

Michigan International Lawyer

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Wayne State University Law School

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Dear Members and Colleagues:



Cameron DeLong

We have had a great start to the Section’s year. The Council meeting and programs in November at Ginopolis’ on the Grill in Farmington Hills and in January at the Skyline Club in Southfield have been very well attended. We look forward to seeing many more of you at the meetings and programs being planned in March and May.

After the Council meeting in November, the program focused on the topic *Preparing for and Responding to International Investigations*. Ashish Joshi, an attorney and shareholder in Lorandos Joshi, P.C., gave a short presentation based on his experiences and then led an interesting question and answer period that included participation by a number of attendees.

The program after the Council meeting in January was titled *Expanding Business into Mexico and Brazil*. Tim Finerty, CPA, a shareholder in Clayton & McKervey, P.C., summarized updates on issues and trends in Mexico and Brazil, changes in government policies, insights on structuring investments, and cultural considerations when expanding business into Mexico and Brazil. Linda Armstrong, a Council member and shareholder in Butzel Long, P.C., also gave a brief overview of immigration issues to be addressed by businesses that plan to expand into Mexico and Brazil.

I would like to thank Ashish Joshi, Tim Finerty, and Linda Armstrong for taking the time to prepare and give their presentations at the recent programs.

In addition to the Council meetings and programs being planned for March and May, the Section will also co-sponsor a program with the University of Detroit Mercy School of Law and the SBM Alternative Dispute Resolution Section on the “nuts and bolts” of international commercial arbitration. The program is being planned for this spring (probably April) so watch for more details in future announcements.

State Bar of Michigan President Tony Jenkins recently sent a letter to section chairpersons encouraging each section and section members to sign onto the “Michigan Pledge to Achieve Diversity and Inclusion” in an individual and/or law firm or company capacity. As you may be aware, at our November 16, 2010 meeting, the International Law Section Council approved of the International Law Section

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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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signing this pledge. I am pleased to report that the International Law Section is the first section of the State Bar of Michigan to do so. I am certain that other sections will follow our lead. The Council of the International Law Section believes it is important that you be aware of this initiative of the State Bar of Michigan so that you can decide if you wish to sign the pledge in your individual capacity and/or on behalf of your law firm or company. Please feel free to bring this pledge to the attention of other lawyers in your law firms or places of work and to lawyers that you interact with in other capacities. You can read and sign the pledge by going to <http://www.michbar.org/diversity/pledge.cfm>.

Once again I invite you to become involved in one of the five committees sponsored by the Section: Emerging Nations, International Business and Tax, International Employment & Immigration, International Human Rights, and International Trade. Contact information for each committee chairperson is listed in this issue of the MIL and on the Section's page on the State Bar of Michigan website. Please contact the chairperson of the committee that is of interest to you and find out how you can contribute to the committee's activities.

You should have received email notices of the Section's recent meetings and programs through the Section's listserv. If you have not, you may not be registered for the listserv or you may have an old email address on file with the State Bar of Michigan. Please contact the State Bar of Michigan to be sure that you are properly registered for the Section's listserv with your current email address.

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

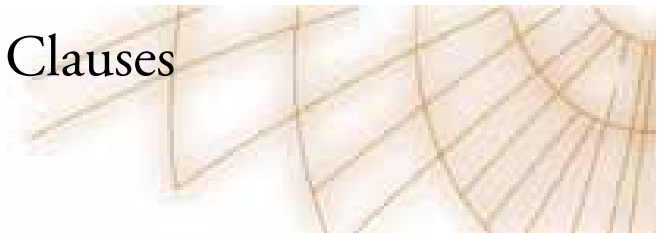
Best regards,

Cam DeLong, Chairperson



Drafting International Arbitration Clauses For Cross-Border Transactions

By Troy L. Harris



Introduction

International arbitration is the preferred method of dispute resolution in cross-border transactions for a number of reasons,¹ in large part because of the widespread ratification of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter “New York Convention”).² At the time of this writing, over 140 countries have ratified the New York Convention,³ with the result that international arbitration awards are enforceable as of right in most countries throughout the world. The right to have an award enforced in any country that has ratified the New York Convention stands in stark contrast to court judgments, which depend for their enforcement upon general considerations of international comity, inasmuch as the United States is not a party to international treaties providing a right to enforcement of US court judgments. In addition to the obvious advantage of the enforceability of international arbitration awards, other factors are commonly cited as advantages to international arbitration over court litigation, including the flexibility of arbitration proceedings and the ability of the parties to choose their own decision-maker.⁴

Despite the importance of a reliable mechanism for enforcing the parties’ rights and obligations in cross-border deals, drafting the dispute resolution provision is often left for the last minute, after the commercial and other legal terms have been agreed. In that situation, there is a danger that parties will agree to a dispute resolution provision that is unclear, self-contradictory, or otherwise “pathological” (i.e., one that

is confusing, self-contradictory, incapable of meaningful enforcement, or the like) and thereby run the risk that the dispute resolution provision itself becomes the subject of conflicting interpretations and, potentially, unenforceable at all.

For many transactions, the safe answer is to cut and paste one of the sample dispute resolution provisions promulgated by one of the name-brand arbitral institutions, such as the International Court of Arbitration of the International Chamber of Commerce (“ICC”), the London Court of International Arbitration (“LCIA”), or the International Centre for Dispute Resolution (“ICDR”). For other transactions, however, more detail may be desirable. Ideally, the international arbitration expert will have been kept in the loop during the negotiations of the commercial and other legal issues in the deal, and he will be in a position to advise on what additional details (e.g., number and qualifications of arbitrators) might be appropriate to a given deal. Even when such an ideal involvement is not possible or practical, however, the range of optional dispute resolution provisions is limited and relatively straightforward. This article surveys both some of the short-form standard clauses that will be sufficient to many cross-border transactions as well as some of the most common “optional” provisions that may be appropriate in some circumstances.

When In Doubt, Keep It Simple

The simplest approach to drafting an international arbitration dispute resolution clause is to use one of the forms used by one of the major institutions. These clauses have the virtue of being known, recognized, and enforced around the

world. The LCIA, ICC, ICDR all have their own model clauses which incorporate by reference the institution’s rules:



Troy L. Harris

ICC:

All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.⁵

ICDR:

Any controversy of claim arising out of or relating to this contract, or the breach thereof, shall be determined by arbitration administered by the International Centre for Dispute resolution in accordance with its International Arbitration Rules.⁶

LCIA:

Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause.⁷

The institutional rules, in turn, address each of the major procedural points of contention likely to arise in the course of the arbitration, including composition of the tribunal and conduct of the proceedings. The name-brand institutions are all generally regarded as neutral as

between claimants and respondents. Stated differently, unlike some fora in the United States that are notoriously plaintiff-friendly, the name-brand institutions have no such bias. Nonetheless, there tends to be some preference for certain institutions under some circumstances. For example, the LCIA is sometimes preferred for arbitrations with a London seat because the LCIA rules are designed to dovetail with the English Arbitration Act (1996). Similarly, the ICC is often chosen as the administering institution for international construction arbitrations because many international construction form agreements specify ICC arbitration. Before agreeing to arbitration administered by one of the (many) non-name brand institutions, it is important to understand what the institutions rules provide, particularly as to arbitrator selection.

Tailoring The Process To Protect The Client

When circumstances permit, it is best if the international arbitration expert can be briefed on the underlying transaction well before the major commercial and legal issues have been decided. Although the dispute resolution provision is in one sense separate from the other deal terms, the other deal terms can make the resolution of any dispute easier or more difficult. For example, in the event a dispute proceeds to international arbitration, neither party is likely to obtain records from the opposite party on anything like the scale that is common in court litigation in the US. As a result, it may be necessary to incorporate robust requirements for not only record retention but also production of records during the course of the parties' performance of the agreement.

Even where the deal terms do not need to be tailored to account for the possibility of a dispute, there are other terms that, while not defining the dispute resolution process itself, have a bearing upon it. For example,

the governing law will determine the enforceability of contractual limitations of liability. Indeed, according to a recent study:

The law governing the substance of the dispute is usually selected first, followed by the seat and then the institution/rules. 68% of respondents believe that the choices made about these factors influence one another, particularly in relation to the governing law and seat.⁸

Perhaps not surprisingly, each of the choices that parties make related to the dispute resolution process is affected by numerous considerations:

Choice of Governing Law:

Choice of governing law is mostly influenced by the perceived neutrality and impartiality of the legal system with regard to the parties and their contract, the appropriateness of the law for the type of contract and the party's familiarity with the law.⁹

Seat:

Choice of seat is mostly influenced by "formal legal infrastructure" [e.g., the jurisdiction's national arbitration law and track record in enforcing agreements to arbitrate and arbitral awards], the law governing the contract and convenience.¹⁰

Arbitral institution (if any):

Corporations look for neutrality and "internationalism" in their arbitration institutions and expect institutions to have a strong reputation and widespread recognition.¹¹

Arbitrator Selection:

Corporations want greater transparency about arbitrator availability, skills and experience and, to some extent, greater autonomy in the selection of arbitrators.¹²

Confidentiality:

50% of respondents erroneously believe that arbitration is confidential even where there is no specific clause to that effect in the arbitration rules adopted or the arbitration agreement and 12% did not know whether arbitration is confidential in these circumstances.¹³

Time and delay:

Disclosure of documents, written submissions, constitution of the tribunal and hearings are the main stages of the arbitral process that contribute to delay.¹⁴

Spotting issues that should be addressed in the dispute resolution provision is one thing. Drafting appropriate and enforceable language is another. As with many things in life, the great virtue of international arbitration—the parties' flexibility to tailor the process to suit their situation—is also its potential vice. The danger is that parties will agree to a pathological clause. Obviously, if a dispute resolution provision itself becomes the source of a dispute, many of the advantages of arbitration over litigation may be lost or compromised, particularly if one or more courts are called upon to interpret the meaning of the provision.

Fortunately, guidance is available for tailoring the dispute resolution process beyond the simple provisions for institutional arbitration noted above. Indeed, the institutions themselves often have tailoring language they recommend. The ICDR counsels parties to consider adding:

- "The number of arbitrators shall be (one or three)";
- "The place of arbitration shall be (city and/or country)";
- "The language(s) of the arbitration shall be ____."¹⁵

Similarly, the LCIA suggests the following optional provisions:

- The number of arbitrators shall be [one/three].

- The seat, or legal place, of arbitration shall be [City and/or Country].
- The language to be used in the arbitral proceedings shall be [].
- The governing law of the contract shall be the substantive law of [].¹⁶

One of the most important resources for counsel advising on the tailoring of dispute resolution provisions is the recently-issued “IBA Guidelines for Drafting International Arbitration Clauses.” The IBA Guidelines address such “advanced drafting” issues as the following:

- Authority of the arbitral tribunal and the courts with respect to provisional and conservatory measures¹⁷
- Document production¹⁸
- Confidentiality¹⁹
- Allocation of costs and fees²⁰
- Qualifications of arbitrators²¹
- Time limits²²
- Finality of arbitration²³
- Multi-tier dispute resolution²⁴
- Multi-party arbitration²⁵
- Multi-contract arbitration²⁶

With respect to each of the foregoing, the IBA Guidelines provide recommended clauses and explanatory commentary.

Industry-specific resources also may provide guidance on customizing a dispute resolution provision. For example, Appendix 31 to the Hinchey and Harris *International Construction Arbitration Handbook* (2008) contains “Sample Clauses for International Construction Contracts.” These include model clauses addressing issues that frequently arise in construction disputes, such as the power of the arbitral tribunal to consolidate related proceedings:

Consolidation. The Parties expressly agree that the arbitrators may order the consolidation of any Dispute with any claim, controversy or difference subject to arbitration that relates either to this Contract or to the Project even though not arising under this Contract, as the arbitrators may deem necessary in the interest of justice, efficiency, or on such other grounds as they may deem appropriate. In the event of any consolidation of the arbitration proceedings, any party to the consolidated proceedings may assert claims, counterclaims or cross-claims against any other party to the consolidated proceedings according to such procedures as the parties may agree or the arbitrators may require. In the event of conflicting consolidation orders, the first in time shall prevail.²⁷

In short, guidance is available to assist in the tailoring of the dispute resolution provision to meet the needs of clients in specific transactions.

