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New York International Chapter News

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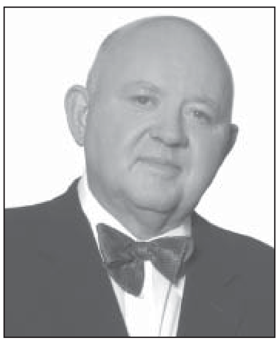
A Word From Our Chair



As this year's Chair, I am pleased to advise you of the Section's principal initiative for 2006, the establishment of a "Long-Range Planning Task Force of the International Law and Practice Section/The Next 20 Years (the "TF2026"). The purpose of the TF2026 is to review how the Section has achieved success over the past 20 years and to plan how to make the Section even stronger over the next 20 years.

The genesis of the TF2026 occurred in early May when Chair-Elect Oliver Armas and I took a taxi to our offices downtown after attending the New York State Bar Association's Section Leaders' Conference. During this taxi cab ride, we discussed bolstering the role of the Section's Committees, expanding and strengthening the Chapter Chair Program, increasing the membership of the Section to 3,000 members over the next several years, adding dynamic new members to the Executive Committee and substantially increasing the number of women on the Executive Committee. As we discussed these laudable goals, it became apparent to us that these changes could not be accomplished in one 12-month term, but they could be implemented over a few coordinated terms. While the current 12-month term of Executive office is required to ensure dynamism within the Section, it does lead the officers to focus far more on the current year's activities, such as the Seasonal Meeting in October, the Annual Meeting in January and the Executive Committee Retreat in May, rather than on structural changes. While we expect that the Section will make bold changes in the next few years, we selected TF2026 as our title to emphasize the importance of long-term planning.

We announced the TF2026 at the Executive Committee Retreat in New York on May 19, 2006 (the "Executive Retreat"). The TF2026 will exist over the combined 2006/2007 terms and will prepare a report to be delivered to the Executive Committee in December 2007. While we will not be presenting a final report until next year, here is an initial report of the progress so far.

Inside

Chapter Chairs

The current co-chairs of the Committee on International Chapters, Eduardo Ramos-Gomez, Gerry Ferguson and Jonathan Armstrong will co-head TF2026's Committee on Chapters. This group already has a plan in action, which they presented at the Executive Retreat. They noted that an important strength of the Section is its network of Chapter Chairs, located in approximately 40 international legal centers around the world. They recognized that the Section has a unique opportunity given the increasing numbers of young lawyers that are sitting for the New York bar and practicing law on a worldwide basis. While the opportunities for inclusion are vast, the group stressed the need to concentrate on the qualifications of candidates for Chapter Chairs and the need to evaluate the performance of those who are currently serving in this role. Messrs. Ramos-Gomez, Ferguson and Armstrong are currently assessing the activity of each existing Chapter and will be proposing additional international legal centers in which to establish new Chapters.

At the Executive Retreat, the Executive Committee approved a set of recommendations from the three Chapter co-chairs regarding (1) requirements for appointment as Chapter Chair, (2) procedures for appointing Chapter Chairs and (3) procedures for re-appointing Chapter Chairs. Copies of these requirements will be posted on the Section's website (http://www.nysba.org/ilp). The goal is to have co-chairs for each city chapter and at least two chairs in every country. To ensure better and more coordinated procedures for Chapter Chairs, there will be an orientation for each new Chapter Chair, and a Chapter Chair Manual will be prepared.

Jonathan Armstrong led a well-attended meeting of Chapter Chairs in Shanghai on October 18, 2006 in connection with the 2006 Fall Meeting in Shanghai. Also in connection with the Shanghai Meeting, a new Chapter was established in Tokyo. Shiro Kuniya and Shigeki Minami were named Co-Chairs of this new Chapter. The Section is exploring adding other Chapters in Asia and in the South Pacific as a result of the successful 2006 Fall Meeting in Shanghai.

Jonathan Armstrong is organizing a meeting of European Chapter Chairs in London in February 2007. The 2007 Executive Committee Retreat will be in Paris in the Spring (exact date still to be determined), in order to facilitate the attendance of our numerous Chapter Chairs in Europe.

Committees

As part of the TF2026, Chair-Elect Armas is leading efforts to review the Section's 37 committees. By the Annual Meeting in January 2007, we propose to present a new roster of committees. Some new committees will be created, others will be consolidated and some will have their scope broadened to include emerging areas of law. We have already selected many new co-chairs, who will be approved at the Executive Committee meeting in January. The new co-chairs will include a significant number of women. As indicated, one of the goals of the present term was to materially improve gender diversity on the Executive Committee. The roster of co-chairs in 2007 will make a significant step in that direction.

The Section's Website

The TF2026 will address how to make the Section's website (http://www.nysba.org/ilp) the primary place for members to obtain information about the Section, as well as international law and practice. The Section's website is already an extraordinary resource for international lawyers. Through the legal links, members of the Section can find and access, with a few keystrokes, the many source materials that are integral for the international practice of law. The website should be the first place members go when looking for an international treaty promulgated under The Hague Convention, information on the United Nations and a myriad of other issues related to the practice of international law. However, the Section needs to add more content to the website about meetings, minutes of meetings, announcements of programs and events, committee papers on issues and information on practicing law in New York for foreign lawyers, a cause that the Section has spearheaded.

Listserve Lawyer Referral

The Listserve is a group email addressed to all members of the Executive Committee. A number of members of the Section have successfully utilized the Listserve to find counsel in the Isle of Mann, Jersey, Lisbon, Luxembourg and Azerbaijan. The Section strictly limits the use of the Listserve to the Section's business. Assisting members of the International Law and Practice Section in locating competent counsel outside the United States serves an important need for New York-based counsel and foreign-based counsel who are members of the Section. We hope to include referral assistance in the definition of Section business and open up this resource to members of the Section.

2006 Fall Meeting in Shanghai

Elsewhere in this issue is a detailed report on the successful meeting that was held in Shanghai October 18, 2006 to October 22, 2006.

2007 Annual Meeting

The Annual Meeting of the Section will be held on January 23-24, 2007. The Section's MCLE Program will be "The United Nation's Impact on International Private Law, Trade and Development." The Section will present its Annual Award for Distinction in International Law and Affairs to Gillian Martin Sorenson, United Nations Assistant Secretary-General for External Affairs.

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A Word From Our Co-Editor

Welcome to the 2006 fall edition of the *New York International Chapter News*. With the globalization of the legal world, it is more important than ever to bring awareness to both the legal developments unique to specific legal jurisdictions around the world, as well as to the challenges that have developed as a result of the internationalization of the economy. This edition raises both global and local legal issues, including the challenges involved in transnational litigation and international arbitration, the issue of data security in the EU and cross-border security in North America, as well as our country-specific contributions, which review legal issues and developments in the countries of our contributing writers.

This edition also contains a summary of the ILPS Fall 2006 meeting, which took place in Shanghai, China. In light of the rapid growth of the Asian economy and the explosion of trade between China and the rest of the world, the meeting proved to be a huge success: strengthening relations and opening doors between the ILPS and the rapidly developing Asian market. I would like to thank the Shanghai Bar Association, members of the steering committee and of course the sponsors for their commitment and support.

As always, I would also like to thank everyone who contributed to this issue, which included members from Argentina, Spain, Panama, Brazil, Chile, Ecuador, UK, Canada and U.S. It is the contributions from our diverse membership that unite legal communities around the world and make this newsletter a continued success. I strongly encourage the members of our Section to contribute to our next edition.

Richard A. Scott, Co-Editor
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Of International Interest

Transnational Litigation and International Arbitration: Cross-Cultural Reflections

Much has been written about globalization of legal practice, particularly commercial and corporate practice, and the increasing similarities (often referred to as "convergence," although surely less "convergent" in the legal domain than in the economic/financial domains generally) of legal practice among jurisdictions worldwide.

In some respects, particularly as to matters of substantive law, the great divide between the world's two archetypal legal systems—the Anglo-American originated common law system (particularly, in its American form) and the Continental European originated civil law system—does seem to have narrowed. In the eyes of the author (an American-trained but multi-qualified practitioner whose career has been split between the U.S. and Europe), matters of substantive law do indeed show significant convergence in the sense that parties are generally able to implement their commercial understandings under virtually any reasonably modern legal system.

Examples would include the areas of project finance or M&A generally, or private equity in particular: Inevitably, both applicable substantive provisions of law (e.g., financial assistance, fraudulent conveyance, consideration, corporate benefit, etc.) and relevant institutional supports (e.g., roles of public notaries and registers) will vary from jurisdiction to jurisdiction. These variances will have unavoidable consequences on the documentation structure and terms, broadly reflecting the civil/common law divide. But sophisticated civil jurisdiction counsel are nonetheless able to assist clients in effecting transactions which are lawful and effective . . . , and which, in a given case, will have a remarkably similar "look and feel" to a transaction of the same nature the structure and documentation for which may have initially been pioneered in the common law world.

Less has been written about globalization in the contentious or litigation context, but some of the best recent scholarship in the area points to the existence of a series of fundamental cultural/conceptual differences as to the nature of the legal process which is so ingrained and "second nature" to practitioners that they inevitably and significantly color the nature of their advice in, and their entire appreciation of the course of, a litigious matter. (See in particular Gregory F. Hauser, "Representing Clients from Civil Law Systems in U.S. Litigation: Understanding How Clients from Civil Law Nations View Civil Litigation and Helping Them Understand U.S. Lawsuits," NYSBA *International Law Practicum*, Autumn 2004, Vol. 17, No. 2.)

The hybrid area of international commercial arbitration, in which parties, counsel and arbitrators from divergent legal traditions are required to come together and craft a common procedure for the settlement of a dispute, provides an interesting window on this aspect of globalization/convergence of legal practice. It has been recently observed that:

> the rules and procedures that commonly apply today in international arbitration reflect a mixture of common law and civil law norms . . . [and] appear to be evolving more in a common law direction that tends to favor counsel trained in the adversarial process. (Javier H. Rubinstein, "International Commercial Arbitration: Reflections of the Crossroads of the Common Law and Civil Law Traditions," 5 Chi. J. Int'l L. 303, 2004-2005.)

By way of example, the disclosure process in international arbitration is said to involve a careful balance between the full disclosure approach of the common law practice of discovery and the much more limited approach of the civil law tradition (tending to result in sanctioning partial disclosure of documents within the possession of the adverse party, but only under the strict control and discretion of the arbitral tribunal). Similarly, international arbitration today tends to give greater scope to the presentation of live oral testimony (including examination by counsel and cross-examination by adverse counsel) than the civil law tradition, with its emphasis on written testimony, would normally countenance.

