19.
 - 17 World Bank, *Report on the Observance of Standards and Codes (ROSC), Corporate Governance, Country Assessment*, (Senegal, 2006). Senegal is under OHADA law; as a consequence, the World Bank's remarks on Senegal will be the same with all other OHADA countries.
 - 18 Claire Moore Dickerson, *The Cameroonian Experience under OHADA: Business Organizations in a Developing Economy*, Bus. And Soc'y Rev., 112, 191-213 (2007).
 - 19 See World Bank, *supra* note 17.
 - 20 JEAN GATSI, L'EFFECTIVITE DU DROIT DE L'OHADA (P.U.A.) (2006) (Cameroon).
 - 21 *Id.*
 - 22 Izaz Ali, Remedies For Breach of Fiduciary Duties, (JAN 2010).
 - 23 KATHARINA PISTOR AND CHENGGANG XU, FIDUCIARY DUTY IN TRANSITIONAL CIVIL LAW JURISDICTIONS: LESSONS FROM THE INCOMPLETE LAW THEORY (2002).
 - 24 See DICKERSON, *supra* note 18.
 - 25 See Gatsi, *supra* note 20.
 - 26 See Stuart Read, *How Expertise Shapes Decision Making* (August, 2008), available at: <http://www.imd.org/research/challenges/TC068-08.cfm> (last retrieved, Oct 9th, 2010 at 4.10pm). See also Brian R. Cheffins, *Current Trends in Corporate Governance: Going from London to Milan via Toronto*, 10 DUKE J. COMP. & INT'L L. 5, 19-25 (1999).
 - 27 *Sblensky v. Wragley*, 237 N.E.2d 776 (Ill. Ct. App. 1968).
 - 28 Brian R. Cheffins, *Current Trends in Corporate Governance: Going from London to Milan via Toronto*, 10 DUKE J. COMP. & INT'L L. 5, 19-25 (1999).
 - 29 Claire Moore Dickerson, *Corporate Social Responsibility and the Failure of Transparency*, 35 Conn. Law. Rev. 1035, 1052-55 (2003).
 - 30 CAMAIR (Cameroon Airlines) was a large Airline in Cameroon that filed for bankruptcy. Only after CAMAIR filed for bankruptcy did the prosecution charge its managers for breach of fiduciary duties as well as other misappropriation of funds.
 - 31 See Zachee Pouga, *supra* note 4.
 - 32 KATHARINA PISTOR AND CHENGGANG XU, FIDUCIARY DUTY IN TRANSITIONAL CIVIL LAW JURISDICTIONS: LESSONS FROM THE INCOMPLETE LAW THEORY (2002).
 - 33 The Democratic Republic of Congo (DRC, is the largest territory in the continent of Africa) officially announced its commitment to join the OHADA Treaty in August 2010. Several actions are in process in the country to have national laws comply with OHADA Treaty and Uniform Acts. The DRC is expected to ratify the OHADA Treaty in 2011.

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May 20, 2011

Int'l Arbitration in the 21st Century: Trends, Developments and Challenges
Los Angeles, CA
<http://apps.americanbar.org/intlaw/calendar/home.html>

May 22-24, 2011

17th Annual Global Insolvency and Restructuring Conference
Paris, France
http://www.ibanet.org/Conferences/conferences_home.aspx

May 24, 2011

Asylum and Cancellation of Removal- Tricks of the Trade
Audio Seminar
<http://www.aila.org/content/default.aspx?docid=9352>

May 25-26, 2011

6th Annual Bar Leaders Conference
Warsaw, Poland
http://www.ibanet.org/Conferences/conferences_home.aspx

May 26, 2011

Show Me the Money- Ability to Pay Beyond the Yates Memorandum
Web Seminar
<http://www.aila.org/content/default.aspx?docid=9352>

May 29- June 1, 2011

2011 ILA Asia-Pacific Regional Conference
Taipei, Taiwan
<http://www.asil.org/events-il-calendar.cfm?mode=all&filterMonth=5&filterYear=2011>