Conclusion

Although the dispute resolution provision of a cross-border deal is a key factor in determining whether a party can enforce the commercial and other terms of the agreement, it is often given scant attention during negotiations. International arbitration is the dispute resolution mechanism of choice for cross-border transactions, and there are off-the-shelf clauses available from the major institutions that administer international arbitrations that will suffice for many deals. However, when circumstances allow for detailed consideration of how the arbitration process could be tailored for a particular deal, care must be taken to draft optional clauses governing such matters as arbitrator qualifications and exchange of information, so that the dispute resolution clause does not itself

become a matter of dispute. Guidelines such as those recently promulgated by the International Bar Association can be of great assistance in customizing a dispute resolution provision. However, there is no substitute for involving arbitration counsel early in the negotiation process, in order to give the client the maximum protection possible in the event of a dispute.

About the Author

Troy Harris is Visiting Assistant Professor of Law at the University of Detroit Mercy School of Law. He earned his J.D. from the University of Michigan, a Ph.D. from the University of Chicago, and a Diploma in International Commercial Arbitration from the Chartered Institute of Arbitrators in London. He is also a Fellow of the Chartered Institute of Arbitrators. Prof. Harris's teaching and scholarship focuses on international commercial arbitration, construction law, and commercial law. He is co-author of the International Construction Arbitration Handbook, published by Thomson West, a two-volume second edition of which will appear in Spring 2011. Prior to joining the UDM faculty, Prof. Harris was a member of the International Arbitration Practice Group at King & Spalding in Atlanta. Prof. Harris may be reached at 313-596-0276 or HarrisTL2@udmercy.edu.

Endnotes

- 1 *International Arbitration: Corporate Attitudes and Practices*, PRICEWATERHOUSECOOPERS AND QUEEN MARY UNIVERSITY OF LONDON, 5, (2006). (Hereinafter, “2006 Study”).
- 2 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 3, 7 I.L.M. 1046 (1968). The New York Convention has been incorporated into the Federal Arbitration Act at 9 U.S.C. §§ 201–208.
- 3 *Status-1958 Convention on the Recognition and Enforcement of Foreign*

- Arbitral Awards*, (2011), http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Jan. 4, 2011).
- 4 2006 Study, *supra* note 2, at 6-7.
- 5 http://www.iccwbo.org/court/english/arbitration/word_documents/model_clause/mc_arb_english.txt (last visited Jan. 4, 2011).
- 6 *Guide to Drafting International Dispute Resolution Clauses*, INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION, 2, available at <http://www.adr.org/si.asp?id=4945> (last visited Jan. 4, 2011). [Hereinafter “ICDR Guide”].
- 7 *Recommended Clauses, Future Disputes*, LCIA (2010), http://www.lcia.org/Dispute_Resolution_Services/LCIA_Recommended_Clauses.aspx (last visited Jan. 4, 2011).
- 8 *2010 International Arbitration Survey: Choices in International Arbitration*, WHITE & CASE AND QUEEN MARY UNIVERSITY OF LONDON, (2010), at 5. [Hereinafter, “White & Case/Queen Mary Study”].
- 9 White & Case/Queen Mary Study, *supra* note 9, at 11.
- 10 *Id.* at 17.
- 11 *Id.* at 21.
- 12 *Id.* at 25.
- 13 *Id.* at 29.
- 14 White & Case/Queen Mary Study, *supra* note 9, at 32.
- 15 ICDR Guide, *supra* note 7, at 2.
- 16 LCIA Recommended Clauses, *supra* note 8.
- 17 *IBA Guidelines for Drafting International Arbitration Clauses*, International Bar Association 2010 at 20 ([hereinafter, “IBA Guidelines”]).
- 18 *Id.* at 22.
- 19 *Id.* at 24.
- 20 *Id.* at 25.
- 21 *Id.* at 27.
- 22 *Id.* at 28.
- 23 IBA Guidelines, *supra* note 18, p. 29.
- 24 *Id.* at 30-34.
- 25 *Id.* at 35-39.
- 26 *Id.* at 39-42.
- 27 John W. Hinchey and Troy L. Harris, *International Construction Arbitration Handbook*, App. 31-4 (Thomson West 2008).

Cross-Border Investigations: Key Issues

By Ashish S. Joshi

Introduction

Multinationals operating in foreign jurisdictions must maintain corporate vigilance. Relaxing that vigilance can be a “bet the company” decision with devastating consequences; the Bhopal disaster in India that had enormous legal, financial, international and humanitarian consequences for Union Carbide Corporation, is a prime example.¹ As corporations have expanded their business and operations globally, the frequency and magnitude of cross-border investigations and transnational litigation regarding corporations’ business practices and conduct has increased dramatically. In a recent survey conducted by KPMG,² companies stated that four of the top six challenges in conducting cross-border

investigations deal with cultural and legal differences. 92% of the respondents to the survey expected cross-border investigations to continue at the current pace or to increase.

One of the reasons for the increase in cross-border investigations is a surge of U.S. investigations into extra-territorial misconduct of the U.S. corporations and/or individuals for a range of offenses, from Foreign Corrupt Practices Act (FCPA) violations to tax fraud. It used to be the case that the Department of Justice and the Securities Exchange Commission focused their enforcement efforts generally on U.S. entities and individuals. Not anymore. The DOJ and SEC have expanded their focus to foreign entities and individuals and their conduct on foreign shores. As evidenced by

the *Siemens*³ settlement, U.S. prosecutors and regulators are receiving increased cooperation from their counterparts abroad. European and other foreign law-enforcement agencies are increasingly working in tandem with U.S. authorities in areas such as antitrust, FCPA and insider trading enforcement. In a 2008 speech, SEC Chairman Christopher Cox noted, “the most striking change of the last few years is that it is no longer possible for the SEC to do its work in the United States without a truly global strategy. That’s because what goes on in other markets and jurisdictions is now intimately bound up with what happens here.”⁴



Ashish S. Joshi

Another reason for the surge in cross-border investigations is that the foreign governments have also increased their focus on corporate wrongdoing.⁵ The increased activity by the Organization for Economic Cooperation and Development (OECD) on bribery and corruption is one example. Laws that counter terrorist financing which stretch beyond any individual country's border, is another.

As a result of these two trends, cross-border legal and practical issues in internal investigations have become increasingly important. Cross-border investigations raise complications surrounding a host of issues, such as conflicting employee legal protections, data privacy and varying governmental interest in the subject of the investigation. The challenges that a company should anticipate when conducting and coordinating a cross-border investigation, include dealing with: (a) foreign evidence; (b) multilingual computer data; (c) foreign nationals; (d) foreign languages; (f) a parallel domestic and/or foreign investigation; (h) foreign laws and procedure; and (i) applicability of foreign privileges and immunities.

Cross-Border Investigations: Substantive Considerations

A preliminary issue in any cross-border investigation is to first consider which regulator is likely to exercise jurisdiction over the allegedly wrongful conduct.

Subject Matter Jurisdiction

Principles governing the extraterritorial application of U.S. law are set forth in the Restatement (Third) of Foreign Relations. Under those principles, a state may exercise jurisdiction where the alleged conduct "has or is intended to have a substantial effect within its territory."⁶ Factors that courts consider in ascertaining subject matter jurisdiction include: (1) the extent of the domestic effect; (2) the connections between the state and the entities and/or persons en-

gaging in the conduct in question; (3) the character of the conduct and the extent to which it is regulated elsewhere; (4) the degree to which justified expectations are protected; (5) the importance of the regulation internationally; (6) the law's consistency with international custom; (7) the extent of another state's interest; and (8) the likelihood that extraterritorial application would create a conflict with the laws of a foreign jurisdiction.⁷

In ascertaining subject matter jurisdiction, a court will weigh domestic and foreign considerations. Domestic considerations include: (1) the nature and extent of the specific law at issue; (2) congressional intent behind the legislation; and (3) constitutional limitations. Foreign considerations include issues of comity and fairness.⁸

Personal Jurisdiction

The existence of personal jurisdiction turns upon whether an entity has sufficient "minimum contacts" with the country exercising jurisdiction such that exercising jurisdiction does not "offend 'traditional notions of fair play and substantial justice.'"⁹

A corporation's operations within a particular jurisdiction must render it foreseeable that it could be haled into the forum court.¹⁰

An entity that "purposefully avails itself of the privileges of conducting activities within the forum state" will be subject to jurisdiction in the forum's courts.¹¹

Forum Non Conveniens

Even after exercising jurisdiction, a court may find that other interests favor having another forum hear the case. A court may dismiss a case on *forum non conveniens* grounds provided that there is another court which is available and adequate and that would also be more convenient or better serves the interests of Justice. Also, a foreign court need not provide exactly the same procedures as U.S. courts; the procedures simply have to be adequate.

Cross-Border Investigations: Procedural Considerations

The Organization and Culture of the Corporation

An effective investigation plan must take into consideration the operation and culture of a corporation. How is the organization structured? What is the organization hierarchy? Is the organizational chart strictly followed in practice? How does an entity collect, process and store information? How are the decisions made? Are the usual corporate formalities observed in making decisions? Who makes these decisions? Understanding the structure and culture of the corporate entity in question is *sine qua non* in crafting a cross-border investigation plan.

Generally, businesses function as vertical organizations. Vertical organizations are hierarchically structured and the management control is centralized. The business operations are typically compartmentalized into separate departments specializing in a specific function or product line. In these organizations, top-level management exerts strong, if not complete, control over the business operations and activities. On the other hand, horizontal organizations are structured with cross-functional and complementary teams across the organization. The corporate "hierarchy" is flattened and the employees are often cross-trained and have skills and tasks that complement other teams across the organization. Before making and implementing decisions in an investigation, the investigator must familiarize himself or herself with the organization and culture of the entity undergoing investigation. Decisions such as evaluating document retention policies, document collection strategies, witness interviews, making and implementation of corporate decisions, should be made only after considering the organization and culture of the entity.

Person in Charge of Investigation

Generally, in domestic internal investigations the Board appoints an Audit Committee or a special investigation committee to oversee the investigation. The Audit Committee then assigns the in-house counsel to conduct investigation or may appoint outside counsel in charge of the investigation and to report to the Committee. In cross-border investigations, appointing an inhouse counsel to conduct investigation would not be prudent.¹² In some foreign jurisdictions, such as the United Kingdom, adequate independence of the investigation can only be established by using outside counsel. In other countries, such as Germany, in-house counsel is generally seen as the advocate for the corporation, and therefore lacking in sufficient independence. It is always prudent to have an outside counsel be in charge of investigation – especially where the corporation desires the protection of privilege. However, no matter who leads the investigation, it is imperative that the investigation have one single point of management control. Without that, the process is likely to be chaotic.

As with the domestic investigation assembling the right team is critical to a cross-border investigation's success. It is essential to recruit counsel and staff who are knowledgeable and sensitive to the cultural, linguistic, and substantive issues that are likely to arise in a cross-border investigation. Some of the considerations in choosing a team are:

Language: Cross-border investigations inherently involve interacting with witnesses in foreign countries, often in a foreign language. When interviewing a witness, it is important that the witness is comfortable during the interview and that the investigator has confidence that both the questions and answers are clearly understood. Investigators may be required to articulate a question in a foreign

language. If so, the nuances of any response to the question posed must be comprehended. It is not uncommon for things to get lost in translation. While interpreters can always be used, it is prudent to have a skilled member on the team who is fluent in the foreign language and customs.

Culture: Cultures are the most challenging part of cross-border investigations. Different countries have different ways of conducting business. Also, investigations handled by companies and law enforcement authorities differ in different jurisdictions. Expected corporate behavior in Denmark may at times starkly differ from what would perfectly acceptable behavior in China or Indonesia. Corporate conduct that is considered to be “traditional” in the West may not be followed or even respected by the new emerging economies in the East. Dealing with this challenge can require an intimate knowledge of the country's or the region's differences. Two important challenges often arise in crossborder investigations: (1) Maintaining “face” and (2) Demonstrating respect.