In the author's experience, however, (1) despite a significant degree of globalization/convergence on the surface, the tenaciousness and material significance of ingrained cultural/conceptual differences in the approaches taken by counsel in the contentious context suggests that globalization's "convergence" in the international commercial arbitration context may be more apparent than real, or at least, more superficial than profound . . . and that counsel would be well-advised to keep this in mind: and (2) the principal source of these inherent and deep-rooted differences in the common vs. civil law "mindset" may well be the prominent role of the jury as the finder of facts in the common law (particularly U.S.) litigation system, and as such, the essential conditioner of the rules of evidence, practice and procedure in the common law mindset.

The following provides an overview of some of the most evident areas, in addition to the area of disclosure/discovery, in which the mindset of common law lawyers will clash with that of civil law lawyers:

- Pleadings: Common law—short form "notice" pleadings are considered sufficient, e.g., a complaint will generally include little more than a basic statement of the cause(s) of action and basis for jurisdiction and a general indication of the nature/range of damages (which, to the civil law lawyer, will seem vague, evasive and incomplete). In addition, under the procedural rules of most U.S. jurisdictions, "pleading in the alternative" is permitted, which can lead in some cases to a single pleading that expresses two or more conflicting theories of the case. Since the discovery process (document production, depositions) is meant to bring out the truth, incompatible versions of alleged facts are allowed at the pleading stage.

  Civil law—pleadings, including the complaint and the answer, tend to be fulsome evocations of facts, law and evidence, including as to damages claimed (to the common law lawyer, these pleadings will seem premature, doctrinaire and unpersuasive).

- Witness Testimony: Common law—views live, direct, cross-examinable testimony (including by way of deposition, i.e., examination before trial) as the best, if not the only credible, evidence of facts ("the best evidence that the sun actually rose yesterday is to have a witness so testify from his direct knowledge"); testimony tends to be wide-ranging, and, once beyond direct examination, relatively unrehearsed and spontaneous, with ample scope for impeachment and delving into questions of credibility.

  Civil law—tends to view witness testimony as merely corroborative of a defined and already-explained position and of generally limited veracity (party witnesses being assumed to lack veracity). From the perspective of a common law lawyer, the civil law approach to witness testimony often amounts to no more than a stiff and rehearsed Q&A session with limited and relatively unrevealing cross-examination.

- Unitary Trial vs. Staged Proceeding: The prominence of the jury as decider of facts requires that the common law "trial" be a unitary process which has no parallel in civil practice, where witness hearings and oral arguments (such as they are) are merely among the many phases in the staged process.

- Facts vs. Law: Common law—generally, once trial is reached, motion practice and jury instructions have established or will establish the applicable rules of law; hence the trial is a search for truth of facts which are deemed at least as important, if not more so, than the law on point.

  Civil law—the law seems to be the paramount focal point of inquiry, with what the common law lawyer would see as a doctrinaire disregard for the importance of the facts and an excessively theoretical or "scientific" approach to the inquiry.

The above are only a few relevant examples of largely unbridgeable conceptual chasms between common law and civil law practitioners' mindsets as they approach litigation, chasms which have their sources in the respective systems of civil procedure. To the extent that these conflicting approaches come to the fore in the context of international arbitration, it is in this area in particular that counsel should be wary of their own (and their colleagues') culturally conditioned conceptions, as no amount of globalization of legal practice will make these fully evaporate so long as the rules, practices and history of civil procedure vary so significantly between the world's two archetypal legal systems.

It has been recently stated that:

> [T]he confrontation between the European and U.S. systems is the greatest challenge which transnational commercial arbitration faces today . . . [I]magining and achieving accommodations between the world's two great arbitration systems is the most significant task that practitioners of transnational commercial arbitration now face. (Ewell E. Murphy, Jr., "Confronting the Confrontation of the

World's Two Great Arbitration Systems," The International Arbitration News, Vol. 3, No. 2, Summer 2003).

It is suggested that this accommodation will never be easy and the confrontation will subsist, albeit somewhat masked or muted by hybrid procedures that adopt elements characteristic of both systems. This confrontation can be a source of strategic or tactical advantage to alert, cross-culturally experienced counsel:

> Practitioners tend to be influenced by their home system, genuinely believing that what is done at home is done everywhere and constitutes the best way to do justice . . . [But t]his kind of preconceived idea can be very dangerous and indeed fatal to the case . . . Arbitration allows enormous flexibility. An experienced practitioner is able to take advantage of this flexibility in the best interest of the case and not according to preconceived ideas as to what should be done and what should not. (E. Gaillard and P. Pinsolle, "Advocacy in International Commercial Arbitration: France," in *The Art of Advocacy in International Arbitration*, R. Doak Bishop, ed., 2004).

Thus, by way of example, pre-trial discovery, aggressive witness cross-examination, forceful, fact-focused argumentation and other standard "tools of the trade" of the common law litigator may not always be desirable in an international arbitration: a common-law trained advocate may be well-advised to mute or override his/her instincts in respect of these matters, and instead to weigh carefully their merits and demerits in light of the relevant facts and circumstances—in particular, the orientation, experience, and likely mindset and expectations of opposing counsel and most especially that of the arbitral panel.

In conclusion, globalization in the legal and business environment inevitably tends toward harmonization and greater understanding of substantive legal rules, not to mention the increasing use of one common language (English being increasingly the language of choice in international business of course). But familiarity with the litigation mindset of opposing counsel, of one or more of the arbitrators in the arbitral tribunal, and even of one's own client and/or the opposing party, can be just as or more important in prevailing in an international arbitration case as a well-grounded knowledge of the relevant substantive law or fluency in the language of the arbitration.

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World Bank Battles Corruption Through New Voluntary Disclosure Program

Approximately 10 years after former World Bank Group President James Wolfensohn's famous "cancer of corruption" speech, the World Bank under Paul Wolfowitz has added another arrow to its anticorruption quiver. Specifically, on August 1st, the World Bank board of executive directors formally launched a new, proactive Voluntary Disclosure Program (VDP). The VDP allows World Bank contractors to identify, investigate and rectify privately, and without the spectre of debarment from World Bank programs, conduct that otherwise would be sanctionable by the World Bank's Sanctions Committee. Through the VDP, the World Bank has enabled the private sector to self-police and join the global fight against corruption, and, more importantly, to avoid joining the more than 330 companies on the World Bank's debarment "black list." The VDP is managed by the Bank's Department of Institutional Integrity, which investigates allegations of fraud and corruption in World Bank-financed projects and staff misconduct, and develops proactive measures for early detection and prevention of corruption.

Overview of the VDP—The VDP is open to all World Bank Group-funded activities, including those of the International Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation and the Multilateral Investment Guarantee Agency. Program participants commit to certain Terms and Conditions requiring them to (1) cease corrupt practices and commit to not engage in misconduct in the future; (2) disclose to the Bank the results of an internal investigation into past fraudulent, corrupt, collusive or coercive acts in Bank financed or supported projects or contracts; and (3) implement a robust "best practices" internal compliance program monitored by a Bank-approved third party for three years. In exchange for these commitments and full cooperation, VDP participants avoid debarment for disclosed past misconduct, they may continue to compete for and participate in Bank-supported projects, and their identities are kept confidential.

Operation of the VDP—The VDP is entirely voluntary and, for eligible parties, essentially consists of an agreement between the participant and the World Bank to a set of standardized, non-negotiable Terms and Conditions. The VDP allows a participant to investigate and provide a disclosure on the previous five years (or more) of contract performance. The VDP consists of multiple stages, including (a) entrance, (b) investigation and disclosure, and (c) compliance and monitoring. These stages are discussed in greater detail below.

Entering the VDP: Eligible candidates, i.e. companies involved in World Bank Group activities that are not under active investigation in any relevant jurisdiction, may initiate entry into the VDP by submitting an Entry Request Form. Available on the World Bank Web site, *www.worldbank.org/vdp*, the form includes company information such as firm name, address and other basic information, as well as the contact person for the program. The form can be submitted electronically or in paper form.

Upon initial review, the Bank sends the prospective participant a Background Data Sheet requesting additional information about the prospective participant's corporate structure, including details on affiliates, holding companies and the like. This data sheet also asks for office locations and areas of operation, products or services offered, and whether the applicant has been investigated in any national jurisdiction. Finally, it requests information on any affiliation with the Bank or its staff.

In reviewing the data sheet, the Bank confirms eligibility and invites the company to join the program. Within 30 days, the Bank will arrange a preliminary meeting with the applicant to discuss VDP terms, programmatic elements, details of the requested internal investigation and any concerns regarding participation. The World Bank, at its discretion or upon receipt of a timely written request and showing of good cause from the participant or the compliance monitor, may extend any deadlines.

Next, the prospective participant is asked to accept the VDP standard Terms and Conditions. The Terms and Conditions, which generally cannot be negotiated or modified, set forth the program's scope and operation, the participant's duties and responsibilities during the investigation and disclosure phase, the participant's obligations regarding future compliance, and the penalty—debarment for 10 years—for breach. The company becomes an active VDP participant when it signs the form.

Investigation and Disclosure Obligations: Upon entry into the program, the participant must conduct an internal investigation and disclose any activity subject to sanctions by the World Bank Sanctions Committee. The VDP also requires the participant to disclose any sanctionable misconduct by other firms or individuals of which the participant is or becomes aware.

To begin the investigation and disclosure process, the participant must, within 30 days of accepting the Terms and Conditions, provide the Bank a list of all contracts within the previous five years related to Bank projects. The participant also may include older contracts. Within 30 days of receiving the list, the World Bank will either accept the list or inform the participant of amendments it wishes to make. Within 60 days of the list's approval, the participant must categorize each contract as "tainted" or "untainted." The Bank will sample untainted contracts to verify proper classification and, within 90 days of receiving the list and with the participant's cooperation, will review and approve tainted contracts needing investigation by the participant.