May 29-June 2, 2011

Law and Business: U.S./Israel/Global Relationships
Eilat, Israel
<http://apps.americanbar.org/intlaw/calendar/home.html>

May 30-31, 2011

WIPO Workshop for Mediators in Intellectual Property Disputes
Geneva, Switzerland
<http://www.asil.org/events-il-calendar.cfm?mode=all&filterMonth=5&filterYear=2011>

June 2, 2011

Fraud, Marriage and False Testimony
Audio Seminar
<http://www.aila.org/content/default.aspx?docid=9352>

June 9-11, 2011

14th Annual Criminal Law Conference
Amsterdam, The Netherlands
http://www.ibanet.org/Conferences/conferences_home.aspx

June 13, 2011

Four Roundtables in Times Square – Putting the Spotlight on International Arbitration on Broadway
New York, NY
http://www.ibanet.org/Conferences/conferences_home.aspx

June 15-16, 2011

10th Annual Mergers and Acquisitions Conference
New York, NY
http://www.ibanet.org/Conferences/conferences_home.aspx

June 15-17, 2011

4th Annual U.S. – Latin American Tax Planning Strategies Conference
Miami, FL
<http://www.abanet.org/intlaw/calendar/home.html>

June 15-18, 2011

2011 AILA Annual Conference on Immigration Law
San Diego, CA
<http://www.aila.org/content/default.aspx?docid=9352>

June 16-19, 2011

Annual Meeting, Business & Applied Sciences Academy of North America (BAASANA)
Bloomsburg, Pennsylvania
<http://www.asil.org/events-il-calendar.cfm>

June 19-20, 2011

Joint Program with the German Bar Association International Section
Munich, Germany
<http://apps.americanbar.org/intlaw/calendar/home.html>

June 30, 2011

Application of the Kazarian Decision in EB-1(1) Extraordinary Ability and EB-1(2) Outstanding Researcher Petitions
Audio Seminar
<http://www.aila.org/content/default.aspx?docid=9352>

July 05-15, 2011

ACUNS-ASIL Summer Workshop: Peacebuilding and Statebuilding in War-Torn Societies
Denver, CO
<http://www.asil.org/events-il-calendar.cfm?mode=all&filterMonth=7&filterYear=2011>

July 25- August 5, 2011

7th Summer School on European Business Law
Duesseldorf, Germany
<http://www.asil.org/events-il-calendar.cfm?mode=all&filterMonth=7&filterYear=2011>

August 4-9, 2011

ABA Annual Meeting
Toronto, Ontario, Canada
<http://www.abanet.org/intlaw/calendar/home.html>

August 23, 2011

Managing A Modern Law Firm: A Dream Come True Or A Complete Nightmare?
Amsterdam, The Netherlands
<http://www.abanet.org/intlaw/calendar/home.html>

September 12, 2011

3rd Annual International Dispute Resolution Conference
Moscow, Russia
<http://www.abanet.org/intlaw/calendar/home.html>

September 16, 2011

2011 Fall CLE Conference
Denver, CO
<http://www.aila.org/content/default.aspx?docid=9352>

September 16-17, 2011

15th Annual Competition Conference
Florence, Italy
http://www.ibanet.org/Conferences/conferences_home.aspx

September 22-23, 2011

5th Biennial Global Immigration Conference
London, England
http://www.ibanet.org/Conferences/conferences_home.aspx

October 11-15, 2011

2011 Fall Meeting
Dublin, Ireland
<http://www.abanet.org/intlaw/calendar/home.html>

October 13-14, 2011

WIPO Arbitration Workshop
Geneva, Switzerland
<http://www.asil.org/events-il-calendar.cfm?mode=all&filterMonth=10&filterYear=2011>

October 20-21, 2011

Border Skirmishes: The Intersection Between Litigation and International Commercial Arbitration
Columbia, MO
<http://www.asil.org/events-il-calendar.cfm?mode=all&filterMonth=10&filterYear=2011>

October 27, 2011

12th Annual "Live from the SEC:" A Review of Recent Developments in International Securities Regulation and Enforcement
Washington, DC
<http://www.abanet.org/intlaw/calendar/home.html>