Maintaining “face” is a very important issue in many cultures, especially in Asian countries. “Face” is a term that has a relationship with the concepts of honor and humiliation.¹³ This is a matter that needs to be handled delicately and by a counsel experienced in international investigations. An investigator acting as a bull in a china shop may cause a serious damage to the relationship that a company has with its agents and employees in a foreign

office. Depending upon *how* and *when* a question is asked, a witness or a person in a foreign country could maintain or lose face. The same applies to demonstrating respect. Respect can be affected by an investigator's body language as well as by the spoken word. Ignorance of basic customs in a foreign country may be viewed as being disrespectful and may hamper the investigation. Examples include not knowing how to give and receive a business card in Japan or how to address and/or treat a senior employee, not necessarily in terms of corporate hierarchy, in India.

Knowledge of foreign laws: It is important for multinational companies with overseas operations to ensure that those likely to be involved in performing cross-border investigations are aware of the relevant local customs and laws. Issues that are especially important to understand are: (1) what may be illegal in one country may in fact be custom and practice in another. For example, it is perfectly acceptable in some countries to pay a “fee” to conduct business, whereas in others such an act is considered to be illegal and may have serious consequences. (2) the manner and extent in which the local authorities will pursue prosecution; (3) whether the country where the investigation is taking place will allow the team to gather “evidence¹⁴”; (4) data privacy laws and (5) the overall attitude of local authorities to foreign-controlled businesses operating in their country.¹⁵

Cross-border investigations call for a paradigm shift. It would be a folly to

conduct a cross-border investigation from a domestic paradigm. Undertaking a paradigm shift of this nature may require a significant shift in a company's internal culture. However, if the cross-border investigation is to be a success, such a shift is essential. Companies must take cultural differences into account while conducting an investigation. In some cultures, the local management should be involved to obtain cooperation of local staff; while in others, this must be avoided at all costs. Overall, having a "local" on the investigation team is invaluable.

Collecting Evidence Abroad

In a cross-border investigation, counsel should focus on two issues when considering collecting evidence abroad: (a) the corporation's ability to obtain and transfer data or evidence from a foreign jurisdiction and (b) the ability of the U.S. regulators and prosecutors to obtain evidence from a foreign jurisdiction.

Multinational corporations often have offices in Europe, Asia, the U.S. and other parts of the world. When crafting an investigation plan, an investigator must consider the hurdles associated with collecting, reviewing and transporting evidence from foreign jurisdictions to the U.S. Production of documents in foreign countries – especially the European Union – face various regulatory hurdles. European Union regulations extend data processing and transfer protections to any corporate record that contains "any information relating to an identified or identifiable natural person." Further, as the U.S. is not generally considered a country that falls within the "safe harbor" provisions for data transfer, the repercussions for the use of the records must be evaluated. Data processing and transfer restrictions may apply even for intra-company data transfers in connection with an investigation. Further analysis must be conducted if there is a possibility of disclosure outside the company to a regulator at the conclusion of the investigation. Also,

as discussed below, national laws prohibiting the exporting of certain documents may subject a person to criminal penalties for violation. This is true even though the U.S. courts may view such laws as efforts to stymie discovery in the U.S. courts by foreign countries.

Employee consent generally is an option to overcome these data processing and transfer restrictions. However, such "consent" must be freely given and the categories of data to which an employee consents must be unambiguous and specifically listed. Moreover, in the EU, in the employer-employee context, consent is deemed to be not given freely because of inherent imbalance of bargaining power between employee and employer. While these considerations are being analyzed, the investigator should move to preserve the integrity of the data on a local basis. An investigator should also consider the location of back-up files and data storage. Are back-up files stored in different locales? Are those locales subject to similar data transfer restrictions? Was the data properly stored there under the laws of the originating jurisdiction in the first place? These questions need to be addressed and answered before the data residing in a region with data transfer restrictions is processed and/or transported. Also, if using third party forensic professionals, an investigator must ensure that the contractors have agreed to abide by appropriate confidentiality restrictions and compliance with laws governing collection, transport, storage and use of data.

An investigator must also consider the ability of other parties – especially the U.S. regulators, prosecutors and/or plaintiffs' lawyers - to obtain evidence from a foreign jurisdiction. Corporations facing potential civil litigation, governmental investigation and/or prosecution must be aware that U.S. regulators, prosecutors and/or plaintiffs' lawyers can obtain information from foreign countries in various ways. In addition to the formal methods set forth below,¹⁶ regulators are increasingly cooperating

with their foreign counterparts on an informal and *ad hoc* basis.¹⁷

The Hague Evidence Convention.

Under the Hague Evidence Convention, parties engaged in litigation in the U.S. can obtain evidence from other countries that are members of the convention. Requests for documents are sent directly through a "central authority" in each of the countries involved. The request is executed with the same measures of compulsion as are provided by the domestic law of the country that received the request. The Hague Convention is intended to streamline the process of obtaining discovery located abroad by bypassing the traditional Consular and/or diplomatic process. However, the U.S. Supreme Court has held that the U.S. plaintiffs in civil litigation are not *required* to pursue production through the Hague Convention before pursuing other methods of production.¹⁸

Letters Rogatory. A letter rogatory is a request by a domestic court to a foreign court to obtain evidence from a witness for use in a domestic forum.¹⁹ Letters rogatory may seek witness testimony or documents or serve process or judicial summons on a person or entity located in a foreign jurisdiction. Generally, for a domestic court to issue letters rogatory, litigation must be pending or be within reasonable contemplation. The process of obtaining evidence through letters rogatory is uncertain, time-consuming and burdensome. Letters rogatory however may be subject to a challenge in the recipient country.

Mutual Legal Assistance Treaties (MLATs). MLATs are treaties that run between the United States and other foreign countries by which DOJ can obtain evidence from foreign entities for use in U.S. domestic criminal investigations. MLAT's are generally used by government attorneys to summon witnesses, to compel the production of evidence, to issue search warrants, to freeze assets and

to serve process in foreign jurisdictions. MLATs are available only to government attorneys, not to private parties.

Memoranda of Understanding (MOUs). The SEC has entered into MOUs with many of their foreign regulatory counterparts by which it can obtain the assistance of the foreign regulator to obtain evidence abroad. MOU assistance can include obtaining access to the files of the foreign agency, the taking of witness statements and testimony and the production of documents. Although MOUs can facilitate cooperation, these arrangements are not a prerequisite for SEC cooperation with overseas authorities. SEC frequently cooperates and seeks cooperation on an informal and *ad hoc* basis with foreign regulators on enforcement matters.

Potential Barriers To Obtaining Information

Foreign laws, regulations and/or customs may create difficulties in obtaining relevant documents for review. As discussed above, the privacy laws along with the labor and employment laws of many countries are extremely protective of employees and allow employees to refuse to submit to questioning by company counsel who are conducting internal investigations. These laws also may preclude access to data concerning individuals and may protect employees from questioning by counsel. Two prominent examples of these laws that can substantially hamper an internal investigation are:

European Union Data Privacy Directive. On October 25, 1998, the EU Directive on Data Privacy went into effect. The Directive is a series of 34 articles and is a mandatory, comprehensive regulatory scheme aimed at protecting personal data of the citizens of EU's member states. The Directive has two articulated purposes: (1) to protect the fundamental rights and freedoms of natural persons, and in particular

their right to privacy with respect to the processing of personal data and (2) to encourage the free flow of personal data between member states. Personal data is defined broadly and includes "any information relating to an identified or identifiable natural person."

The Directive requires that: (i) Personal data must only be collected for legitimate purposes such as compliance with a legal obligation; or to which the data subject unambiguously consents; (ii) the data must be processed fairly and lawfully. The entity that is processing the personal data has a duty to inform the data subject of its identity, the purpose of the data processing, and other specifics relating to the data processing. The Directive also requires that the data must be accurate and up-to-date. "Data subjects" have the right to access their personal data and to change or delete incorrect information. Also, the entity processing the personal data must implement security measures to ensure that the data is adequately protected.

The Directive places strict limitations on the transfer of personal data from a EU member state to a third-party country. These restrictions may apply to intra-company transfers. Violation of or noncompliance with the Directive can result in penalties, fines, civil suits, criminal sanctions and even data embargoes. In order to bridge the difference in their approach to privacy, the US and the EU have entered into a "Safe Harbor Agreement." This Agreement offers a streamlined means for the US companies to comply with the EU's Data Protection Directive. Under this agreement, data transfers from the EU can take place to US companies that agree to meet certain intermediate privacy protection standards.

At times, a company may be faced with the between-the-devil-and-the-deep-sea choice. U.S. courts have not been sympathetic to companies' fear of sanctions levied by foreign countries for transporting and/or producing data within the company's possession and/or

control in U.S. litigation. U.S. courts have held that foreign statutes implementing EU's Data Directive will not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence, *even though that production may violate that statute*. See *Columbia Pictures, Inc., et al., v. Bunnell, et al.*, 245 F.R.D. 443 (C.D. Cal. Aug. 24, 2007).

Blocking Statutes. In addition to the Data Privacy Directive, some European countries, notably France, have enacted *penal* laws that prohibit transmittal of certain types of documents.

The U. S. Supreme Court has historically been critical of foreign efforts to curtail discovery in the U.S. courts by legislating such blocking statutes.²⁰

An example of such blocking statute can be found in French Penal Code, Law No. 80-538, which provides that:

Subject to treaties or international agreements and applicable laws and regulations, it is prohibited for any person to request, seek or disclose, in writing, orally or otherwise, economic, commercial, individual, financial or technical documents or information leading to the constitution of evidence with a view to foreign judicial or administrative proceedings or in connection therewith.

The statute makes an exception for discovery obtained through "treaties or international agreements" such as obtaining discovery through the means of the Hague Evidence Convention.

As with the foreign statutes implementing EU's Data Directive, U.S. courts have not accorded deference to these blocking statutes. U.S. courts have required the parties in U.S. litigation to produce documents in discovery even where the production may trigger a violation of a blocking statute. In *Enron v. J.P. Morgan Secur. Inc.*,²¹ the Bankruptcy Court in the Southern District of New York held that the threat of prosecution

under the French blocking statute was not sufficient to require that the parties implement Hague Convention discovery procedures. Citing other Second Circuit cases, the court held that “the interest of the United States to apply its procedural rules for discovery for the purpose of adjudicating fully and completely matters before its courts outweighs the interest of France’s enactment of the French Blocking Statute.”²²

However, given the increased foreign enforcement and strengthening of French blocking statute, the U. S. courts may change their attitude. Recently, a French court upheld a sentence fining a French lawyer 10,000 Euros for violating the French blocking statute.²³

Attorney-Client Privilege: Now You See It, Now You Don’t!

Protections accorded to the attorney-client privilege differ from country to country. The level of protection that the privilege commands in the U.S. generally does not exist to the same extent in other jurisdictions. Privilege is recognized in most of the common law jurisdictions, particularly those that can trace roots to the UK legal system, such as India, Hong Kong, Singapore, Australia and New Zealand.

Compared to the U.S., attorney-client privilege is given a narrow interpretation and effect in the European countries. And in some countries, such as China and Czech Republic, the privilege is not recognized at all. In the EU, the attorney-client privilege will be recognized when two conditions are met: (1) the communication is made *for the purpose* and *in the interest of the client’s defense*; and (2) the lawyer is independent.²⁴ In EU, a lawyer is only considered “independent” only if he or she is not employed by his or her client. Similarly, the privilege does not extend to in-house lawyers in France, Germany, Russia, Sweden, and Thailand. As a result, conversations between employees and in-house counsel, while

protected from disclosure in the U.S., are not likely to be protected in these countries.

Due to the fact that the scope of the privilege may vary from country to country, it is imperative that the investigator consult foreign counsel concerning the extent of protection available afforded by the attorney-client privilege in a particular foreign jurisdiction. Investigator should also check whether the privilege extends to documents or simply applies to oral communications. Even in some jurisdictions where privilege is recognized, a document can lose its privilege by leaving it in the hands of the corporate client.

U. S. courts have upheld assertions of privilege based on foreign law with respect to information that might not be protected under U.S. law. In *Eisai Ltd. v. Dr. Reddy’s Labs*, 406 F. Supp. 2d 341 (S.D.N.Y. 2005), the court refused to compel production of documents which the plaintiff contended were privileged. These documents contained legal advice provided by Japanese legal professionals known as “benrishi.” In Japan, benrishi act as patent agents or patent prosecution attorneys. The Court, recognizing the privilege and engaging in a functional analysis, held that in order to be recognized, the foreign-privilege law need not be identical to the U. S. privilege protections.