During this review period, the participant must develop a plan for investigating tainted contracts. This internal investigation plan must conform to the World Bank's Internal Investigation and Report Protocol and be approved by the Bank. The protocol generally requires the participant to identify, secure and retain all documentation needed for the internal investigation. The protocol also directs the review of relevant documentation, including, but not limited to, correspondence, e-mails, memoranda, requests for proposals, proposals, contracts, agency or sales representative agreements, joint-venture agreements, payment documentation, bank statements, performance reports and all other documentation requested by the Bank. Further, the protocol requires interviews of anyone—including current and former officers, directors, employees, representatives, agents or contractors—who may have general or direct knowledge of the misconduct to be disclosed. These interviews will be conducted in the presence of two witnesses and documented. Finally, the protocol directs that the investigative report be prepared and submitted in a particular manner. The Terms and Conditions provide that the internal investigation shall be completed within six months.

Upon completion of the internal investigation and submission of the investigative report, the World Bank, or an independent party retained by the Bank at the participant's expense, will verify the report. The VDP requires participants to cooperate fully with the verification process, which generally includes a review of no more than 30 percent of the tainted contracts identified. This process may include additional contracts if the initial verification is not satisfactory. The VDP anticipates that the process, though extendable, will be completed within 12 months.

Compliance and Monitoring: With the initiation of the internal investigation and within 60 days of acceptance of the Terms and Conditions, the participant shall submit to the World Bank copies of current corporate compliance and ethics programs, and related internal controls. The participant also must improve its compliance program based on lessons learned during the internal investigation and recommendations from the Bank. The VDP requires the resulting compliance program to conform to international best practices derived from compliance measures published by the International Chamber of Commerce, the World Economic Forum, Transparency International and other anti-corruption authorities. Specifically, the program directs the prohibition of sanctionable conduct, including corrupt payments, coercion, collusion and fraud, and extends compliance to third parties such as agents, intermediaries and joint ventures. The VDP also addresses gifts, hospitality and charitable contributions, and requires strict financial controls, recordkeeping and auditing.

After implementation of the compliance program and verifying the investigative report, the VDP requires the participant to engage, at its own expense, a Compliance Monitor to conduct three annual reviews and submit to the World Bank a monitoring report on the participant's status and progress. The Compliance Monitor must be independent and acceptable to the World Bank. The participant is required to cooperate and provide full access for the purposes of the monitoring report. In addition, the monitor will make scheduled and unannounced visits to the participant or any affiliate. The World Bank reserves the right to extend the monitoring beyond three years if certain sanctionable conduct not subject to the 10-year debarment continues. The participant will not be deemed to have violated VDP terms and conditions if the misconduct occurs because any employee, agent or representative deliberately violates the participant's or relevant affiliates' policies for personal benefit and attempts to conceal the misconduct or delay its discovery by management. However, the participant must notify the Bank of the misconduct and take appropriate measures to address the misconduct, including disciplinary or remedial action toward the individual if it, or any of its affiliates, learns of or has reason to suspect such a situation.

VDP Perceptions and Realities—Although the VDP is new, it has received attention in the press and in legal and development communities. Considering this interest, a few points are worth clarifying.

Off the Hook?: The program provides the right to continue working on World Bank projects in exchange for disclosure of past wrongs and commitment to future anti-corruption compliance. Specifically, by joining the VDP, contractors with less-than-perfect pasts will not end up on the Bank's debarment black list. However, if a participant is found in material violation of the Terms and Conditions, it faces mandatory public 10-year debarment through a proceeding before the Bank's sanctioning body. This debarment provision is triggered if the participant:

- engages in misconduct that is sanctionable by the Bank (e.g., fraud, corruption, collusion and coercion);
- conceals or destroys information demonstrating misconduct;
- fails to properly report past or current misconduct;
- does not implement a compliance program;
- fails to hire and cooperate fully with an independent compliance monitor; or
- fails to mitigate or remove any disclosed imminent threats to human health or safety.

The World Bank retains the right to impose the debarment for any misconduct committed while in, but discovered or reported after termination from, the VDP.

While debarment results from breach of the Terms and Conditions, participation in the VDP does not waive the Bank's right to exercise any available contractual remedies. Further, program participation does not provide immunity from prosecution in any jurisdiction. The World Bank may promise not to impose administrative sanctions (i.e., debarment), but it cannot prevent the national departments or ministries of justice from enforcing their national anti-corruption (bribery, fraud, kickback, etc.) laws if such authorities independently investigate the participant's activities.

Confidentiality: Under the World Bank's sanctions procedures, companies debarred from Bank projects are listed publicly on the Bank's Web site. National anti-corruption enforcement authorities may request, and will be provided, information on these debarments. On the other hand, anything provided to the Bank for purposes of the VDP is confidential. For example, if the U.S. Department of Justice requests information on companies suspected of violating the U.S. Foreign Corrupt Practices Act, the World Bank will not disclose VDP participant data. The VDP's confidentiality policy is a result of the need to protect the participant's physical safety. Namely, the World Bank does not have a "witness protection" program or other resources to protect or otherwise defend those companies or individuals who participate in the VDP.

Costs and Benefits: There are clear benefits of participating in the World Bank VDP. Primary among these are freedom from the stigma of public debarment and the opportunity to "clean up your own house." The continuation of the revenue stream of World Bank-funded contracts and avoiding negative publicity from an anticorruption investigation are also strong positives. However, the VDP imposes significant costs that should be considered. First, fees for attorneys, other experts and assistants during the investigation, and the costs of preparing the disclosure report and devising the compliance program are at the participant's expense. The cost burden of investigation verification is on the participating company as well. Likewise, the participant must pay all costs associated with the compliance monitoring.

Therefore, while there are definite benefits to the VDP, the overall cost of participation is considerable. The World Bank, however, may provide participants with up to 50 employees with technical expertise to help them meet program obligations. Assistance may include performing the internal investigation, drafting the investigation report, and developing and monitoring implementation of the compliance program. Smaller companies' participation costs likely will be lower because less work is involved in the investigation and verification phases.

Conclusions—Born of the World Bank's desire to combat corruption globally and the private sector's desire to self-police and correct past sanctionable conduct, the VDP is an important new tool for the Bank's Department of Institutional Integrity and the Bank as a whole. Contractors, through the VDP, may come to the Bank with a full disclosure, make amends for past misconduct, fortify compliance capabilities and maintain their ability to participate in World Bank programs without debarment or publicity. In turn, the World Bank has a mechanism for reducing and addressing corruption—which studies show stifles development—so that development resources may be better used. The VDP is a win for the private sector, a win for the World Bank and a win for international development.

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SPP and/or NAFTA, Do We Have to Choose?

As we approached the 21st Century, there was general optimism that globalization, and correspondingly free trade, would eventually cause borders between nations to become irrelevant. Following September 11, 2001, the world ushered in a new normal and the idea that borders may one day become irrelevant now seemed a distant memory. The focus in North America was now on securing borders. As nations grappled with a new sense of insecurity pertaining to their borders, the economic interdependence created by successive free trade agreements had to find a way to survive. In North America, finding a way to facilitate the free trade of goods and services in the new normal had been made a priority from day one, albeit always a subservient one.[1]

While the Governments of Canada and the United States undertook immediate efforts to ensure the border continued to function, a year after these Governments launched the Smart Border Accord, the private sector called for further action. In January of 2003, the Canadian Council of Chief Executives (CCCE) published its North American Security and Prosperity Initiative (NAPSI).[2] This initiative proposed a strategy with five major elements, "reinventing borders, maximizing regulatory efficiencies, negotiation of a comprehensive resource security pact, reinvigorating the North American defence alliance and creating a new institutional framework."[3] In setting out these major elements, the CCCE called on the Parties to the North American Free Trade Agreement (the "NAFTA") "to create a zone of cooperation encompassing the continent rather than focusing security efforts on the line that separates us."[4] The initiative also sought to liberalize NAFTA Rules of Origin, harmonize regulatory standards and impose smarter regulations, all under the rubric of promoting competitiveness while enhancing health and safety.

Two years after the CCCE published its NAPSI, in March of 2005, the NAFTA Parties launched the North American Security and Prosperity Partnership (the "SPP").[5] The SPP was adopted to: establish and develop a cooperative approach to advance common security and prosperity and ensure that these seemingly opposed objectives somehow become mutually reinforcing. To that end, the SPP provides a mechanism to advance collaboration in the areas of security, trade facilitation, transportation, the environment and public health. Contrary to the calls by the CCCE, the SPP does not create a new institutional arrangement. In fact, it is neither an international agreement nor a treaty. It is merely a framework for dialogue. As a flexible arrangement that attempts to develop a collaborative approach, the SPP allows for bilateral discussions and initiatives, presumably to address the distinctions in pressing matters that arise bilaterally between the trilateral group.

While trilateral free trade is a necessary component of prosperity, it is not the guiding force of this arrangement. As noted by a White House Press Release, "the SPP is based on the principle that our prosperity is dependant on our security, and recognizes that our three great nations are bound by a shared belief in freedom, economic opportunity, and strong democratic institutions."[6] Given America's increased sensitivity to security, it is trite to say that the SPP is aimed at addressing the new normal that arrived on September 11, 2001 and therefore is primarily focused on securing, preventing and responding to both external and internal threats within North America. Although securing North America is the driving force behind the SPP, it does attempt to address the inherent threat to continental prosperity. Thus, the SPP sets out to streamline the secure and efficient movement of legitimate and low-risk traffic but in so doing, it also sets out to undertake such initiatives as liberalizing the duty free treatment for goods under the NAFTA, which used to be reserved for the NAFTA process.

Since the adoption of the SPP, the leaders of North America have reported various accomplishments. It is of no surprise that successes in the area of security are well represented. That said, focusing on the technical aspects of the initiatives only serves to detract from the real issue at hand, being that the fundamental changes that are occurring in this trilateral trade relationship are being concluded outside the framework of the NAFTA, rather than addressing the fundamental deficiencies within its structure, operation and framework.

The most recent Canadian Federal Budget pledged C$303 million to further the SPP. In the Budget materials, under the heading of Security, the Government stated:

> To support the SPP agenda, this budget will invest $303 million over two years on a range of initiatives. Key among these is the border strategy aimed at efficient and secure movement of low-risk trade and travellers to and within North America, while protecting Canadians from threats, including terrorism.[7]

In comparison, the Canadian Section of the NAFTA Secretariat's operating budget for the 2004-2005 fiscal year was $2,972,000 and the estimates for 2005-2006 were a mere $2,956,000.[8]

SPP: Next Steps

On March 31, 2006 in Cancun, Mexico, the leaders of North America met to discuss the next steps for the SPP. At this meeting, the leaders agreed to advance the SPP agenda by focusing on five priorities. These five priorities are:

1) **The North American Competitiveness Council:** to engage the private sector by allowing them to provide strategic medium- and long-term advice by providing input and ideas;

2) **Advancing Cooperation on Avian and Pandemic Influenza:** the leaders agreed to specific principles to guide collaboration;

3) **North American Energy Security Initiative:** to enhance a North American energy resource base and strengthen North American energy markets;

4) **North American Emergency Management:** to develop a common approach to critical infrastructure protection and develop and implement joint plans for cooperation and incident response, as well as coordinated training; and

5) **Smart Secure Borders:** complete certain listed activities such as establishing risk-based screening standards and compatible electronic processes for supply chain security.[9]

Mexico and the U.S. have already accepted Canada's invitation for the next trilateral meeting in 2007.