October 30-November 4, 2011

IBA Annual Conference 2011
Dubai, UAE
<http://www.ibanet.org/Conferences/IBAAnnualConfs.aspx>

November 3, 2011

Canadian Council of International Law 2011 Conference
Ottawa, Canada
<http://www.asil.org/events-il-calendar.cfm>

January 27, 2012

2012 Midyear CLE Conference
Costa Rica
<http://www.aila.org/content/default.aspx?docid=9352>

February 1-7, 2012

2012 ABA Midyear Meeting
New Orleans, LA
<http://apps.americanbar.org/intlaw/calendar/home.html>

April 17-21, 2012

2012 Spring Meeting
New York, NY
<http://apps.americanbar.org/intlaw/calendar/home.html>

Other ABA Section of International Law Events

<http://www.abanet.org/intlaw/calendar/home.html>

Other AILA events

<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



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 January 18, 2011, at the Skyline Club – 2000 Town Center, 28th Floor, Southfield, Michigan 48075.

The following voting members of the Council were present in person: Cameron S. DeLong, Margaret A. Dobrowitsky, Jeffrey F. Paulsen, Linda Armstrong, Dave Guenther, Eve Lerman, Tricia Roelofs and Andrew Thorson. Student Council Members in attendance: Tim Kaufmann. Immediate Past Chair Richard Goetz and past chairs Randolph Wright and Lois Bingham 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 4:30 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.

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 Sec-

tion’s Bylaws. The Secretary said that the notice will be filed with the minutes of the meeting. The Secretary declared that a quorum was present at the meeting, without objection.

Approval of Meeting Minutes

The Secretary circulated a draft of the minutes of the Council meeting held on November 16, 2010. After discussion, upon motion made and supported, the Council approved of the minutes without correction.

Treasurer's Report

The Treasurer, A. Reed Newland, was unable to attend the meeting and no Treasurer’s report was given.

2010 IBA Annual Meeting

Richard Goetz, immediate past chairperson, provided a report on the IBA meeting he attended in Vancouver in October 2010. Mr. Goetz reported that over 5,000 were in attendance with individuals from many nationalities. He remarked there were less Americans and Asians than expected and that many African nations were represented. Mr. Goetz described the breadth of the meeting and the many conference sessions that attendees could attend. Mr. Goetz discussed the ongoing efforts amongst International Law Sections across the United States that were attempting to build collaboration opportunities and although no conclusions were reached, Mr. Goetz shared his comments at the meeting that any organization that may be created be new and useful and not just another committee commitment for its members. Mr. Goetz described the Bar Issues Commission and noted that the State Bar of Michigan through the International Law Section is a member. Mr. Goetz recommended to the

Council that it continue to support the attendance of SBM International Law Section members at the IBA meetings as there would continue to be collaborative opportunities for the SBM International Law Section. Upon motion made and approved, the Council approved of the payment of sixty (60) British Pounds Sterling to renew the Section’s IBA membership. Cameron DeLong noted that attendance at and a request for funding of representation at the Dubai meeting in 2011 would be discussed at a later meeting.

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 fall edition of the MIL was published in October 2010 and that the winter issue would be delayed due to a committed author being unable to meet the publishing deadline. Mr. DeLong renewed his request for the large law firms, ILS Committees and ILS members to commit to publishing articles.

Annual Meeting & Program

Chair-Elect Margaret Dobrowitsky provided a handout and updated the Council and Section members on the likely topics and a draft agenda for the Section’s Annual Meeting to be held in September 2011. The Chair-Elect noted that the SBM 2011 annual meeting would be held in Dearborn at the Hyatt Regency. A discussion then ensued as to the preferred day and time of the meeting. Votes for Wednesday, Thursday and Friday (September 14, 15 and 16) were

made and it was determined that the Chair-Elect would come back to the Council with the selected date and time that made most sense for the Section and its members. 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. It was suggested that the time given to both panels be approximately equal. The Chair-Elect reported the names of the volunteer members of the Annual Meeting Planning Committee and welcomed others to join if interested. The Chair-Elect indicated that she would set up a follow up conference call for input as she hoped to have most of the details, Panel Moderators and Panelists, determined by the March 2011 meeting. Cameron DeLong noted that he was scheduled to be out of the country at the time of the Annual Meeting, but that he hoped to participate by teleconference if possible. Mr. DeLong also noted that the Annual Meeting locations have already been set for 2012 through 2014 with the location alternating between Dearborn and Grand Rapids.