Privilege Against Self-Incrimination

As with the attorney-client privilege, privilege against self-incrimination differs around the world. In the U.S., the protections of the Fifth Amendment privilege can be asserted in any proceeding - criminal, civil, investigatory, and regulatory - as long as there is a *genuine risk* of incrimination. However, while the Fifth Amendment precludes drawing adverse inferences against defendants in criminal cases, the same is not true for civil or regulatory actions - even if the government is a party to the action

and would benefit from such adverse inference. Defendants subject to parallel proceedings therefore must make the exceedingly difficult choice whether to (i) testify at the civil proceedings and risk incriminating themselves at their criminal trials, or (ii) invoke the Fifth Amendment and risk an adverse inference in the civil proceedings.²⁵

Moreover, cross-border investigations often highlight the differences in the way the privilege is interpreted and/or protected in different jurisdictions. For instance, while in the U.S., a witness may “take the Fifth”, and refuse to answer a question because the answer may incriminate him, in Canada, the witness *must* answer the question but the use that can be made of the answer is restricted. Therefore, the Canadian protection against self-incrimination arises only *after* an incriminating answer has been compelled and the witness has “spilled the proverbial beans.”²⁶ A legitimate fear of Canadian witnesses who may have been interviewed in a crossborder investigation is whether the American authorities would be able to “make an end-run around the 5th Amendment.”²⁷

In a recent decision that has been widely criticized in Canada, the Ontario Court of Appeal ordered Conrad Black and others to testify at depositions in Canada, even though that testimony might be admissible against them in parallel U.S. proceedings.²⁸

Then there are jurisdictions where the privilege against self-incrimination is actually broader in its applicability than the U.S. For instance, Indian Constitution grants the privilege against self-incrimination not only to individuals but also to corporations.

Disclosure

Finally, an investigator has to decide *whether*, *when* and *how* to disclose the “problem” or the result of the investigation and to *which* regulatory, government and/or agency. In crossborder investigations where multiple regulators

or government agencies are involved, this becomes a complex exercise. Some considerations²⁹ on this issue include:

Timing: Who gets the first call?

Generally, in cases where a U.S. regulator is involved and the company has strong ties to the U.S., the U.S. regulator would get the first call. If the U.S. is the “home country,” in this regulatory climate, it would be difficult to imagine circumstances where a foreign regulator is made aware of the “problem” or the results of an investigation before his counterpart in the U.S. is made aware of the same.

Leaks: No regulator likes to learn about something from a press report or from a foreign counterpart – especially when the regulator has been made aware of an ongoing cross-border investigation. Disclosures or deliberate “leaks” to press is often more of a rule than an exception in many jurisdictions. Also, with increased international cooperation amongst the regulatory and law enforcement agencies, communication among regulators should be assumed. Once a disclosure is made to one, it is likely to be quickly passed to others.

Conclusion

The investigation of cross-border fraud and/or misconduct involves numerous legal issues, jurisdictions, and cultural challenges. Geographical challenges alone often overwhelm businesses faced with undertaking a cross-border investigation. The time and expense involved in transporting the investigative team to a foreign locale of the investigation can make the crossborder investigations costly. At times, the companies try to achieve the cost savings by using local counsel or investigators. However, if the issue is serious and the company ultimately plans to disclose the findings

of the investigation to the Government, it would be prudent to have the investigation conducted by one firm or counsel. As globalization continues to expand, regulators and law enforcement agencies – especially of the U.S. – can be expected to be increasingly aggressive in investigating and/or prosecuting extra-territorial conduct that they perceive to be in violation of the country’s regulatory and/or criminal law. The costs to respond to such crossborder investigations are undoubtedly high in time, resources and money. But, the response and its quality will make all the difference to the outcome.

About the Author

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Endnotes

- 1 Corporate Compliance Answer Book 2009, edited by Christopher Myers, Practising Law Institute, pg. 526.
- 2 See Cross-Border Investigations: Effectively Meeting the Challenge, KPMG International (2007) available at - <http://www.kpmg.com/Global/IssuesAndInsights/ArticlesAndPublications/Pages/Crossborderinvestigations.aspx>.
- 3 In December 2008, Germany’s Siemens AG and three of its subsidiaries entered guilty pleas to violating the FCPA. The DOJ and SEC jointly announced record fines exceeding \$800 million against Siemens for engaging in a pattern of bribery that “was unprecedented in scale and geographic reach.” U.S. Department of Justice, *Press Release No. 07-296* (April 26, 2007). Interestingly, Siemens was

investigated for “worldwide bribery”; virtually none of the offensive conduct on the part of Siemens took place in the U.S. Id.

- 4 David B. Anders, *Issues Arising In Cross-Border Investigations*, PLI Corporate Law and Practice Course Hand-book, June 2008, pg. 57.
- 5 Ashish S. Joshi, *Britain’s Fight Against The “Silver Lance”: A Radical Overhaul of the U.K.’s Bribery Laws*, *The Champion*, February 2009.
- 6 See generally Wilmore, Hendrix and Calamita, *International Litigation*, 39 *International Law* 297 (Summer 2005).
- 7 Anders, *supra*, pg. 58.
- 8 *Id.*
- 9 *Int’l Shoe Co. v. State of Wash.*, Office of Unemployment Compensation and Placement, 326 U.S. 310, 316 (1945).
- 10 Anders, *supra*; also see *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).
- 11 *Hanson v. Dencla*, 357 U.S. 235, 253 (1958).
- 12 In fact, the author firmly believes that even in domestic internal investigations, companies are better off in ap-pointing an outside counsel to lead the investigation.
- 13 See note 2, KPMG Report, pg. 15-16
- 14 In China, for example, any attempt to gather evidence without obtaining express permission from China’s central authority could expose the investigator and his team to criminal sanctions.
- 15 See note 2, KPMG Report, pg. 15-16
- 16 See Anders, *supra* at 69.
- 17 At a recent FCPA symposium, Mark Mendelsohn, the Deputy Chief of the DOJ’s Fraud Unit, announced that the year 2008 was the year of “foreign coordination” amongst the law enforcement and regulatory agencies. Mendelsohn noted that the DOJ was “now working with our foreign law enforcement colleagues in bribery investigations to a degree that we never have previously.” See “2008 Year-End FCPA Update,” Gibson, Dunn &

Crutcher LLP, at 7 (January 5, 2009), available at www.gibsondunn.com.

- 18 See *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522 (1987).
- 19 See *Intel Corp. v. Advanced Micro Processors, Inc.*, 542 U.S. 241, 29 n.1 (2004).
- 20 See, e.g., *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522 (1987).
- 21 No. 01-16034 (Bankr. S.D.N.Y. July 18, 2007).
- 22 See *Rich v. KIS Cal., Inc.*, 121 F.R.D. 254 (M.D.N.C. 1988). (French statute was “solely designed to protect French business from foreign discovery” and is different from other foreign laws “whose subject is a specifically identified legitimate interest.”); *Compagnie Francaise D’assurance Pour Le Commerce v. Phillips Petroleum Co.*, 105 F.R.D. 16, 30 (S.D.N.Y. 1984) (“plaintiff’s fear [of criminal sanction under the French Blocking Stat-ute]....appear to have no sound basis.”)
- 23 See *Couer de Cassation Chambre Criminelle*, Paris, Dec. 12, 2007, *Juris-Data* No. 2007-332254.
- 24 See *Anders supra*, at 65.
- 25 See *Anders, supra*, at 68.
- 26 See Linda Fuerst and Nadia Campion, *The Right Against Self-Incrimination: Disclosure in Cross-Border Investigations*, a paper presented at the Canadian Institute’s 19th Annual Securities Super Conference (2009).
- 27 Brian Greenspan, Brett Cohen and H. Roderick Anderson, *When the Americans Come Knocking: Immunity Implications for Compelled Testimony* (Toronto, Ontario: Osgoode Professional Development CLE, April 2007), pp. 11-12.
- 28 See *Catalyst Fund General Partner Inc. v. Hollinger Inc.*, [2005] O.J. No. 4666 (Ont. C.A.).
- 29 Henry Klehm, III, *Cross-Border Considerations In Internal Investigation*, PLI Corporate Law and Practice Course Handbook Series (June 2008), pg. 315.

A Status Report on U.S.-Led Worldwide Efforts To Combat Trafficking in Persons

By Charles Lamento and Paul J. Carrier

Introduction

Ten years ago, nations of the world undertook to create a comprehensive system for suppression of transnational crime. The United Nations Convention against Transnational Organized Crime (Organized Crime Convention) is the primary framework agreement, and 147 countries adopted Resolution 55/25 of 15 November 2000 in the months that followed.¹

The agreement includes three protocols, the first of which is the primary subject of this article: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children.² Two other protocols are part of the Organized Crime Convention, and they involve smuggling of migrants³ and illicit manufacture and trafficking in firearms, parts, components and ammunition.⁴

The purpose of this article is to sketch a basic ‘status report’ of the international legal framework of efforts to criminalize and to prevent human trafficking, as the initial ten-year effort has drawn to a close. This includes identification of certain key concepts and distinctions that are important for understanding the current status of the international framework, which to many will seem more ‘diplomatic’ than ‘legal’, and will hopefully indicate the direction in which efforts should move in the fight against the worst offenses, in what many consider to be modern slavery.⁵ The article will next advocate interim steps to move the struggle forward until the international community reaches the right point to finally implement an effective global framework. Finally, Appendix 1 provides general web addresses to several of the major global and regional, often governmental, organizations engaged in the fight against human trafficking. This is in addition to a growing number of private, non-governmental organizations (NGOs) that are engaged in efforts to eradicate this continuing problem. Appendix 2 sets out special reports of committees and commissions that occasionally deal with human trafficking issues.

An interesting feature of the Organized Crime Convention and its Protocols, including the Anti-Trafficking Protocol, are that they are efforts targeted at law enforcement and not directly at human rights protection. Evidence of this is the fact that it is the UN Crime Commission in Vienna, and not the UN human rights bodies in Geneva and New York, that developed them.⁶ Worthy of note is a distinction between humanitarian law and human rights law to help explain at least in part the more aggressive progress. Pursuant to the concept of legal positivism, international law is a set of rules exercised between states, whereas municipal law pertains to individuals and their relationship with a state and its organs.⁷ Despite significant efforts by NGOs and by some international tribunals to equate human rights with the much more established humanitarian law, from the law of war, parity between the former and the latter with regard to a binding international nature has not been reached.⁸ Accordingly, the lion’s share of enforcement regarding human trafficking is within the realm of domestic systems, relegating the eradication of human trafficking on an international level to diplomatic efforts rather than legal ones. Article 4 of the



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Organized Crime Convention clearly references the principles of sovereign equality, territorial integrity and non-intervention in domestic affairs⁹ and further prohibits extraterritorial exercises of jurisdiction.¹⁰

In addition, Article 5 of the Anti-Trafficking Protocol further requires members to adopt the appropriate legislation and other measures to prevent, investigate, and prosecute offenses, which underscores sovereign concerns and relegates activity to the diplomatic channels more than to legal ones.¹¹ Neither the Organized Crime Convention nor its Anti-Trafficking Protocol set out specific penalties for failures to honor their provisions, though the “diplomatic” litigation over perceived breaches is possible. More effective are U.S. efforts to tie aid to compliance.

The Anti-Trafficking Protocol¹²

With regard to the criminalization, the primary provisions of interest are Articles 3 and 5 of the Organized Crime Convention¹³ and Articles 4, 5, 6 and 8 of the Anti-Trafficking Protocol. Arts. 3 and 4 of the Convention and the Protocol, respectively, set out the scope. Art. 3 of the Organized Crime Convention limits its criminalization to defined offenses involving participation in an organized criminal group (Art. 5), laundering the proceeds of crime (Art. 6), and corruption (Art. 8), along with other “serious crimes” defined in Art. 2.¹⁴ Art. 3(2)(a)-(d) sets out tests for when criminal activity is transnational rather than purely domestic, the latter of which is not covered. A perceived weakness of the Convention could be that it protects sovereignty, sovereign equality and territorial integrity, which is set out in Art. 4. This explains the need for quantification of national legislation and enforcement efforts. Similarly, Art. 4 of the Anti-Trafficking Protocol limits its efforts to prevent, investigate and prosecute offenses set out in its Art. 5 of the Protocol. Art. 5 calls on the members to

adopt legislative and other measures for intentional actions set out in the Protocol’s Art. 3, recruitment, transportation, transfer, harboring, or receipt of persons by threat or use of force or other forms of coercion, abduction, fraud. Art. 3(b) makes consent of the victim irrelevant, and Art. 3(c) makes the recruitment, transportation, transfer, harboring or receipt of a child actionable “trafficking in persons” without exacerbating factors required for other offenses.