The political will to create a competitive North American market is certainly evident and the SPP has gained the political momentum and attention to be the major vehicle to accomplish this in the new era, where security concerns necessarily trump trade.[10] While the SPP is a positive mechanism to facilitate free trade within the North American continent in the new reality that was thrust upon us after September 11, 2001, one must question whether or not the resources and momentum being provided to the SPP may leave the NAFTA to languish. This arrangement, and most specifically its dispute mechanism, has come into disrepute lately, especially in light of the course of the softwood dispute. While the three leaders claim that the SPP does not seek to rewrite or renegotiate NAFTA and creates no "NAFTA-plus legal status," given some of its areas of focus, such as standards and rules of origin, it remains to be seen if this initiative will bleed resources and energy from an institution desperately in need of the same.

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Endnotes

1. On December 12, 2001 Canada and the United States signed the Smart Border Accord, which contained a 30 point plan aimed at ensuring security while simultaneously allowing for the free trade of goods and services. http://w01.international.gc.ca/minpub/Publication.aspx?isRedirect=True&publication_id=378884&Language=E&docnumber=162.
2. The Canadian Council of Chief Executives (CCCE) is a not-for-profit, non-partisan organization composed of the CEOs of some of Canada's leading enterprises. The CCCE engages in public policy research, consultation and advocacy on behalf of its members.
3. <http://www.ceocouncil.ca/en/north/north.php>.
4. CCEO NASPI proposals for reinventing the border. Accessed at http://64.26.159.96/en/north/reinventing.php.
5. See Joint Statement of the Leaders, March 23, 2005 <http://www.whitehouse.gov/news/releases/2005/03/20050323-2.html>.
6. See Fact Sheet issued by the Office of the Press Secretary dated March 23, 2005 found at http://www.whitehouse.gov/news/releases/2005/03/20050323-4.html.
7. See Chapter 3 of the Budget Plan, 2006 at http://www.fin.gc.ca/budget06/bp/bpc3de.htm. In allocating these funds specifically to the SPP, the Budget identified the following key initiatives: The establishment of the North American Competitiveness Council, which will ensure private industry has a say in making our markets more competitive; a commitment to implementing within two years, several measures aimed at continuing to create smarter and safer borders; a commitment to increasing cooperation between the three countries in response to natural or man-made disasters; a reaffirmed commitment to putting in place a trilateral framework for regulatory cooperation; an initiative to promote innovation and research and development in areas such as clean energy techniques.
8. See NAFTA Secretariat 2005-2006 Estimates at http://www.tbs-sct.gc.ca/est-pre/20052006/NAFTA-ALENA/pdf/NAFTA-ALENAr56_e.pdf.
9. http://www.spp.gov/pdf/security_and_prosperity_partnership_of_north_america_fact_sheet.pdf.
10. It is interesting to note that the NAFTA Commission met in Acapulco, Mexico on March 23rd and 24th. Minister Emerson's Press Release following this meeting notes that this meeting took place as the Prime Minister prepared to meet with Presidents Bush and Fox in Cancun on the 30th. Even this press release indicates a sort of subservience of the NAFTA to the SPP. See <http://w01.international.gc.ca/minpub/Publication.aspx?isRedirect=True&publication_id=383800&Language=E.

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The Softwood Lumber Agreement—Seven Years of Peace or Temporary Ceasefire?

Background

On September 12, 2006, Canada and the U.S. signed a new Softwood Lumber Agreement (SLA or "Agreement") after having received the support of all the major exporting Canadian provinces and a majority of companies comprising the softwood lumber industry. Broad support from the Canadian lumber industry was critical for the SLA to be signed and remains so for it to come into force since the SLA requires that at least 95% of those entitled to refunds of duties agree to relinquish their claims. On September 18, 2006, the Canadian government tabled a Notice of Ways and Means Motion, which passed by a majority of votes on September 20, as part of the process to implement Canada's commitments under the SLA and prior to introducing more detailed legislation.

The SLA is an attempt to put an end to one of the longest lasting and largest trade disputes in history. A bilateral agreement to resolve issues surrounding softwood lumber trade between the U.S. and Canada is not a new idea—the last softwood lumber agreement lasted between 1996 and 2001 and put an end to Lumber III, a protracted countervailing duty proceeding initiated by the U.S. lumber industry against Canadian imports. That agreement imposed a quota scheme under which Canadian lumber companies were permitted fee-free exports to the U.S. of 14.7 billion board feet per year for lumber first manufactured in British Columbia, Alberta, Ontario and Québec. The Canadian government was required to collect fees on any exports that exceeded this limit. Exports that exceeded 14.7 billion board feet a year were subject to a "Lower Base Fee" of approximately USD 50 per thousand board feet (MBF) (adjusted annually for inflation) for the first 650 million board feet and an "Upper Base Fee" of approximately USD 100 per MBF (adjusted annually for inflation) for greater quantities. The Canadian government also allocated export quotas for each eligible Canadian company on an annual basis. The administration of this quota system was highly contentious from its outset, with many challenges over the methods used to allocate the quota between regions and among companies.

Once that agreement expired on March 31, 2001, the U.S. lumber industry once again launched a number of challenges to imports of softwood lumber from Canada in the form of Lumber IV, involving countervailing and, for the first time, antidumping, proceedings that have snaked their way through various dispute settlement bodies including U.S. domestic courts, NAFTA Chapter 19 panels and the WTO Dispute Settlement Body. The SLA is intended to terminate these proceedings and once again take softwood lumber into the territory of "managed trade," at least for the foreseeable future.

This article evaluates the likely implications for the Canadian softwood lumber industry of the text of the SLA dated September 12, 2006.

Winning the Battle and Losing the War?

Weighing the Options. The SLA provides each of the "Regions" in Canada (i.e., Alberta, the B.C. Coast, the B.C. Interior, Manitoba, Ontario, Saskatchewan and Québec) the choice to adopt one of two regimes that would govern exports of softwood lumber by producers operating in those Regions.

Under "Option A," an export charge would apply at rates varying from 0% to 15% when the price of softwood lumber declines from over USD 355 per MBF to USD 315 or less per MBF—there is no export charge when the "prevailing monthly price" (calculated as per Annex 7A of the SLA) is over USD 355 per MBF; there is a charge of 5% when the price is between USD 336 and USD 355; a charge of 10% when the price is between USD 316 and USD 335; and a charge of 15% when the price is USD 315 or below.

Under "Option B," a lower export charge would apply, but it would be combined with a volume restraint (quota) that declines as prices fall within the USD 355 to USD 315 range—there is no export charge or volume restraint when the prevailing monthly price is over USD 355 per MBF; there is a charge of 2.5% and a quota of a maximum of that Region's share of 34% of "expected U.S. consumption" (calculated as per Annex 7D of the SLA) for the month when the price is between USD 336 and USD 355; a charge of 3% and a quota of a maximum of that Region's share of 32% of expected U.S. consumption for the month when the price is between USD 316 and USD 335; and a charge of 5% and a quota of a maximum of that Region's share of 30% of expected U.S. consumption for the month.

Option A also involves a further "anti-surge" surcharge when a "trigger volume" of exports by a Region, of approximately 10% over that Region's U.S. market share is reached. Under this mechanism, the trigger volume is reduced by the amount it is exceeded each month if the trigger volume is exceeded by 1% or less. If the trigger volume is exceeded by greater than 1%, then all the exports for that month are subject to 150% of the applicable export charge. The SLA contains a mechanism to calculate a Region's trigger volume. Each Region's U.S.

market share is specified under the SLA. For instance, the B.C. Coast Region's percentage share of U.S. consumption is 1.86, that of the B.C. Interior is 17.43, and that of Ontario is 3.15 (table 1, Annex 8, SLA).

While Option B does not involve any "anti-surge" surcharge, it includes fairly restrictive provisions limiting the degree of flexibility which a Region that adopts this option has in relation to meeting its export demands. In particular, a Region covered by Option B is permitted to exceed its "monthly quota volume" only by a maximum of 12%, and this, too, is "borrowed" from the Region's quota for the next month, or carried forward from unused quota in the previous month. The "monthly quota volume" for a Region is defined as the monthly expected U.S. consumption (calculated as per Annex 7D, SLA) times the Region's share of U.S. consumption (as specified in table 1, Annex 7B, SLA) times the price adjustment factor (as specified in table 2, Annex 7B, SLA). The penalty for a Region exceeding this limit is quite drastic—under Article XX(3) the U.S. can exercise its right to immediately and unconditionally terminate the Agreement.

Regions that adopt Option B, therefore, have to very carefully manage and predict their monthly exports to the U.S., which may or may not always be possible since lumber supply and demand is generally fairly volatile from month to month, being in response to orders that may be placed on the spot market. This may result in a Region (and, correspondingly, the companies operating in that Region) significantly underutilizing its total quota when calculated on an annual basis. For instance, a Region may be underutilizing its monthly quota by 15% for three consecutive months, and may wish to go over its monthly quota by 20% in the fourth month, but will be able to go over only by 12% (carried forward from the last month when it underutilized its quota). As a result, over the four-month period, the Region has lost the 15% that it underutilized in the first two months, lost 3% that it underutilized and could not carry forward in the third month, and lost business worth 8% of its monthly quota in the fourth month since it is not permitted to go over its limit by any more than 12% of its monthly quota.

Balancing the Scales. A unique aspect of the SLA is Article IX that provides for the repayment of part of the export charges when imports into the U.S. from third party countries as well as domestic sales by U.S. producers are rising, but Canadian imports into the U.S. are falling. In such situations, up to 5% of the export charge for a Region operating under Option A, and the entire export charge (but not the quota restriction) for regions under Option B will be repaid. This provision, in essence, ties the Canadian export charges and quotas to non-Canadian production and export.