SBM-ILS LinkedIn Group

The Secretary, Jeffrey Paulsen, noted that the idea of creating a LinkedIn Group devoted to the interests and members of the Section was discussed at the last Council meeting and he solicited additional ideas and input from Council and Section members. The Council agreed that creating a LinkedIn Group should be pursued and the Secretary agreed to work with volunteers to gather information and ideas to implement the SBM ILS LinkedIn Group.

Chairperson's Report

The Chairperson reported that he was pleased to see the attendance at the Section meeting, especially in view of the weather and he encouraged members to continue to attend meetings and participate.

SBM Diversity Pledge: The Chairperson noted that the Council had approved of the signing of the Pledge at the last Section meeting and he was pleased to report that the ILS was the first section of the SBM to sign the Pledge. The Chairperson then discussed a letter he received from Tony Jenkins, SBM President, encouraging all SBM members to consider signing the Pledge in their individual and/or law firm and employer capacities. The Council approved of circulating the letter from Mr. Jenkins along with a link to the Pledge so that ILS members could consider if they wished to sign the Pledge.

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 and asked Professor Troy Harris of UDM to provide a brief overview of the program. Professor Harris provided an overview requesting volunteers to serve as speakers and noted the program would be in April 2011. Upon motion made and approved, the Council approved of providing \$500 to support this program.

Master MIL Authors and Publications Schedule: The Chairperson provided an update on efforts to encourage the large Michigan based law firms to commit to at least one article per year and/or at least one program speaker per year. 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. The Chairperson indicated he would give a further report at the March 2011 Section meeting.

2010-2011 Council Meeting Schedule and Program Planning: The Chairperson provided a hand out of the proposed Council meeting dates and possible program topics for March and May 2011. The Chairperson noted that the next meeting had tentatively been scheduled for March 22nd at U of M Law School in Ann Arbor. The practical application of alternative dispute resolution that

was previously suggested by Professor Greg Fox was discussed as likely program topic. The subsequent meeting was tentatively set for May 17th, with the location and subject matter still to be determined.

Law Student Members: The Chairperson noted that the Section's By-Laws permitted the appointment by the Chairperson upon approval of the Executive Committee of up to five (5) student members. Efforts had been made to have one student from each of the five (5) Michigan Law schools appointed. It was noted that to date four (4) had been appointed and that he had just received information about a well-qualified individual, Julia Papastavridis, from U of M Law School, who would be appointed until the September 2011 Section Annual Meeting.

Wayne State University Law School U.S.-China Program: The Chairperson reminded the Council and Section members about the upcoming program being hosted at Wayne State Law School on February 11, 2011.

Wayne State University Law School Lunch Panel: The Chairperson noted that Sam Saif, the WSU Law School student member of the Section, was looking for volunteers to assist the International Law Student Association by serving on a lunch panel to discuss international law experiences with students. If Section members have an interest, they should contact Cameron DeLong or Sam Saif.

Committee Reports

The Chairperson reported that the International Business and Tax committee chair Michael Domanski could not attend this evenings meeting due to a conflict, but that this committee has been active. The Chairperson reported that Andrew Doornaert, committee chair of the International Trade committee, wished to resign due to other commitments. Richard Goetz, the chair of the Emerging Nations committee, reported on the recent activities of the committee, including organizing the

African Nation symposium held by the Section in the summer of 2010. Debra Auerbach Clephane could not attend this evenings meeting due to a conflict, but it was noted that the International Employment Law and Immigration committee has been active, including providing a presentation at the January 2010 Section meeting and presentation following this meeting by Ms. Linda Armstrong. Andrew Moore, newly appointed chair of the International Human Rights committee, reported that he was just getting up to speed on the activities of the committee and that he would have a report at later meetings. Mr. DeLong noted that a message would be sent on listserv requesting a volunteer to serve as Chair of the International Trade Committee and for additional volunteers to serve on all of the Section's committees. The Chairperson encouraged members of the Section to join the committees to assist the committee chairs.