Furthermore, members to the Organized Crime Convention are called upon to establish rules for the confiscation and seizure of proceeds from covered offenses as well as property, equipment and other instrumentalities in Art. 12. Art. 13 requires the members to cooperate with any such confiscation proceedings for assets within a member nation’s territory.¹⁵ While The Anti-Trafficking Protocol does not specifically mention confiscation and seizure, nor does it refer to Arts. 12 and 13 of the Organized Crime Convention, such provisions are applicable to offenses covered by the Convention and therefore, the obligation to legislate and to cooperate transnationally attaches to all signatories of the Protocol. Likely, this will prove to be more effective, at least in the short run, than criminal prosecutions, extradition, and the host of political and diplomatic issues that would ensue from any national prosecution proceedings.

Though much was left to be done in the efforts to cause member nations to adopt appropriate laws on protection of victims of trafficking, of prevention by comprehensive policies, programs and other measures including information exchange and border measures, and prosecution, the 3 “P”s of the “3P paradigm,”¹⁶ at least a solid framework was put into place. The Organized Crime Convention and Anti-Trafficking Protocol do not focus on specifics such as timetables for quantifiable improvement. However, efforts particularly by the United States have called for reporting and quantification, which is no doubt

a driving force in an improving area of transnational law.

US Federal Efforts in Brief

In connection with its ratification of the Organized Crime Convention and the Anti-Trafficking Protocol, the United States passed the Victims of Trafficking and Violence Protection Act of 2000.¹⁷ This Act implicitly recognizes the primary national character of anti-trafficking legislative and enforcement efforts, along with the diplomatic need for further cooperation:

(24) Trafficking in persons is a transnational crime with national implications. To deter international trafficking and bring its perpetrators to justice, nations including the United States must recognize that trafficking is a serious offense. This is done by prescribing appropriate punishment, giving priority to the prosecution of trafficking offenses The United States must work bilaterally and multilaterally to abolish the trafficking industry by taking steps to promote cooperation among countries linked together by international trafficking routes. The United States must also urge the international community to take strong action in multilateral fora to engage recalcitrant countries in serious and sustained efforts to eliminate trafficking and protect trafficking victims.¹⁸

The U.S approach does, however, pressure foreign nations to improve their anti-trafficking efforts domestically by tying qualification for economic or security assistance to a recipient nation’s efforts. First, nations receiving such aid must report severe forms of human trafficking,¹⁹ defined as “sex trafficking in which a commercial sex act is induced by force, fraud or coercion, or in which

the person induced to perform such act has not attained 18 years of age²⁰ or “recruitment, harbouring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.”²¹ Further, Section 110 requires the Secretary of State to provide annual reports on aid-receiving nations²² and authorizes the President to withhold non-humanitarian, nontrade-related assistance until a nation complies with minimum standards or at least makes significant efforts to bring itself into compliance.²³

Earlier this year, the State Department issued its 10th annual report.²⁴ The Report for the first time includes reporting on the trafficking of persons in the United States, as well as for 176 other nations, broken down into three basic tiers of compliance.²⁵ Each country narrative provides information on prosecution, protection, prevention. With special aid for anti-trafficking efforts as a carrot²⁶ and potential loss of non-humanitarian and non-trade aid as the stick, the U.S. has initiated a pragmatic system for stimulating cooperation without breaching national sovereignty, without causing unintended harm to recipients of humanitarian aid due to the deficiencies of a particular government,²⁷ and without interfering with the most sacred and independent of institutions: international trade – at least on the national level. An Ambassador-at-Large has been specifically tasked from May of 2009 to direct the Office to Monitor and Combat Trafficking in Persons at the State Department.²⁸ Importantly, U.S. State Department policy has now turned to a fourth “P”: discussion and assistance with the role that public-private partnerships may play in the fight against modern forms of slavery.²⁹

US States’ Efforts in Brief

While analysis of state laws in this area is beyond the scope of this article, a

majority of states, at least 41 states, have enacted or are in the process of enacting anti-trafficking laws or are seeking to amend existing criminal laws to include human trafficking, a significant portion of such activity has commenced last year or this year.³⁰ In 2006, the State of Michigan amended its prostitution laws to criminalize labor secured by force, fraud or coercion, including provisions on the actual trafficking for forced labor, including for prostitution.³¹ Legislative efforts are currently underway to bolster the criminality of receiving.³² It is likely that state efforts will increase now that a 10-year benchmark is in place and federal as well as international efforts are augmented in light of results.

Community Based Anti-Trafficking Model

As human trafficking continues to spread in the US and throughout the world, the specifics of law and practice, including the methods of investigation and prosecution will need to change in the area of anti-trafficking efforts. It is my contention that a successful anti-trafficking model must include a community based multi-disciplinary enforcement approach that includes comprehensive partnerships with law enforcement agencies, civil groups, NGOs, and groupings of concerned citizens committed to taking steps to maintain a high public profile.

The Anti-Trafficking Protocol directs member nations to cooperate with non-governmental organizations and civil groups.³³ It is often an easy thing to hide real progress behind a lack of resources, or for filing reports rather than taking action. In countries with high levels of corruption and where the lines between government and organized crime are blurred, foot-dragging and report writing are to be expected. It is only with data and vigilance that the problems of human trafficking, and now that a framework is in place, failures to make progress, will stay in the limelight.³⁴ In light of the source of human trafficking,

of course, caution is required. In light of potential dangers, however, it is posited that whereas the criminal justice systems of member nations and NGOs are best equipped to deal with improvements in law and policy and on data collection at higher levels, members of the civil society too must play a role.

A community based multi-disciplinary approach will include the enforcement of domestic civil laws, specifically utilizing health, fire, and building code laws, utility service laws, common law nuisance, and property forfeiture laws that allows citizens to inform themselves of such rules (which are often local) and utilize the civil machinery to point out likely dens of prostitution, human trafficking and similar. There may be laws against prostitution. There may be laws establishing minimum square footage per person for safe living, often violated in situations involving human trafficking. In many places, there are even a variety of mechanisms to locate and to substantiate likely inappropriate activity. Examples could include bizarre levels of water use or electricity use at a particular location not in keeping with the ordinary uses of surrounding buildings. In places that do not have anything resembling a legal regime protecting health, safety, morals and welfare of the general populace with regard to their living conditions, it may make sense to advocate adoption of such rules, and to tie this to progress in the context of the Anti-Trafficking Protocol. Crime prevention institutions may make use of information gathered on the civil side. Admittedly, this may be a back-door mechanism of inducing nations to adopt laws and practices akin to what are best described as human rights standards.

Conclusion

The efforts underlying the State Department’s 10-year report and all that it entails, including information to be used when deciding on international aid packages, have given real meaning to the Anti-Trafficking Protocol. Credit is

also due to NGOs which have made human trafficking a priority, some of which undoubtedly assist with data collection and data sharing among themselves, the UN, the State Department, etc. The mechanism to induce progress by tying it to US aid packages, rather than to hard-line diplomacy or sanctions, has much to recommend it, particularly because it avoids the appearance of a direct criticism of national policy that calls into question national dignity and the right of sovereign nations to be masters of their own internal policies. The community-based anti-trafficking model to nurture the voluntary participation of the private sector will also focus on the economics rather than on the criminality. High-profile prosecutions may be forthcoming, domestically or internationally. In the meanwhile, the efforts of governments, NGOs, and active citizens can disrupt the flow of money, which is the root cause of human trafficking. Quite possibly, such efforts will arguably prove to be the more effective mechanism. While the State Department is reaching out to private businesses as the fourth “P” (public-private partnerships), to engage other facets of the civil sector will bring home the scope and the nature of the problem. With any luck, engaging the citizenry will lead to further improvements in domestic legislation, prosecution and all other facets of the problem, particularly in light of the sensitivities that the international framework must accommodate centering on sovereignty and positivist sentiment.

About the Authors

Charles Lamento is a legislative advocate working in Europe to eradicate crimes against humanity, centering on the outbreak of human trafficking, through the creation of anti-trafficking policies, laws, and tactics that will disrupt, dismantle, and eliminate this brutal crime. Lamento is a former criminal prosecutor and investigator with an extensive background in the investigation, prosecution, and punishment of complex crime. He is

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Endnotes

- 1 United Nations Convention against Transnational Organized Crime, Nov. 15, 2000, S. Treaty Doc. No. 108-16 (2004), 2225 U.N.T.S. 209 (also available at <http://www.unodc.org/unodc/en/treaties/CTOC/index.html#Fulltext>) (last visited Aug. 12, 2010). For ratifications, declarations and understandings, see http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsq_no=XVIII-12&chapter=18&lang=en (last visited Aug. 12, 2010). The Convention is organized into five parts: a general resolution of several pages; the Organized Crime Convention as Annex I; the Anti-Trafficking Protocol, see *infra* n. 2, as Annex II; and two other Protocols dealing with smuggling of persons and of weapons, parts and ammunition as Annexed III and IV. See *infra* n. 3 and n. 4.
- 2 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Nov. 15, 2000, S. Treaty Doc. No. 108-16 (2004), 40 I.L.M. 335, 377 (hereafter Anti-Trafficking Protocol) (also available at http://www.unodc.org/pdf/crime/a_res_55/res5525e.pdf as Annex II) (last visited Aug. 12, 2010).
- 3 Protocol against the Smuggling of Migrants by Land, Sea and Air, Nov. 15, 2000, S. Treaty Doc. No. 108-16 (2004), 2241 U.N.T.S. 480 (as Annex III and available on the web see n. 2 *supra*).
- 4 Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition, Supplementing the United Nations Convention Against Trans-

national Organized Crime, G.A. Res. 55/255, UN DOC A/RES/55/255 (June 8, 2001) (also available on the web see n. 1 *supra*).

- 5 James C. Hathaway, The Human Rights Quagmire of “Human Trafficking”, 49 VA. J. INT’L L. 1, 7 (2008) (hereafter The Human Rights Quagmire).
- 6 Ann. D. Jordan, The Annotated Guide to the Complete UN Trafficking Protocol (May 2002 as updated August 2002), Introduction pp. 2-3 and n. 5, available at <http://www.walnet.org/csis/papers/UN-TRAFFICK.PDF> (last visited Aug. 12, 2010). For analogy to the early criminalization of “trade” in slaves instead of the institution of slavery, see, generally, the Human Rights Quagmire, *supra* n. 5, pp. 7-9. See also Victims of Trafficking and Violence Protection Act of 2000, PL 106-386; 114 Stat. 1464 (Oct. 28, 2000), § 102(b)(23) (hereafter PL 106) (“The United States and the international community agree that trafficking in persons involves grave violations of human rights [] ...the international community has repeatedly condemned slavery and involuntary servitude, violence against women, and other elements of trafficking....”).
- 7 Mark W. Janis, Individuals as Subjects of International Law, 17 CORNELL INT’L L. J. 61, at 61 (1984).
- 8 See, e.g., Theodor Meron, The Humanization of Humanitarian Law, 94 AJIL 239 (2000). The law of war early began to recognize humane treatment for combatants who were, for example, captured and who surrendered, or those who were wounded. The Geneva Conventions of 1949 went a long way to extend protections to civilians caught up in the arena of armed conflict, which prior thereto were not officially recognized as a part of the law of war. The general protection of civilians or citizens, i.e., human rights, is primarily a national responsibility and not an international one. Significant efforts have been made in the last several decades, however, by international treaties and by legal scholars in an effort to require international recognition of human rights generally, which are most pressing during times