The SLA's relatively complex mechanisms for restricting the amount of exports of softwood lumber from Canada to the U.S. are likely to give rise to a number of disputes relating to the product scope of the Agreement and how various calculations are made, and quotas allocated, among Canadian lumber producers. The U.S. domestic industry may quickly challenge any methods adopted in Canada that it perceives to be inconsistent with the SLA. While the SLA has dispute settlement provisions that envisage arbitration in accordance with the rules of the London Court of International Arbitration, continued litigation on aspects of the SLA will hardly serve the purpose of arriving at a bilateral agreement that is meant to terminate litigation with all its attendant uncertainty and expense. Indeed, the dispute resolution mechanism under the SLA itself gives rise to some concerns—only prospective remedies may be ordered, making expeditious resolution key (but not necessarily a likelihood); arbitrators cannot be citizens or residents of either the U.S. or Canada, thus making allegations of bias less likely but reducing the pool of experts on the subject; there is no provision for appeal which, while making the process shorter, also eliminates avenues for correcting potential errors.

While fraught with all these ambiguities, among the main benefits the Canadian government is seeking from the SLA would be the measure of certainty that would arise from having a specified mechanism for export control rather than being in limbo as to the antidumping and countervailing duties that the U.S. authorities may impose after each fresh round of litigation at the various fora where challenges against the U.S. trade actions are currently pending. Another major benefit that the Canadian lumber industry may see in the SLA is that it guarantees the return of USD 4 billion of the USD 5 billion in duties that Canadian companies have paid thus far in terms of duties during the course of Lumber IV. While this is only 80% of the duties paid, money in the pocket may well be considered worth twice (or at least 20% more) in the bush.

This needs to be contrasted with what the Canadian lumber industry has given up in exchange. For starters, Article XI(1) states that the SLA is "without prejudice" to the position of either Party (i.e., the U.S. and Canada) as to the validity of the antidumping and countervailing orders made against Canadian softwood lumber imports, or as to the legal effect of any decision of any court or other dispute settlement body regarding those orders. This means that the SLA potentially wipes out any gains that the industry has made in terms of victories at the various fora before which softwood lumber-related litigation is ongoing. In particular, most recently, in August 2006, the WTO Appellate Body reversed a November 2005 WTO Compliance Panel finding that a U.S. International Trade Commission (ITC) determination of November 2004 that Canadian imports threaten to injure the U.S. domestic industry was consistent with U.S. WTO obligations. Similarly, in August 2005, the Extraordinary Challenge Committee of the NAFTA ruled that the NAFTA bilateral

Panel that had made a ruling in August 2004 that the ITC's determination that the Canadian imports threaten to injure the U.S. domestic industry was unsubstantiated, did not violate NAFTA rules.

Second, under the SLA, the Canadian lumber industry will be repaid only 80% of the duties it has paid to the U.S. government since the termination of the previous agreement. What makes this worse is that the various duties imposed by the U.S. authorities have served the U.S. domestic industry well, permitting them to reap substantially increased profits from relatively high lumber prices. The Canadian industry will not benefit to any extent from these high prices, despite the fact that the ITC never found that imports from Canada caused injury to the U.S. industry, and NAFTA and WTO panels have found that the ITC's findings that Canadian imports threatened to cause injury were unsubstantiated. (See the Opinion and Order of the Extraordinary Challenge Committee of the NAFTA, ECC-2004-1904-01USA, dated August 10, 2005; the Second Remand Decision of the NAFTA Panel, USA-CDA-2002-1904-07, dated August 31, 2004; and the decision of the WTO Appellate Body, WT/DS264/AB/RW, dated August 15, 2006). In other words, by having countervailing and antidumping duties that were not legally justified imposed, the U.S. lumber industry has gained the protection and benefits of high import prices, while the Canadian lumber industry has to settle for a refund of only 80% of the duties that were illegally imposed to begin with.

Moreover, the calculation of export charges under the SLA is based on a relatively high benchmark for softwood lumber prices, agreed upon at the peak of a U.S. housing construction and renovation boom. As the housing market in the U.S. cools, as it has shown signs of doing, the price of softwood lumber will drop, making it likely that the highest rates of export charges, and the smallest quotas, will apply. For instance, the "Random Lengths Framing Lumber Composite Price" as used by the SLA (see Annex 7A), for September 1, 2006 is USD 304 per MBF. Indeed, since mid-May, 2006, this price has been below the USD 355 trigger, and since mid-July 2006 below the USD 315 limit that triggers the highest level of export charge and lowest quota.

Further, half of the USD 1 billion not being recovered by Canadian lumber companies under the SLA will in fact go to a coalition of U.S. lumber companies that supports countervailing and dumping measures against Canadian imports. As per Annex 2C of the SLA, the U.S.-based Coalition for Fair Lumber Imports will receive USD 500 million. Another USD 50 million will go to the binational industry council to be set up to promote increased co-operation between the U.S. and Canadian softwood lumber industries. The final USD 450 million of the USD 1 billion will go to a "meritorious initiatives account" that will be used to support certain lumber-related initiatives in the U.S.

A long-term solution that puts an end to costly and uncertain continuing litigation could be well worth the USD 1 billion and potential legal victories that the Canadian industry must be willing to give up. After all, the victories before the NAFTA and the WTO could mean little considering that imposing retaliatory measures against the U.S. is hardly a viable solution for a trading partner so heavily dependent on U.S. trade (especially when the reverse is not true). Most members of the Canadian industry understand that, even if all the pending litigation before the WTO and NAFTA were resolved in Canada's favor, there is nothing to prevent the U.S. trade remedies litigation from starting up again—new dumping or subsidy findings by U.S. authorities could well result in Lumber V because trade disputes are largely fact-based.

Negotiation and resolution of the underlying issues is arguably the most enduring solution. The fundamental concerns of the U.S. lumber industry relate to the Canadian stumpage and log export policy under which Canadian lumber producers pay a fixed stumpage fee to the provincial governments, and exports of logs are prohibited or restricted. The SLA does recognize that these issues need to be dealt with—it proposes the creation of a Working Group on Regional Exemptions which would be charged with developing substantive criteria and procedures for establishing when a Region can be considered to have adopted "market-determined timber pricing and forest management systems" (Article XII and Annex 12, SLA). However, there is little impetus under the SLA to reach a satisfactory resolution of this issue. The Working Group is given only a year and half to complete its task, and even then, will only provide "recommendations" which the Parties to the SLA will make "best efforts" to incorporate into an addendum to the Agreement.

If these recommendations are not acceptable to Canada and the U.S., the basic issues remain unresolved, leaving the field open for the U.S. to terminate the SLA and for the U.S. domestic industry to commence Lumber V.

Indeed, the SLA does not guarantee a long-lasting solution even though it contemplates a term of seven years that can be extended by agreement between the U.S. and Canada for an additional two years. This is because, at any time after the Agreement has been in force for 18 months, the SLA permits either party to terminate the Agreement for no cause upon providing six months' notice (Article XX(1), SLA). The only limited consolation is that the U.S. lumber industry is not permitted to commence countervailing or antidumping actions for a further period of one year. However, this protection applies only when either the U.S. has terminated the SLA (Article XX(1), SLA). Further, if as a result of a dispute arising from the interpretation of the SLA, Canada decides to take any compensatory measures that the dispute resolution tribunal authorises, under Article XX(2), the U.S. may terminate the Agreement by providing only a month's notice.

Thus, the SLA is certainly not a clear win for the Canadian lumber industry, but neither is it a complete loss—the industry will be receiving most of the monies it has paid as duties and for which it has been battling hard over the years (none of the ongoing litigation would have allowed the Canadian lumber industry to recover any lost profits or damages anyway), and will be getting some degree of certainty for at least the next two years. The immediate sacrifice is the USD 1 billion that the Canadian industry is not recovering. What more the Canadian lumber industry has given up in order for the SLA to take effect will perhaps become clear only over time—as the practical aspects of implementing the SLA commence to take shape, and the uncertainties and disputes under the SLA raise their head.

From a broader trade policy perspective also, the SLA raises some concerns:

- whether an agreement is necessary when the dispute resolution processes under other multilateral agreements (i.e., the NAFTA and the WTO) were properly performing their roles;
- whether an agreement such as the SLA that creates export restraints violates the WTO agreements that expressly prohibit voluntary export restraints; and
- whether the SLA violates the spirit of free trade embodied under the NAFTA and the WTO agreements by adopting a mechanism of managed trade for a particular industry.

In Summary

The implementation of the SLA is a matter for the Canadian Parliament, as many legislative and regulatory changes will be necessary to put into effect its export quota scheme and the collection of export taxes. A vote on whether the softwood lumber agreement should be accepted is scheduled for the third or fourth week of September. Indeed, Prime Minister Harper has declared the vote a confidence measure because of its fiscal implications—ostensibly because the Canadian government will be handling the escrow accounts through which the Canadian lumber companies will receive their refund.

Ultimately, whether the SLA will come into effect is in the hands of the U.S. and the Canadian lumber industry. While there appear to be a number of aspects that could result in uncertainty, and companies may realize that Option B in particular appears to be difficult to comply with without making a significant sacrifice, each lumber company is likely to face considerable peer pressure to not be the only one to oppose the deal and thereby scuttle the Agreement altogether. A compromise—that is the SLA—that doesn't make anyone happy, but lets everyone live relatively harmoniously, may ultimately be to everyone's benefit. Whether the SLA lasts at least part of its intended term or rushes toward demise rather rapidly leaving all the ongoing litigation lumbering on remains to be seen.

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Trusts in Latin America[1]

In this work we shall briefly describe some of the laws passed in Latin America regarding trusts, or to be more precise the laws on *Fideicomiso*, which is the name commonly used to describe a legal institution that is similar to the Anglo-American trusts (for the purposes of this work, we will use the name "trust" or "trusts"). We will also refer to the most common and novel uses of trusts in Latin America, and try to explain the reasons why Latin-American countries did not ratify the 1985 Hague Convention on the Law Applicable to Trusts and on their Recognition (the "Convention").