New Business

Tim Kaufmann, the Michigan State University Law school student member, reminded the Council and Section members about an upcoming International Law Symposium at MSU and that they were looking for sponsors and volunteers to serve on four panels. The Chairperson suggested that he and Mr. Kaufmann discuss the upcoming program so that it can be presented to the Council at a future meeting.

The Secretary noted that efforts had been made to update the SBM International Law Section website, including the posting of program presentations. He directed Council and Section members to *www.michbar.org/international* for more information.

Adjournment

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

Post-Meeting Reception and Program

The program "Expanding Business into Mexico and Brazil" was presented by Tim Finerty, a shareholder in Clayton McKervery, P.C., and Immigration Overview: Mexico and Brazil was presented by Linda Armstrong, a shareholder in Butzel Long. It was noted that these presentations would be available on the SBM International Law website. A networking reception was held immediately after the adjournment of the Program.

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

State Bar of Michigan Launches New Online Career Center

The State Bar of Michigan has launched a new online career center to connect employers in the legal profession to eligible and qualified candidates looking for job opportunities.

The Bar partnered with JobTarget, an industry leader in job board development, to build a unique SBM employment marketplace with features that are different from generalist job boards in a number of ways, including:

- A highly targeted focus on employment opportunities in a certain sector, location, or demographic;
- Anonymous resume posting and job application—enabling job candidates to stay connected to the employment market while maintaining full control over their confidential information;
- An advanced "Job Alert" system that notifies candidates of new opportunities matching their own pre-selected criteria;
- Access to industry-specific jobs—and top-quality candidates.
- Employer access to a large number of job seekers.

"This new online center is built with the latest technology in career development and will give our members the most effective job searching and recruiting capabilities that exist today," said SBM President W. Anthony Jenkins. "It's a valuable member benefit. We realize how difficult it can be to match quality employees with job opportunities — the new online career center will help address that problem."

The career center is free for job seekers. Employers will pay a fee to post jobs. For more information visit the Career Center at <http://jobs.michbar.org/>.

Treasurer's Report

For the three months ending February 28, 2011

	Current Activity December	Year-to-date February
Revenue:		
International Law Section Dues	30.00	12,180.00
International Stud/Affil Dues		130.00
Total Revenue	30.00	12,310.00
Expenses:		
ListServ	25.00	125.00
Meetings		1,111.67
Annual Meeting Expenses		30.00
Travel Expenses		4,030.42
Telephone	5.36	39.04
Newsletter	1,039.55	2,100.55
Postage		5.00
Total Expenses	1,069.55	7,441.68
Net Income	(1,039.55)	4,868.32
Beginning Fund Balance:		
Fund Bal-International Law Sec		21,523.38
Total Beginning Fund Balance		21,523.38
Ending Fund Balance	(1,039.55)	26,391.70

U.S.-China Economic Law Conference

Academic experts and officials from North America, Europe, and Asia met on February 11th at the Wayne State Law School to analyze critical legal, regulatory, and policy issues surrounding the world's most important trade and investment relationship. The event was co-sponsored by Wayne State University Law School, University of Michigan Law School, and University of Michigan Center for Chinese Studies.

More information about the program can be found at <http://law.wayne.edu/us-chinaconference.php>.

The keynote speaker for the conference was Ambassador Charlene Barshefsky, *Partner, WilmerHale, Washington, D.C.* and former *U.S. Trade Representative*.



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September 14-16

2011

STATE BAR OF MICHIGAN
ANNUAL MEETING

&

SOLO AND SMALL FIRM
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Practice Management Resource Center

STATE BAR OF MICHIGAN

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