- of armed conflict. Nevertheless, there is yet a clear distinction between human rights and protections to civilians during times of armed conflict.
- 9 Organized Crime Convention, *supra* n. 1, Art. 4(1).
 - 10 *Id.*, Art. 4(2).
 - 11 *Id.*, Annex II, Art. 5(1).
 - 12 There are 117 signatories and 140 parties to this Protocol. See http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsq_n_o = X V I I I - 1 2 - a&chapter=18&lang=en (last visited Aug. 14, 2010). For a history of international efforts leading up to the Organized Crime Convention and particularly to the Anti-Trafficking Protocol, see, generally, Mohamed Y. Mattar, Incorporating the Five Basic Elements of a Model Antitrafficking in Persons Legislation in Domestic Laws: From the United Nations to the European Convention, 14 TUL. J. INT'L & COMP. L. 357, 361-366 (2006); see also Anna Zalewski, Migrants For Sale: The International Failure to Address Contemporary Human Trafficking, 29 SUFFOLK TRANSNAT'L L. REV. 113, 114-121 (2005), The Human Rights Quagmire, *supra* n. 5, pp. 15 – 25 (particularly with regard to UN efforts on slavery).
 - 13 Whereas these articles deal with participation in international organized crime generally, other articles in this Convention criminalize things like money laundering (Art. 6) and corruption (Art. 8).
 - 14 The serious crimes are those punishable by a maximum deprivation of liberty of at least four years or a more serious penalty. Organized Crime Convention, *supra* n. 1, Art. 2(b). As noted earlier, the focus is on trafficking and not acts of money laundering or corruption.
 - 15 These efforts at criminalization of transnational organized crime and efforts at confiscation and seizure have been compared to U.S. Racketeering-Influenced and Corrupt Organizations (RICO) legislation. See generally Roger S. Clark, The United Nations Convention Against Transnational Organized Crime, 50 WAYNE L. REV. 161 (2004).
 - 16 Binding international standards for prosecution and punishment are still in the process of being developed because until recently they have been nearly the exclusive subject of national (criminal) law, albeit with some diplomatic cooperation. Until a more international framework is developed, the focus on anti-trafficking should be 1) “protection” of those injured or at risk, 2) increased “prevention” by improved policies and laws such as new enforcement mechanisms, and 3) more aggressive “prosecution” (particularly at the national level, but under the watchful eye of the international community). For a general explanation of U.S. efforts, see, e.g., <http://www.state.gov/g/tip/rls/tiprpt/2009/123133.htm>.
 - 17 PL 106-386, *supra* n. 6.
 - 18 PL 106-386, § 102(b)(24).
 - 19 PL 106-386, § 104(a) (economic assistance) (amending the Foreign Assistance Act of 1961, 22 U.S.C. 2151(f), to require the addition of reporting on severe forms of trafficking in persons); PL 106-386, § 104(b) (amending Section 502B of the Foreign Assistance Act of 1961, 22 U.S.C. 2304).
 - 20 PL 106-368, § 103(8)(A).
 - 21 PL 106-368, § 103(8)(B).
 - 22 PL 106-368, §110(b)(1).
 - 23 PL 1-6-386, § 110(d)(1).
 - 24 Trafficking in Persons Report – 10th Edition, June 2010 (available at <http://www.state.gov/documents/organization/142979.pdf>) (last visited Aug. 13, 2010) (hereafter The Report).
 - 25 The Report, *supra* n. 16, pp. 47-359. The categories include a Tier 2 “Watch List” and one for “Special Cases.” The country narratives begin on p. 55.
 - 26 See *supra* n. 18 and accompanying text.
 - 27 For a recent example, see <http://www.state.gov/r/pa/prs/ps/2010/08/146155.htm> (last visited Aug. 21, 2010) (U.S. funding of Belize’s efforts to combat organized crime, gangs, and trafficking of narcotics and firearms).
 - 28 See <http://www.state.gov/r/pa/ei/biog/124083.htm> (last visited Sept. 12, 2010) (State Department biography of Ambassador CdeBaca). See also, e.g. <http://www.usun.state.gov/briefing/statements/2010/146655.htm> (last visited Sept. 12, 2010) (Statement of the US Representative to the Economic and Social Council of the UN as part of the US Mission on the launch of a UN Global plan of action).
 - 29 See <http://www.state.gov/r/pa/prs/ps/2010/09/146985.htm> (last visited Sept. 12, 2010) (Ambassador CdeBaca to address the role of public-private partnerships with regard to combating trafficking in persons). The other three ‘P’s of the 3P paradigm are prevention, protection, and prosecution.
 - 30 See <http://www.trendtrack.com/texis/cq/viewrpt?event=49f99ef0e9> (last visited Aug. 14, 2010). See also, e.g., <http://www.centerwomenpolicy.org/documents/FactSheetonStateAntiTraffickingLawsJanuary2010.pdf> (last visited 1/24/2011).
 - 31 P.A. 2006, No. 162, effective August 24, 2006, added § 462a to the Michigan Penal Code’s provisions on prostitution, MCL §§ 750.448 – 750.462. Most of the provisions concern forced labor and acts of coercion, whereas subsections 750.462g and 750.462h for the first time criminalized the trafficking aspects, including recruitment, transportation, harboring, etc., of minors for purposes sexual exploitation, and also for purposes of forced labor or services, or receiving any benefits from such activity, respectively.
 - 32 Five State House Bills, 2009 MI H.B. 5575 – 5579, were referred to the Committee on Judiciary on 21 January 2010. MI S. Jour., 2010 Reg. Sess. No. 5.
 - 33 Anti-Trafficking Protocol, *supra* n. 2, art. (3) (“Policies, programmes and other measures established in accordance with this article shall, as appropriate, include cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.”)
 - 34 See Incorporating the Five Basic Elements of a Model Antitrafficking in Persons Legislation in Domestic Laws, *supra* n. 12, pp. 406-408.

The New gTLDs

Mary Squyres



In 2011, the ICANN Board of Directors intends to create an unlimited number of new gTLDs. ICANN considers these additions to the Internet as its number one priority. The introduction of these new gTLDs, according to ICANN, will promote competition in registry services, increase consumer choice, and allow for diverse service providers.¹

Types of Names

These new gTLDs would cover the following types of names:

- Branded gTLDs, such as .Nestle;
- Industry-related gTLDs, such as .bank, .lawyer, .rockandrollmusic, etc.;
- Geographically specific names, such as .Chicago, .Beijing, etc.; and
- TLDs which use non-Latin scripts such as Chinese, Japanese, Cyrillic or Arabic characters.²

Application Process

The application process would work in the following way:

- Only corporations, organizations and institutions can apply for a new gTLD; an individual or sole proprietorship cannot apply;
- Applications will only be submitted during a certain time period, though there will most likely be subsequent filing periods;
- ICANN will examine each application for valid information, fee payment and technical ability to operate a proposed gTLD registry services with a Rights Protection Mechanism and administrative proceedings

under the Uniform Name Dispute Resolution policy for second-level domains (if the applicant chooses to do so);

- Applicants must submit proof of its legal establishment and good standing;
- The application must be marked as an open gTLD or a community-based gTLD and must show an ongoing relationship between the applicant and the relevant community and/or an endorsement by an established institution representing the community;
- Applications for geographic names must include a letter from all relevant government entities that have authority over that jurisdiction;
- Applications with non-Latin characters must comply with ICANN's Internationalizing Domain Names in Applications Protocol;
- Applications will be reviewed for string confusion against other gTLDs, ccTLDs, or reserved names,³ and
- Applications which pass the Initial Evaluation must enter into a registry agreement with ICANN within 90 days of the decision. The successful registrant will then delegate names into the root zone database.

Extended Evaluation

ICANN may determine that there is a need for an Extended Evaluation if the gTLD threatens string stability or registry service stability. An independent panel, called the Registry Services Technical Evaluation Panel (RSTEP), will

determine if the string will have an adverse effect on Internet security or stability. RSTEP will also evaluate failed applications from the initial evaluation based on the applicant's technical, operational or financial qualifications.

If RSTEP decides against registration of the gTLD, then the applicant can either withdraw the application or proceed without the registry services.⁴

Dispute Resolution

Once ICANN posts the Initial Evaluation results, a third party can object to the string during a given time period based on one of four grounds:

1. The string is confusingly similar to an existing or concurrent TLD;
2. The string infringes existing rights of the third party;
3. The string violates international norms of morality and public order, or
4. The string is unacceptable to the community affected by it.⁵

An Independent Objector with considerable experience can also file a morality and best interest of the public objection.

The factors to be considered if the string may infringe existing rights include:

- Similarity in appearance, sound and/or meaning;
- Use of the objector's rights;
- Recognition by the relevant sector of the public of the objector's rights,



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the applicant’s string, and rights belonging to a third party;

- The applicant’s intent behind applying for the string, including whether it has knowledge of the objector’s rights;
- Applicant’s use or preparation to use the string that does not interfere with the objector’s use of its rights;
- Applicant’s other related rights, and/or
- Any confusion as to source, sponsorship, affiliation or endorsement of Applicant’s string.⁶

If the two parties do not settle a filed objection, then the applicant files a response within thirty (30) days. Dispute Resolution Service Providers (DRSPS) then review the objection. Different entities review different types of objections. The DRSP will encourage negotiations and mediation to resolve the matter. If there is no resolution, then the DRSP will appoint a qualified panel to adjudicate the matter.

The DSRP will submit an “expert” determination. The panelists may then request a limited document exchange between parties, appoint experts (paid for by the parties), and conduct a hearing of no more than one day.

Once the DRSP delivers its determination, ICANN then makes a final decision on the future of the application.⁷

String Contention

Another type of resolution is the string contention process when two or more applied for gTLDs are either identical or confusingly similar. The String Similarity Examiners will handle both direct and indirect (2 gTLDs are in direct contention with a 3rd gTLD but not each other) disputes.

There are three methods to resolve string contentions:

1. A voluntary agreement where one or more of the parties withdraws its application;

2. A comparative evaluation or auction conducted by ICANN for community-based applications, and
3. An auction as a mechanism of last resort. ICANN will determine what happens to the proceeds.⁸

Fees

The applicant must pay \$US 185,100 to cover the online registration fee and the initial evaluation. The applicant may receive an \$US 86,000 credit if the gTLD is the same as an application filed in 2000 for the proof-of-concept application process.

Additional fees include the following:

- \$US 50,000 and up for an Extended Evaluation;
- \$US 1–-5,000 to respond to an objection;
- \$US 2–-8,000 for Dispute Resolution for string confusion and/or legal rights objection;
- \$US 32 - 122,000 for a morality and public order and/or community objection from both parties (prevailing party payment will be refunded);
- Partial refunds may be available when applications are withdrawn depending on the time frame, and
- US \$25,000 or more annual registry fee depending on registry transaction revenue.⁹

Implementation Recommendations Team Report

Many trademark owners and organizations have voiced serious concerns as to how owners will defend their marks against a plethora of new gTLDs and in particular second-level domains. In order to address these concerns, the ICANN Board of directors appointed a trademark task force called the Implementation Recommendation Team (IRT) in March 2009. This group was composed of practitioners (both in-house and in firms), academicians, and domain name registrars. Their mission

was to identify needed protections and safeguards. Their recommendations, as finalized with input from the trademark community, are as follows:

1. An IP Clearinghouse of protected names, specially noting major global brands in a Globally Protected Marks List;
2. An Uniform Rapid Suspension System (URS) for taking down Web sites displaying clear abuse of the system;
3. Improved post-delegation dispute resolution procedures against the gTLD register, based on the World Intellectual Property Organization (WIPO) model;
4. A thick Whois requirement for all new domains, and
5. An expanded algorithm which will stop more infringing strings to proceed by evaluating them based on sound, sight, and commercial impression.¹⁰

Applicant Guidebook

The ICANN Board of Directors has implemented third and fourthth version of the Applicant Guidebook during 2009-2010, ending with the Proposed Final Applicant Guidebook in November 2010. The fourth version was open to comment until January 15, 2011.