1. Brief Overview of Latin American Legislation on Trusts or Fiduciary Property

For the purpose of this article, although we only mention some of the Latin-American legislation, we reviewed the legal rules on trusts of the following countries as well: a) Peru: (general law No. 26702 of 1996, Resolutions S.B.S 1019-99 and S.B.S. 0084-2000 of the Superintendency of Banks and Insurance); b) Panama: (law No. 1 of January 5, 1984, regulated by the Executive Decrees 16 of October 3, 1984, 213 of October 3, 2000, Executive Decree No. 106 of 1995, largely upon laws of trusts as exist in Anglo-Saxon Countries); c) Uruguay: (Civil Code sections 856-867; law 17703 of October 4, 2003; regulated by Decree 516/2003 of December 11, 2003); d) Venezuela: (law on trusts of 1956, with the amendment by the General Banking Law of 2001, Resolution 179-00 of the Superintendency of Banks and other Financial Institutions); e) Ecuador: (Civil Code sections 766-795), law 107 of July 1, 1998, Resolution of National Security Commission—004-2001, Executive Decree No. 390 R0/87 of 1998 and General Law on Institutions of the Financial System).

1.1. Chile

Chile is one of the countries that has not legislated trusts (or any of its variations like the commercial trust, or "*fiducia comercial*"). However, the freedom to contract allows the creation of a relationship substantially similar to the one created by the trust, and many of such relationships are expressly acknowledged in the Chilean Civil Code (sections 732-763, 1079, 1164-1166).

Furthermore, the Chilean banking laws state that mortgage and commercial banks may act as trustees (Decree Law No. 3 from the Ministry of Finance).

With regards to securitization in Chile, it has been widely developed since the passing of the Securities Market Law (law 18045, amended by law 19301 and 19705 (sections 132-153)). The Chilean securitization system consists basically of creating, with the securities subject to securitization, a separate "estate" from that of the issuing company. In the securitization contract, the goods, contracts, credits and rights that form the separate "estate" must be individualized, according to their nature.

Furthermore, the system provides that creditors of the issuing company may not enforce any action for the purpose of liquidating the assets of the "estate" or enforce an attachment thereon.

1.2. Brazil

Brazilian law does not contain a general regulation on trusts allowing the wide and open application of such an institution, but Brazilian legislation provides for different types of fiduciary operations aimed at specific cases, namely:

- Fiduciary transfer as security of real estate (law 9514);
- Fiduciary transfer as security of personal property (section 803 to 813 of the Civil Code);
- Fiduciary transfer of shares (law 6404);
- Securitization System (law 9514);
- Fiduciary ownership of real estate for the purpose of creating common real property investment funds (law 8668).

Taking into account that Brazil has no general trust system, the fiduciary businesses not falling under any of the specific systems referred to herein are considered "atypical."

1.3. Argentina

In Argentina, trusts are governed by law 24,441 passed in 1994, although some forms of fiduciary ownership had already been provided for in the Civil Code.

The Argentine Trust Law provides for *inter vivos* trusts as well as for testamentary trusts, and it states that the property of any given trust is separated from the property of the trustee and the trustor, and is only liable for the debts pertaining to the trust.

Any person (physical or legal entity) may be a trustee, except for financial trusts, where the only persons allowed as trustees are financial entities pursuant to law 21,526 or entities authorized by the National Securities Commission.

It is currently under discussion as to whether a trustee may also be the sole beneficiary of a trust. Although such situation is not expressly provided for in the Argentine Trust Law, recent judicial precedents approved such possibility (Federal Administrative Court of Appeals No. III, in *Banco Hipotecario c. Ciudad de Buenos Aires*, Revista Jurídica la Ley 20/09/2005, decision made on a matter related to consumer protection).

1.4. Colombia

In Colombia there are two types of trusts: *inter vivos* and *mortis causa* (the latter are the ones expressly provided for in a will). Trusts are governed by the provisions of sections 794-822 of the Civil Code and 1226-1244 of the Commercial Code (Decree 663 of 1993) and External Regulation No. 081 of 1996 of the Superintendency of Banks.

The commercial trust implies a transaction by which a person, called trustor, transfers specific assets to another person, called trustee, who undertakes to administer (manage) or sell those assets in order to comply with a specific purpose determined by the trustor, for his benefit or for the benefit of a third party called a beneficiary. Commercial trusts may be used for several different purposes (pursuant to the operations authorized by External Circular No. 081 of 1996 of the Superintendency of Banks).

Civil trusts are more narrow in scope, in a way, since the ownership by such trusts is only for the purpose of transferring the assets of the trust to another person upon the occurrence of a condition.

Unlike commercial trusts where only credit institutions and financial companies may be authorized (by the Superintendence of Banks) to act as trustees, in civil trusts, the trustee (fiduciary owner) may be any natural person or legal entity.

In civil trusts, the powers of the trustee may have different levels, from being very simple "manager of assets" to having ample powers. The trustor determines the powers of the trustee.

1.5. Mexico

Trusts are regulated by the General Law on Securities and Credit Operations of 1932 (sections 381 to 414) and amendments thereto. This law must be studied jointly with the Law on Credit Institutions and the provisions of the Commercial Code (sections 1414 bis to 1414 bis 20).

Basically, a trust implies that the trustor delivers to the trustee certain assets to make them subject to a specific regime for the benefit of a beneficiary. Trusts may be created with any kind of assets or rights, except those that the law determines as strictly personal and thus non-transferable.

The only institutions authorized by law to serve as trustees are banks, insurance companies, securities firms, special-purpose financial institutions and public bonded warehouses.

2. Use of the Trust in Latin America

In addition to the traditional use of the trust as an institution providing guarantee and for securitization purposes, below we refer to more novel uses of trusts in Latin America. We note that although these uses may be considered common in jurisdictions following the British or U.S. legal tradition, they are relatively new in Latin America.

2.1. Novel Uses

In Venezuela a trust has been created with funds contributed by the National Government, administered by a national institution with the purpose of financing organ transplants in public and private centers (Agencia Bolivariana de Noticias—www.abn.info.ve—September 2, 2005).

In Puerto Rico, the Trust of Science and Technology created by law 214 was implemented (Zona i.com—www.zonai.com—September 26, 2005). Such trust has the purpose of creating and managing a science and technology fund to promote scientific development in Puerto Rico. The purpose of the initiative is mainly to develop new employment opportunities in the areas of research, development and technology. Eleven trustees are gathered in a council, and the financing of the trust comes from different state organisms, the beneficiaries being those persons (physical or legal entities) projects that have been approved.

In Chile, a draft law has been recently presented creating what is called a "blind trust," whereby public officers whose assets amount to more than $300 million Chilean pesos (approximately U.S.$556,800), must entrust the administration of their property to a third person while they hold office (Diario Financiero—www.eldiario.cl—September 27, 2005). This measure would apply even to the President of the Republic, parliament members, majors, state ministers, among others. The trustee would be a financial institution, local or international, controlled by the superintendency of the industry. This is certainly a very novel use of the trust as an institution.

In the Province of Rio Negro (Argentina), a trust was set up in early 2005 to acquire machinery for agricultural producers in the region. The assets of the trust, mainly cash, were contributed by the Province and by the Federal Investment Council (Ámbito Financiero, September 27, 2005).

In Peru, a trust regime will be executed for the purpose of providing financial means to vehicle owners to install new gas equipment that will also allow the creation of a database for the supply of natural gas to vehicles (El Comercio—www.elcomercioperu.com.pe—September 20, 2005). In this way, vehicle owners who recharge gas in authorized places shall not pay the conversion service immediately and the cost would be deducted each time they recharge natural gas.

The Uruguayan parliament is studying a draft law to create a trust for the purpose of obtaining civil redress for the damages caused by medical malpractice (El País Digital—www.elpais.com.uy—September 5, 2005). The beneficiaries of said trust would be the injured patients and the trustors would be physicians who shall contribute $100 per month.

In Argentina, companies offering pension plans by means of trusts are becoming more common (El Cronista Comercial—May 9, 2005). After the devaluation of the currency in 2001 and considering the lack of credibility of the current retirement systems, many companies are trying to use trusts to organize private retirement plans or retirement insurances.

2.2. The Use of Trusts in the Infrastructure of the Region

In addition to these novel uses, some traditional uses of the trust continue to be important.

For instance, in the Provinces of Buenos Aires and Santa Fe (Argentina), the federal government intends to provide for the necessary infrastructure to supply natural gas to small towns (El Cronista Comercial, August 19, 2005). In order to build the necessary gas pipelines (worth U.S.$100 million, approximately), a trust will be created with assets coming from the federal government, and then the users of the different towns will reimburse the amounts paid for such work to the federal government.

Also, the Argentine province of San Juan is executing the "*Proyecto Caracoles*," consisting of the construction of a dam and a hydroelectric power station. It is the most important power station currently being built in Argentina (Ámbito Financiero, September 23, 2005). The funds to carry out such project were obtained through the contribution from the Province of San Juan and the federal government (Cuyo Noticias—www.cuyonoticias.com.ar—September 9, 2004). The trustee—*Banco de San Juan*—administers the funds and delivers to the beneficiaries—the contractors—the amounts agreed under the public works agreement upon completion of the different stages (Diario de Cuyo, July 2, 2004).

2.3. Trusts as Financing Means

In Argentina, financial trusts are displacing negotiable obligations (i.e., debt instruments) as a financing tool for private companies (El Cronista Comercial—August 31, 2005). During the first semester of 2005, financial trusts totaled more than U.S.$500 million. During the first quarter of 2005, financial trusts grew 900% as compared with 2004 (El Cronista Comercial, April 27, 2005).

As an example of this tendency, the biggest producer and distributor of beverages in Argentina, Cervecería and Maltería Quilmes S.A.I.C.A. y G. repaid its short term financing with long term financing coming from a trust in the amount of U.S.$150 million, the securities of which are denominated in dollars and are due on 2012 (El Cronista Comercial, March 16, 2005). The underlying asset of the trust is a loan that Citibank Argentina granted to Cervecería and Maltería Quilmes in approximately U.S.$150 million. The reasons why Cervecería and Maltería Quilmes used a trust instead of resorting to issuing regular debt instruments are basically related to regulatory matters. That is because trusts are not subject to the many information requirements provided for in the Argentine securities legislation.

2.4. Trusts for Personal or "Private" Uses

From the examples seen above, we observe that trusts in Latin America are being used in different areas of the economy, both new and traditional.

But we still do not see a great incidence of the trusts in the estate planning field at personal or "private" levels.

We note, though, that during the last few years testamentary trusts are being used more frequently in Argentina due to certain advantages that they offer.

These trusts allow the appointment of a trustee so that upon the death of the testator, the former receives all or part of the latter's property in order to use it for specific purposes to or for another reason. These "Testamentary Trusts" are very useful in order for the testator to secure provisions of funds for certain persons (for their education, health expenses, etc.). Upon termination of the trust, the property must be transferred to the persons appointed in the will, or otherwise as the law provides.

The main problem with this kind of trust is the possibility of affecting the "legitimate portion" of "mandatory" heirs. In this case (legitimate portions affected by the testamentary trust), heirs may file claims for reduction of the trust.

3. Possible Reasons Why Latin-American Countries Did Not Ratify the Convention

Although some Latin-American countries (Argentina, Uruguay, Panama and Venezuela) took part in the negotiations resulting in the Convention, no Latin American country has ratified it.

More than 13 years have passed since the entry into force of the Convention, and so far we find no indication that any of the countries mentioned or any other in Latin America in general intends to become subject to the Convention.

In this regard, the case of Argentina is particularly noteworthy, since Argentine legislation admits trusts in its internal legislation and said country has ratified many international conventions (among others the 1978 Convention on the Law applicable to Agency, the 1986 Convention on the Law Applicable to Contracts for the International Sale of Goods, and the 1956 Convention concerning the Recognition of the Legal Personality of Foreign Companies, Associations and Institutions).

One of the reasons that we believe may have influenced the Latin American position vis-à-vis the Convention is that not all of them, like Chile and Brazil, specifically contemplate trusts in their domestic legislations.

Another important factor may be that civil law countries are more prone to regulating a certain legal relationship through the application of a single law, and do not feel particularly comfortable with applying multiple pieces of legislation to a concrete case.

In that respect, we note that the (optional) *dépeçage* is not a procedure highly used by Civil Law countries, and thus the methodology used in the Convention may have caused a lack of interest—or mistrust—by certain countries (The *dépeçage* is known as the voluntary division whereby the parties may freely chose different legal bodies to govern different aspects of the agreement—"*Derecho Internacional Privado de los Estados Mercosureños*." Coordinator: Diego P. Fernández Arroyo, Editorial Zavalía, Buenos Aires 2003 p. 1000—Depeçage is provided for in article 9 of the Convention).

Having said that, we believe that the explanation for the lack of ratification may come mainly from the mistrust on the part of some tax authorities from Latin American countries with respect to trusts in general.

As we all know, trusts and in particular the Anglo-American "trust" are commonly used for international tax planning purposes. In some cases, such use may be seen by Latin American authorities as a tool to defraud local tax authorities. For example in Argentina, in a recent case where a trust was used for tax planning reasons, the trust was deemed to be illegal by the tax administration. The operation consisted of the creation of trusts outside of Argentina, and the trustor could revoke the empowerment of trust administrators at any time. The trustor gave to the trust certain sums of money received under stock purchase operations in different companies. Those sums were not declared in the tax return on personal property. The tax authority held that the trust did not exist and thus understood that there was tax fraud. However, the Court acquitted the defendant for understanding that the structure used was lawful and thus there had been no tax evasion. (*E.E. c. s/ laws 23771 and 24.769*, case No. 1861/2001, published in El Derecho, 209-351, Buenos Aires). We have to mention that this case is still pending resolution in the Tax Court, which will decide if the defendant will have to pay the tax.

Despite the provisions of section 19 of the Convention, the purpose of which was to avoid the non-ratification of the Convention due to fear related to the tax effects of trusts, such fear may be the reason for the lack of ratification.

We note in this respect the warning of Alfred E. Von Overbeck, who when referring to section 19 of the Convention stated that "if the convention appeared to allow, through means of trusts, the evasion of certain taxes, its chances for ratification would be seriously compromised" (*see* Explanatory Report on the 1985 Hague Trusts Convention (www.hcch.net)). These remarks may have been very much to the point.

As we all know, tax matters have always been a very delicate issue for developing countries, and thus the recognition of trusts created abroad may give them the impression of supporting a means to avoid or evade the payment of taxes. It is unlikely that this perception will change overnight, and all members of the Latin American legal community have hard work ahead to make widely known that trusts are much more than an efficient tax planning tool, and that they are very useful as an estate planning mechanism that ensures childhood studies, old age and other family and private oriented matters.

4. Conclusion

We have briefly seen here the current legislation on trusts in some Latin-American countries, some modern and traditional uses of them, and possible explanations of the Latin American position toward the Convention.

We conclude that although trusts are commonly used in many fields and their use is increasing, still we do not see trusts being used enough as instruments for family estate planning and for other private (as opposed to purely business oriented) uses.

Hopefully those "private" uses will increase in the future. And the chances of that happening will be higher if all members of the Latin American legal community work hard on raising awareness on the multiple possible uses of trusts.

In addition, we also would like to point out that the use of the trust and the capital inflows in our region are heavily regulated by the relevant authorities, the reason why a thorough analysis of such rules is advisable prior to creating a trust, using a trust or to transferring funds to the region.

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Endnote

1. The content of the following work is for information purposes only and it shall not be construed or used as legal advice.

Argentina

Promotional System for the Production and Sustainable Use of Biofuel

Law No. 26,093 (the "Law") approving "Promotional System for the Production and Sustainable Use of Biofuel" (hereinafter, the "System") was published in the National Official Bulletin on May 15, 2006.

Under such Law, the initial effective term of the System will be 15 years. This term may be extended by the Argentine Executive Branch.

Reference is made below to the most significant aspects of the Law.

(i) **Licensed Plants**. The Law provides that biofuels may be produced only by plants expressly licensed for such purpose. In order to qualify for the production of biofuels, plants shall meet the relevant biofuel quality requirements and undergo a prior Environmental Impact Assessment procedure.

(ii) **Beneficiaries**. In general terms, in order to be eligible for the benefits under this System, projects for the setting-up of biofuel plants must (a) be carried out in Argentina; (b) belong to private, state-owned or partially state-owned companies or cooperatives organized in Argentina; (c) most of the capital intended for these projects must be contributed by the Argentine Government, the City of Buenos Aires, Provincial Governments, Municipalities or natural or artificial persons mainly engaged in agricultural and livestock activities.

(iii) **Promotional System**. The total quota of promotional benefits shall be fixed annually in the National Administration Budget Law and shall be appropriated by the Argentine Executive Branch, which shall prioritize projects according to the following criteria: (a) promotion of small and medium businesses; (b) promotion of agricultural growers; and (c) promotion of regional economies.

(iv) **Promotional Benefits**. Basically, promotional benefits may be summarized as follows: (a) anticipated value added tax reimbursement and accelerated depreciation of assets for income tax purposes; (b) assets related to the projects will not be taken into account as part of the taxable base for minimum presumed income tax; (c) biodiesel and bioethanol shall not be levied with Tax on Liquid Fuels and Natural Gas (Impuesto sobre los Combustibles Líquidos y el Gas Natural), the so-called Tax on Gas Oil Transfers or Gas Oil Imports (Impuesto sobre la transferencia a título oneroso o gratuito o sobre la importación de Gasoil) and Rate on Hydro-Infrastructures.

(v) **Kyoto Protocol**. Approved projects shall be eligible for the benefits provided under the Kyoto Protocol.

(vi) **Blending of Biofuels with Fossil Fuels**. The Law provides that, effective as of January 1, 2010, (a) gas oil and diesel oil shall be blended with at least 5% of "biodiesel" and (b) gasoline shall be blended with at least 5% of "bioethanol." The blend shall be made by facilities specifically authorized for such purpose.

(vii) **Use of Biofuels by the Argentine Government**. The Law imposes on the Argentine Government as well as on private undertakings located alongside rivers, lakes, lagoons and National Parks or Natural Reserves the obligation, effective as of January 1, 2010, to use biodiesel or bioethanol in the percentages to be defined by the authority or unblended biogas.

It is expected that the implementation of the Law will trigger new investment flows and incentives in connection with fuels, becoming an excellent alternative to: (a) decrease the great demand of the domestic gas and oil market and its high purchase prices on the international market and (b) reduce the environmental impact and promote the implementation of projects under the Clean Development Mechanism.

For further information please refer to your contact person at **Brons & Salas** or to Amalia Saenz, Telephone (54-11) 4891-2719, e-mail asaenz@brons.com.ar.

Outsourcing: Joint and Several Liability Derived from Subcontracts

On February 3, 2006, the National Labor Court of Appeals of the City of Buenos Aires, sitting *en banc*, resolved *Ramirez v. Russo Comunicaciones e Insumos S.A.* that Section 705 of the Civil Code was applicable to the joint and several liability established in Section 30 of the Employment Contract Law. This means that any claim for labor or social security obligations by the employees of an assignee, contractor or subcontractor of certain activities of the company that may be considered as its normal and specific activity may be brought directly against the company hiring such services without the need that the employees of the outsourcing company also file their claims against their direct employer.

In short, in the case of outsourcing of certain services, an employee of a contractor could directly sue the company which hired the services for labor obligations of the outsourcing company.

This *en banc* decision has unified case law on the matter and its doctrine shall be binding on all the panels of national labor courts.

For further information, please refer to your contact person at **Brons & Salas** or to Gustavo Ferrante, Telephone (54 11) 4891-2720, e-mail: gferrante@brons.com.ar.

Employer's Powers Concerning the Exercise of the "*ius variandi*"

On April 24, 2006, Law 26,088 was published, modifying the second paragraph of Section 66 of the Employment Contract Law ("ECL") related to the employer's power to change working forms and conditions.

According to the new wording of Section 66 of the ECL, in the event the employer makes a change in the essential conditions of the labor relationship or a change in the conditions of the labor relationship causing property or moral damages to the employee, or when the "*ius variandi*" is unreasonably exercised by the employer, the employee may, as it was already established by the aforementioned Section 66, consider himself dismissed without cause; but according to the new law, the employee is also entitled to claim against the employer that the essential working conditions so affected be restored.

In particular, salary, workday and employee's category are considered essential working conditions.

In the event the employee claims the restoring of the former working conditions, he/she must file a legal action before the competent court, which shall be handled by summary proceedings. The application of the new working conditions shall be stayed throughout the pendency of the suit, until final judgment is rendered.

The above-mentioned stay shall not apply in the event the changes resolved by the employer affect the whole establishment or the department where the claimant discharges his duties.

For further information, please refer to your contact person at **Brons & Salas** or to Gustavo Ferrante, Telephone (54 11) 4891-2720, e-mail: gferrante@brons.com.ar.