This version includes the following items:

- Enhanced background checks of new gTLD applicants, including exclusion of those found guilty of intellectual property offenses;
- Rights Protection Mechanisms (RPMs) which include the Trade Mark Clearinghouse (TM Clearinghouse). The TM Clearinghouse will accept all national and multi-national registered marks as part of a repository of rights and marks that will act as a bases for claims against third parties in some instances, regardless of whether a substantive review of the marks occurred;

- All gTLD registries will implement pre-launch RPMS which could be a Trade Mark Claims service (recognize all marks in the TM Clearinghouse) or a Sunrise process (recognize all text marks that conducts a substantive review prior to registration or validated by the TM Clearinghouse);
- Under the Uniform Rapid Suspension (URS), a complainant must prove that the domain name is identical or confusingly similar to a mark the complainant owns from a jurisdiction that conducts substantive review or has been validated by the TM Clearinghouse or a court procedure;
- The respondent in an URS can file an appeal up to two years after the notice of default;
- The URS must be reviewed after a year of implementation;
- The Post Delegation Dispute Resolution Policy (PDDRP) provides a recourse for trademark owners against registry owners that may act in bad faith and profit from systemic registration of infringing domain names for profit or use the registry for other improper purposes;
- The PDDRP is open to trademark owners who claim one or more of their trademarks have been infringed;
- The Panel for the PDDRP can have three members if one of the parties requests it, and
- The Panel will not award monetary damages.^[11]

Registration of gTLDs will most likely occur in 2011, with registration of second-level domain names for the new gTLDs coming in 2012.

Advantages of the New gTLDs

- Solid protection for trademark owners from infringements from any party using .brand for both top and second level domains;
- Authentic Web sites for consumers

from which to get all information and genuine goods;

- New marketing platforms for trademark owners;
- Greater opportunities to increase Internet presence;
- Easier access for consumers to brands;
- Trademark Clearinghouse to protect existing rights;
- Trademark Claims Service to notify trademark owners of possible problems;
- Prevention of fraud, counterfeiting and infringement;
- Limited access for registrants on the second domain level;
- Determination of its own eligibility rules by the gTLD owner;
- Ownership of generic names (.dog, .housebuilding) to attract more customers;
- Elimination of cybersquatters because of high costs; and
- Secure networks.

Disadvantages of the New gTLDs

- Protection of trademark rights both at the top and second level;
- Clash of trademark owners who use an identical name (APPLE I-PHONES and APPLE records);
- Plethora of Web sites for consumers to find information about a given brand;
- Costs involved instructing consumers which Web site to use;
- Costs involving the upkeep of numerous domain name registrations;
- Costs for submitting an application could exceed \$500,000 after all relevant issues are evaluated since a registrant will run a registry;
- Potential for competitors to keep consumers away from competing brands, goods, services;

- No procedure for typosquatting (registering common misspellings);
- Increased confusion from consumers as to which site is the official site, and
- Consumer confusion over what site is official for a particular brand.

Strategies for Trademark Owners in Light of the New gTLDs

Trademark owners need a strategy both for registration of marks as domain names and quite possibly a separate strategy for registration of a gTLD. Merely considering what marks to register at the second level (to the left of the dot) of gTLDs and ccTLDs is insufficient in light of the new gTLDs. However, what becomes quite clear is that the two strategies will most likely overlap.

In addition to every day management issues for a domain name portfolio, trademark owners must now view their trademark and domain name portfolios with an eye toward registering for a new gTLD, registering as part of one, or adopting a “wait and see” approach.

Registration of Domains in General

For the current portfolios, the following elements should be considered:

- A trademark strategy which defines major marks and their uses;
- Registration of major marks as domains and common misspellings of those marks, if appropriate;
- Need to register domains under irrelevant gTLDs (.pro, .aero, etc.);
- Registration of domain names to target customers;
- Measurement of user traffic for existing domains;
- Ease of use of the primary website;
- An assessment for use of generic domain names like .tv, .co, .aero, and future gTLD registrations for easy access;

- Access of website(s) from mobile phones;
 - Use of abbreviated names for texting and Tweets (e.g., limited spaces);
 - Use of marks on social media sites, e.g., Facebook, Twitter, Second Life, etc.;
 - Use of ccTLDs for access for users in specific geographic areas;
 - Use of internationalized domain names;
 - Use of category names to denote certain activity, e.g., Kia.charity;
 - Use of mark(s) for advertising purposes, e.g., diet.Coke to tie-in with advertising on other media (TV, radio, etc.), on packaging;
 - Use of mark to designate site as official, e.g., .COKE;
 - A determination of monitoring use of marks on the Internet
 - A regular update of both gTLD and second-level strategies as economic and marketing considerations change;
 - Policies on enforcement of which infringements (phishing, malware, use of a mark on a website, use of a mark as a domain name, nature of content, number of users, possible transfer of the domain, etc.); and
 - Regular update of strategies as new TLDs appear.^[12]
- Use of current second-level domains possibly not as effective as a gTLD, e.g., applerecords.com as opposed to .apple);
 - Current use of confusing second-level domains by third parties, e.g., mark1.com, mark2.com, mark3.com as opposed to .mark;
 - Need for enhanced security (banking or online transactions);
 - Return on investment (estimates of \$US 2 million for one-two years of operations);
 - Use of a gTLD that negatively impacts current marks, e.g., .Jones for people with the surname of Jones could negatively impact JONES apparel;^[13]
 - Return on investment (estimates of \$US 2 million for one-two years of operation);
 - Development of a legal, technical (data back-up, hardware, etc.) business and a three-year financial plan (projections, costs, capital expenditures, funding, contingency planning, timelines, etc.) to run a gTLD;
 - Preparation of financial statements for submission to ICANN;
 - Preparation for background checks;
 - Compliance with ICANN policies and procedures;
 - Implementation of a post-launch rights protection mechanism;
 - Protection for country and territory names;
 - Deposit of data into escrow;
 - Delivery of monthly reports to ICANN;
 - Hosting of Whois services;
 - Maintenance of relationships with ICANN-accredited registrars;
 - Maintenance of an abuse point of contact;
 - Cooperation with mandatory compliance audits;
- Implement the availability of TLD zone files;
 - Enabling of domain Name System Security Extensions (DNSSE); and
 - Determination of community for community-based TLDs.^[14]

Defensive Strategies for the New gTLDs

A “wait and see” approach may be the best one for those trademark owners who are not in a position to run a gTLD. This type of approach allows for the following considerations:

- Review of submission submitted by third parties during the 60 day application period once published by ICANN 4 weeks later;
- Objection filings to any submission that infringes a trademark owner’s rights for a 5.5 month period;
- String confusion objection (similarity to an existing TLD or another applied for TLD);
- Legal rights objection based on existing rights in a mark;
- Morality and public order objection based on generally accepted legal norms of morality and public order recognized under international principle of law;
- Community objection based on a significant portion of a community targeted by a Community-based gTLD.
- Dispute policies and procedures similar to the Uniform Dispute Resolution Process (UDRP), mostly likely handled by the Arbitration and Mediation Center of the World Intellectual Property Organization (WIPO);
- Allocation of budget expenditures to object to gTLD applications in 2011, and
- Allocation of budget expenditures for second-level registrations in 2012.^[15]

Registration of gTLDs

Many of the same factors which apply to management a domain name portfolio also apply to whether or not a trademark owner should register its marks as a gTLD. The unique considerations for this new registration level on the Internet are as follows:

- Use of a gTLD domain as easier for users than a second-level domain registration (.brinkshofer as opposed to brinkshofer.com);
- Use of multiple marks with the company name, e.g., Buick.GM, Cadillac.GM, etc.;

Whatever course a trademark owner may take, the time is now to evaluate the role of its marks on the Internet. ICANN quite possibly could take definitive action on this issue in 2011.

About the Author

Mary M. Squyres is chair of the International Trademark Practice Group at Brinks Hofer Gilson & Lione, one of the largest intellectual property specialty firms in the country with approximately 180 attorneys. Ms. Squyres has been with the firm for over 15 years.

As a shareholder and chair of the International Trademark Practice Group, Ms. Squyres manages eight staff and more than 20,000 active trademark files. Her practice includes international trademark litigation, licensing and prosecution, including determination of international filing strategies, negotiating worldwide mutual co-existence agreements and effective enforcement strategies to defend marks and prevent infringements.

Endnotes

- 1 *New GTLDs: Changing The Internet As We Know It*, LAW 360 1, (2009), available at <http://www.law360.com/technology/articles/100741/new-gtlds-changing-the-internet-as-we-know-it> (last visited Jan. 24, 2011)
- 2 *Id.* at 2-4.
- 3 *Id.* at 4-5.
- 4 *Id.* at 5.6.
- 5 FULL DRAFT APPLICANT GUIDEBOOK, THE INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS (ICANN) (3d ed. 2009), available at <http://www.icann.org/en/topics/new-gtlds/dag-en.htm>.
- 6 *Id.*
- 7 *Id.*
- 8 *Id.*
- 9 *Trademark Owners Air Concerns as ICANN Readies New Domains*, WORLD INTELLECTUAL PROPERTY REPORT, (Sept. 29, 2009).
- 10 *An Open Letter from the IRT Introducing our Work*, <http://www.icann.org/en/topics/new-gtlds/irt-final-report-trademark-protection-29may09-en.pdf> (last visited January 30, 2011).
- 11 David Taylor, *Domain Name Briefs*, WORLD INTELLECTUAL PROPERTY REPORT, (July 16, 2010), checked with review of the November 12, 2010 version of the Proposed Final Applicant Guidebook. (See printed version).
- 12 Bruce Tonkin, *Preparing for Change-Establishing a Domain Name Strategy for the gTLD Regime*, 26 WORLD TRADEMARK REVIEW 83-85 (Aug/Sept. 2010). (See printed version).
- 13 *Id.* at 85.
- 14 Jaime Angeles et al, *Features*, 19 INTA BULLETIN 5. (See printed version).
- 15 *Id.* at 6.

Event Calendar: Meetings, Seminars, & Conferences of Interest

February 1, 2011

Late-Breaking Seminar: Managing the New I-129 Export Control Certification in Your Practice
Audio Seminar
<http://www.aila.org/content/default.aspx?docid=9352>

February 9, 2011

Law of War Detention
Washington, DC
<http://www.asil.org/events-il-calendar.cfm>

February 9, 2011

U.S. Economic Sanctions on Iran: A Discussion with the Treasury and State Departments about the Implementation of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010
Washington, DC
<http://www.asil.org/events-il-calendar.cfm>

February 9-13, 2011

Gujarat National Law University
International Moot Court Competition (GIMC 2011)
Gujarat, India
<http://www.asil.org/events-il-calendar.cfm>

February 10-11, 2011

TLCP Symposium 2011 "Ten Years after 9/11: Rethinking Counter-Terrorism"
Iowa City, IA
<http://www.asil.org/events-il-calendar.cfm>

February 11, 2011

U.S.-China Economic Law Conference
Wayne State University Law School
<http://law.wayne.edu/us-chinaconference.php>

February 15, 2011

Current Issues for Artists and Entertainers
Audio Seminar
<http://www.aila.org/content/default.aspx?docid=9352>

February 21-23, 2011

Olimic Size Investments: Business Opportunities and Legal Framework
Rio de Janeiro, Brazil
http://www.ibanet.org/Conferences/conferences_home.aspx

February 23, 2011

Partnering for Compliance™, East Coast
Orlando, FL
<http://www.asil.org/events-il-calendar.cfm>

February 24, 2011

Rule of Law Informational Sessions - U.S. Department of State's International Narcotics and Law Enforcement Bureau (ILN)
TBD
<http://www.abanet.org/intlaw/calendar/home.html>

February 25, 2011

Teaching International Humanitarian Law Workshop
Atlanta, GA
<http://www.asil.org/events-il-calendar.cfm>

February 28, 2011

ECFA: A New Era Across the Taiwan Strait
Washington, DC
<http://www.asil.org/events-il-calendar.cfm>

March 4, 2011

8th Annual AILA New England Chapter Advanced Immigration Law Conference
Boston, MA
<http://www.aila.org/content/default.aspx?docid=9352>

March 7-8, 2011

16th Int'l Wealth Transfer Practice
London, England
http://www.ibanet.org/Conferences/conferences_home.aspx

March 13-15, 2011

12th Annual Private Investment Funds Conference
London, England
http://www.ibanet.org/Conferences/conferences_home.aspx

March 23, 2011

International Humanitarian Law: Emerging Issues in the Law of Armed Conflict
Washington, DC
<http://www.asil.org/events-il-calendar.cfm>

March 31-April 1, 2011

Double tax treaties: current developments in Latin America
São Paulo, Brazil
http://www.ibanet.org/Conferences/conferences_home.aspx

April 5-9, 2011

ABA 2011 Spring Meeting
Washington, DC
<http://www.abanet.org/intlaw/calendar/home.html>

April 10-12, 2011

The New Normal: The Effect of the Global Financial Crisis
Chicago, IL
http://www.ibanet.org/Conferences/conferences_home.aspx

April 27-28, 2011

Law Firm Management in the Arab World
Cairo, Egypt
http://www.ibanet.org/Conferences/conferences_home.aspx

May 2-3, 2011

Global Investments in Real Estate: Trends, Opportunities and New Frontiers
Miami, FL
http://www.ibanet.org/Conferences/conferences_home.aspx

May 5-6, 2011

Second Conference of the Americas
Miami, FL
http://www.ibanet.org/Conferences/conferences_home.aspx





May 15-18, 2011

22nd Annual Conference on
Globalisation of Investment
Funds
Boston, MA
[http://www.ibanet.org/Conferences/
conferences_home.aspx](http://www.ibanet.org/Conferences/conferences_home.aspx)

May 17-18, 2011

27th Annual IBA/IFA Joint
Franchising Conference
Washington, DC
[http://www.ibanet.org/Conferences/
conferences_home.aspx](http://www.ibanet.org/Conferences/conferences_home.aspx)

May 19-20, 2011

IBA Annual Litigation Forum:
Managing Litigation Risk
- A View From Inside The
Corporation
Krakow, Poland
[http://www.ibanet.org/Conferences/
conferences_home.aspx](http://www.ibanet.org/Conferences/conferences_home.aspx)

May 25-26, 2011

6th Annual Bar Leaders
Conference
Warsaw, Poland
[http://www.ibanet.org/Conferences/
conferences_home.aspx](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](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](http://www.abanet.org/intlaw/calendar/home.html)

June 16-19, 2011

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

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](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](http://www.aila.org/content/default.aspx?docid=9352)

September 22-23, 2011

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

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

November 3, 2011

Canadian Council of
International Law 2011
Conference
Ottawa, Canada
[http://www.asil.org/events-il-calendar.
cfm](http://www.asil.org/events-il-calendar.cfm)

Other AILA events

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

Other IBA Events

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

Section Council Meeting Minutes



A meeting of the Council (“**Council**”) of the International Law Section (“**Section**”) of the State Bar of Michigan (“**State Bar**” or “**SBM**”) was held on November 16, 2010, at Ginopolis on the Grill - Farmington Hills, Michigan 48334.

The following voting members of the Council were present in person: Cameron S. DeLong, Margaret A. Dobrowsky, Jeffrey F. Paulsen, A. Reed Newland, Linda Armstrong, Debra Auerbach Clephane, Michael Domanski, Greg Fox, Dave Guenther, Silvia Kleer, Tricia Roelofs and Eve Lerman. Student Council Members in attendance: Tim Kaufmann and Sam Saif. 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 Section’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 May 19, 2010. After discussion, upon motion made and supported, the Council approved of the minutes without correction.

Treasurer's Report

The Treasurer, A. Reed Newland, presented the financial statement of the Section for the twelve months ended September 30, 2010 and the related detailed trial balance for the same period, prepared by the Finance & Administration Division of the State Bar.

The Treasurer noted that total revenue for the Section, which comes from member and student dues, for the fiscal year, was \$12,005.00, with total expenses for the same period of \$17,081.35, resulting in a negative net income of -\$5,076.35 for the fiscal year. The beginning fund balance on October 1, 2009 was \$26,599.73 and the ending fund balance as of September 30, 2010 was \$21,523.38. The Treasurer noted that expenses were spent in the last fiscal year to bring interesting program events to the members and to encourage member participation and involvement in Section meetings and activities. The Chairperson noted that the State Bar encourages its Sections to spend money on activities in support of the Section members and that a Section funds balance should be approximately two times its annual

revenue. After discussion, upon motion made and supported, Council approved of the financial statement.

Michigan International Lawyer

Melina Lito, Senior Editor gave a status report on the Section’s publication entitled *Michigan International Lawyer* (“MIL”). Ms. Lito reported that the fall edition of the MIL for the current fiscal year was published in October 2010 and that the winter and spring issues would be published in February 2011 and April 2011, respectively.

Committee Reports

The Chairperson reported that the International Business and Tax committee has been active through the leadership and programming efforts of committee chair Michael Domanski. The Chairperson received no report from Andrew Doornaert, committee chair of the International Trade committee. Richard Goetz, the chair of the Emerging Nations committee, had a scheduling conflict and was unable to attend today’s meeting. The Chairperson did report that Mr. Goetz would be asked to provide a report at the Sections’ next meeting on his recent trip on behalf of the Section to the International Bar Association meeting in Vancouver. Debra Auerbach Clephane reported that the International Employment Law and Immigration committee has been active, including providing a presentation at the January 2010 Section meeting. Ms. Clephane indicated that she hoped to collaborate with the Immigration Section of the State Bar with a program

possibly highlighting recent immigration/employment changes involving NAFTA. Ms. Clephane also recognized Ms. Linda Armstrong for her efforts on the committee. Professor Greg Fox, chair of the International Human Rights committee, reported on the presentation at the April 2010 Section meeting and that due to his time commitments that he is recommending that Mr. Andy Moore of UDM replace him as committee chair. Professor Fox highlighted (a) recent communication with U.S. Government officials regarding the treatment of Iraqi's who were unable to obtain U.S. visas; (b) programs regarding nuclear non-proliferation; (c) programs regarding corporate responsibility with regard to human rights issues, mentioning Ford Motor in particular; and (d) his desire for the support of Amicus Brief writing.

A brief discussion then ensued as to whether the Section leadership should recommend supporting amicus briefs and the concern that the Section membership may have widely divergent opinions on the proposed amicus briefs. The Board of Commissioner liaison, Margaret Costello, clarified the SBM's process on matters of "public policy". Comments were provided by Professor Fox and other Section members. The Chairperson noted that the Section Officers would have further discussions about whether the support of amicus briefs would be in the best interests of the Section members. The Chairperson further reported that an updated list of committee chairs would be sent to the section members and that the Section website would be updated as appropriate. Finally, the Chairperson encouraged members of the Section to join the committees to assist the committee chairs and to let him know if a member was interested in joining a committee.

SBM Diversity Pledge

The Chairperson provided a hand out of the recently approved and published Diversity Pledge of the SBM and the ability of individual members and law firms to sign on to the pledge. The Secretary then provided further information as to the three focus groups held across Michigan to discuss and vet the content of the pledge; noting that promoting Diversity was one of the main objectives of the newly elected SBM President. Various questions were raised and comments were made and discussed by committee members. Upon motion made and supported, the Council and Section members present authorized the Chairperson to have the Section sign to acknowledge the Section's support of the SBM Diversity Pledge.

SBM-ILS LinkedIn Group

The Secretary introduced the idea of creating a LinkedIn Group devoted to the interests and members of the Section; noting that social media has become much more prevalent; and that the free network would create a forum for members to stay connected, provide information and provide a discussion platform for members to communicate. The Secretary noted that other SBM sections have created Group LinkedIn sites and he requested input and discussion as to what Section members thought. Various members asked questions and provided further thoughts, including questions regarding the time commitment to maintain and update the Group website, how this would give an opportunity for two way communication as the Section's current listserv is a message only system, whether the site would be limited to Section members, and potential liability questions. Ideas about the use of additional or alternative social media sites, including Facebook were

also discussed. Members volunteered to participate if needed. The members agreed that the Section leadership should further explore whether creating a social media connection would be in the best interests of the members.

Chairperson's Report

The Chairperson reported that he was pleased to see the attendance at the Section meeting and he encouraged members to continue to attend meetings and participate.

Master MIL Authors and Publications Schedule: The Chairperson provided a hand out that outlined a proposed schedule for MIL authors and publication dates. The Chair encouraged the large Michigan based law firms to commit to at least one article per year and/or at least one program speaker per year. He suggested that the fall edition of the MIL could be targeted for articles provided by the large law firms. The Chairperson also suggested that the winter edition of the MIL be targeted for articles and/or program speakers by the Section Officers and Council members. Finally, the Chairperson suggested that the spring edition of the MIL be targeted for articles by the Section's committees, reminding the committee chairs that article writing and speaking by the committees were part of the committee chairs commitments under the Section's By-Laws. A brief discussion ensued, including whether each MIL edition could be dedicated to a particular theme. The Council and Section members in attendance did not object to the Chairperson's plan and the Chairperson indicated that the suggested MIL schedule would be sent and published and that he would make contact with the chairpersons of the large law firms' international departments.

Joint International Arbitration Program with UDM School of Law and

SBM Dispute Resolution Section: The Chairperson provided a hand out of a proposed program indicating that Troy Harris of UDM contacted him to discuss collaboration with UDM and other SBM sections. The Chairperson noted that the anticipated expense to the Section would be \$500 and that this program would be in addition to the Section's regular scheduled meetings. The Chairperson requested Section member feedback and input and comments were given including whether the disadvantages of using arbitration would also be presented. The Chairperson asked for those interested to let him know and that hearing no objections that he would proceed to discuss this potential collaboration.

Possible Joint Social Event with the SBM Antitrust Section: The Chairperson reported that he was contacted by the SBM Antitrust Section to collaborate on a social event that could include third parties and/or that could also include a third party presentation. It was noted by the Chairperson that the Antitrust Section has between 350 and 400 members. After discussion, the members agreed that the Chairperson should continue to explore this potential collaboration.

UDM International Law Society: The Chairperson reported that he was contacted by the UDM International Law Society about a potential joint program focused on international law matters. It was suggested by a member that it be considered that the event be expanded to encompass all five Michigan based law schools.

2010-2011 Council Meeting Schedule and Program Planning: The Chairperson provided a hand out the proposed Council meeting and program dates in January, March and May. After discussion, including potential law student schedule conflicts, the Chairperson indicated that the dates would be published on listerv and on the Section's website; but that he was reserving the right to change the dates in the event of currently unknown circumstances.

The Chairperson indicated that he had hoped to have a discussion regarding preferred and recommended topics for the upcoming Section meetings, but that due to time constraints, that he would call a Council meeting by telephone to discuss topics and meeting locations for the remainder of 2010-2011.

Annual Meeting & Program

Chair-Elect Margaret Dobrowsky circulated a draft list of potential topics for the Section's Annual Meeting to be held in September 2011. The Chair-Elect stated that the Section decided to hold its 2010 annual meeting in Dearborn rather than during and with the State Bar of Michigan's Annual Meeting which was held in Grand Rapids. It was noted that the SBM 2011 annual meeting would be held in Dearborn and that the Section had held its annual meetings in conjunction with the SBM annual meetings in the past. It was also noted that the majority of Section members were from Southeast Michigan. The Council and Section members discussed the list of

proposed topics, ideas of locations for the meeting, asked questions and provided suggestions. The Chair-Elect indicated that she would set up a conference call for Council input as she hoped to have a selected topic by the January 2011 meeting.

Post-Meeting Reception and Program

The Chairperson reminded attendees that dinner would be provided, that a program would be presented, and that a networking reception would be held immediately after the adjournment of the Council meeting.

The Chairperson introduced Mr. Ashish Joshi, a shareholder and partner of Lorandos Joshi, as well as the program to be given by Mr. Joshi entitled "International Investigations". The program was well received with many questions asked of Mr. Joshi and much discussion amongst Section members.

Adjournment

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

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



Treasurer's Report

For the three months ending December 31, 2010

	Current Activity December	Year-to-date December
Revenue:		
International Law Section Dues	720.00	11,580.00
International Stud/Affil Dues		105.00
Total Revenue	720.00	11,685.00
Expenses:		
ListServ	25.00	75.00
Meetings		1,111.67
Annual Meeting Expenses	30.00	30.00
Travel Expenses		4,030.42
Newsletter		1,061.36
Postage		5.00
Total Expenses	55.00	6,313.45
Net Income	665.00	5,371.55
Beginning Fund Balance:		
Fund Bal-International Law Sec		21,523.38
Total Beginning Fund Balance		21,523.38
Ending Fund Balance	665.00	26,894.93

STATE BAR OF MICHIGAN

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