New Alternatives for Foreign Companies to Meet the Filing Requirement Established by the General Inspection of Corporations

In the last few years, the General Inspection of Corporations ("GIC") has been exerting stricter control over foreign companies registered as a branch or participating in local companies. Since 2003, several resolutions were issued regulating the documents foreign companies must annually file to identify their members and to demonstrate that, according to their activity and financial position, their purpose is mainly fulfilled outside Argentina. These resolutions and their strict enforcement criterion triggered significant resistance and objections of a different nature, mainly related to the increase of bureaucracy and costs, lack of competence of the GIC, among others.

General Resolution No. 12/2005 ("GR 12/05") of the GIC published in the Official Bulletin on December 30, 2005 loosened the requirements established by the GIC for evidencing the foregoing and provides for new alternatives and mechanisms of compliance.

GR 12/05 establishes that, in order to demonstrate that their main activity is conducted abroad, foreign companies may file advertisements placed abroad, information related to business, projects or investments published in specialized magazines or in the economy and business sections of newspapers having international circulation and distributed in Argentina, abstracts of web pages certified by a notary public, etc.

Likewise, GR 12/05 sets forth that foreign companies that prior to the date of this resolution had already evidenced that they performed their activities abroad and which do not evidence their activities as per the publicity guidelines indicated above (i.e., those that have demonstrated that their main activities are conducted abroad by, for instance, filing the certificate of foreign assets provided for in certain resolutions issued before the issuance date of GR 12/05) may annually demonstrate that their main activity is conducted abroad by filing a statement from the management body of the company or a person empowered by such management body, stating that the information filed with the GIC in connection with the corporate assets located outside Argentina has not sustained significant changes and therefore, that the company's main activities continue being carried out abroad. The referred statement may be issued by the person registered as representative before the GIC if he/she has sufficient powers for such purpose.

Lastly, GR 12/05 establishes that the foreign companies that have already complied with the obligation to identify their partners continue filing the documents identifying their partners only in the event of changes in the structure and ownership of the corporate capital.

For further information, please refer to your contact person at **Brons & Salas** or to Guillermo Malm Green, Telephone (54 11) 4891-2717, e-mail: gmalmgreen@brons.com.ar.

Extension of the Effective Term of the Mandatory Mediation and Settlement Law

Law No. 24,573 dated October 27, 2005, provided for the mandatory mediation proceedings prior to the filing of any court action, except for criminal cases, insolvency and bankruptcy proceedings, actions grounded on family law (save for their economic aspects) and precautionary measures, among other legal actions in which the nature of the claims is incompatible with the mediation and settlement spirit.

Law No. 26,094, published on May 9, 2006, provided for a new extension of the term of validity of Law 24,573.

In this case, a two-year extension was established, and therefore the new expiration date of Law 24,573 shall occur in April 2008.

For further information, please refer to your contact person at **Brons & Salas** or to Lisandro Allende, Telephone (54 11) 4891-2716, e-mail: lallende@brons.com.ar.

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Brazil

Non-Compete Arrangements in International Transactions and Its Limitations Under Competition Rules in Brazil

Companies are commonly concerned about how to assure the success of their transactions. One of the most common concerns is related to non-compete clauses and their enforcement. It is crucial for new players to avoid "unfair competition" from the former owner of a recently acquired business. Besides any labor concern related to natural persons, the Brazilian competition rules and authorities have tackled such issues several times, and it is possible to establish some general guidance that may be useful for foreign investors to consider.

In principle, parties are allowed to freely establish their rights and obligations in a contract or agreement in Brazil, save and except for cases in which there is express legal provision stating otherwise.

Non-compete clauses follow the same principle. Moreover, there is no legal provision that expressly determines a given term or geographical restriction for such kind of provision. The Brazilian Civil Code has only a general principle in case of omission of the parties, but such provision does not represent an express restriction to the freedom to drafting a non-compete clause.

The Brazilian competition agency, CADE (Administrative Council for Economic Defense) has a general standard when it is analyzing non-compete clauses. According to CADE's general understanding, a non-compete clause should be limited to a five-year term and such a clause should be limited to the geographical market in which the parties are active (or where the transaction will produce its effects). Moreover, it is understood that a non-compete arrangement may be acceptable to the extent that it does not exceed the terms of the deal, meaning that it should not exceed what is reasonably necessary to achieve its legal purpose. CADE has ordered applicants to amend their agreements to adjust the clause to such parameters.

However, it is possible to draft a non-compete clause to achieve just what the parties want. If the parties have a sustainable reason to ask for a longer or broader non-compete clause, CADE has been shown to be open to such requests.

In a recent case involving two major players of the chemical industry in Brazil, CADE accepted a non-compete clause with a 14 year term. In this case, it was a termination of a joint venture that had lasted for more than 15 years. Both parties knew each other very well and would continue to share certain infrastructure for some period of time. Additionally, one part was leaving the business, but would remain a supplier of the main raw material. The transition issues for the phasing out would last for approximately 10 years. Given the circumstances of the case, CADE understood that during the phasing out both parties would have access to strategic information of each other and thus approved the transaction without restrictions.

Although some flexibility is apparent, it is important to reiterate that CADE is reluctant to alter its "standard" approach. In view of that it is advisable to have local assistance from competition experts before drafting the non-compete clause until CADE's final decision.

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Chile

Approval for Juridical Entities Domiciled or Resident Abroad to Issue and Place Bonds in Chile

1. Regulations Issued by the Central Bank of Chile

The Central Bank of Chile (the "Central Bank") issued new regulations, published in the Official Gazette of July 31, 2006, authorizing juridical entities domiciled or resident abroad to issue and place bonds in Chile, as follows:

(a) The juridical entities domiciled or resident abroad must trade the publicly offered securities they issue in stock exchanges authorized by the Chilean Risk Classification Commission ("CCR").

(b) Such entities are authorized to issue and place in Chile bonds payable in Chilean pesos, expressed in Chilean pesos or in an adjustment system, provided both the issuers and the issued securities are registered in the Securities Registry kept by the Superintendency of Securities and Insurance ("SVS"). This authorization also includes the acquisition of such securities by persons domiciled or resident in Chile with the sole obligation to report to the Central Bank, as expressed below.

(c) The foreign issuers must report to the Central Bank, under the terms and conditions detailed below, the investments, capital contributions, loans or deposits they make or grant in Chile, originated in the proceeds or funds obtained in the placement of the bonds, as well as any purchase of foreign currency they may carry out. The purchasers of such securities who are qualified as institutional investors pursuant to Law Nr. 18,045 (the "Securities Law") are also under the obligation to report to the Central Bank.

(d) The new regulations expressly state that the foreign exchange transactions carried out by the issuers referred to therein and which originate in the placement and payment of the bonds, or in the funds obtained from the investments, capital contributions, loans or deposits made or granted by such foreign issuers, shall be ruled by the foreign exchange regulations in force at the date each transaction was carried out. The same rule applies to the investments made by persons not domiciled or resident in Chile to purchase such securities.

(e) The General Manager of the Central Bank was expressly empowered to issue the regulations and establish the operative procedures for purposes of the information that must be provided by the issuers and purchasers of bonds.

On such basis, the General Manager of the Central Bank issued Circular Nr. 847, dated October 6, 2006, regulating the information requirements both for the issuers and the purchasers of such bonds.

The issuers must file Form Nr. 1, including information on the issuer (identification, nationality, name of representative in Chile, etc.) and on the bonds (date of placement, currency or adjustment system, amount, term, placement price, interest rate, maturity, etc.).

The issuers must also file Form Nr. 2, on a quarterly basis, including information on the investments made with the proceeds of the placement and of payments made during such period to the bondholders.

The purchasers (institutional investors, as defined below) must file Form Nr. 3, on a quarterly basis, with information on their investments in these bonds.

2. Regulations Issued by the SVS

On January 23, 2006, the SVS issued General Rule Nr. 193 ("Rule 193") establishing the procedure and information required to register the foreign issuers and the bonds to be issued in the Securities Registry for their public offer.

The public offer of bonds shall be directed exclusively to the "qualified investor market," as defined in General Rule Nr. 119, of August 16, 2001. Qualified Investors are: (i) Institutional Investors (banks, financial institutions, insurance companies, local reinsurance companies and fund administrators authorized by law and other entities expressly authorized by the SVS); (ii) stockbrokers and broker dealers acting on their own or as administrators of third parties' portfolios; (iii) individuals or juridical entities, local or foreign, who declare and evidence financial investments of at least 2,000 UF (approximately U.S.$70,000); and (iv) juridical or other entities in which all the partners, shareholders, participants or members are those mentioned above.

Foreign issuers wishing to register under these rules must be registered or trade their securities in the stock exchanges authorized by the CCR for purposes of the investment in shares by pension funds. However, the SVS may authorize entities whose securities are not registered in stock exchanges but are subject to the control and supervision of the corresponding regulating authority of the pertinent market.

Rule 193 sets forth the legal, economic and financial information that must be provided with respect to the issuer and the bonds.

The bond indenture may stipulate that the issue shall be for a fixed amount or a bond line. In this latter case, the value of the bonds that may be simultaneously in circulation as well as their maturity may not exceed the amount and term set forth in such bond indenture.

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Ecuador

Differences Between a Corporation and a Limited Liability Company in Ecuador

1. Corporations

Concept and Nature

A corporation is a company whose capital is divided into freely negotiable shares of stock and formed by the individual contributions of the shareholders who are solely liable up to the amount of their shares.

A corporation is an equity capital company comprised of two or more persons who may be natural or legal persons. It may have an unlimited number of stockholders.

A married couple may not initially establish a corporation but may eventually become shareholders in the one established, through the transfer of stock. Such a company may not be established between parents and unemancipated children.

Foreign companies of any type may be stockholders in corporations.

Natural or juridical persons may be parties to the incorporation through attorneys-in-fact.

Limitation of Liability

An important but not distinctive feature of corporations is the limited liability of the stockholders. The company, however, is liable up to the amount of its assets.

Capital

The capital of a corporation is divided into shares of stock, which are marketable securities the transferability or circulation of which cannot be limited in any manner.

(a) **Authorized Capital.** A company may have or not have authorized capital. This capital is an open legal possibility or available amount allowing it to accept subscriptions of capital stock, increase the subscribed and paid-in capital and issue stock shares by merely reporting to the Office of the Superintendent of Companies. Authorized capital cannot exceed twice the amount of the subscribed capital.

(b) **Subscribed Capital.** It is the capital subscribed by the company shareholders upon the incorporation thereof, and which may reach the sum of the authorized capital through successive increases to the amount of the subscribed capital.

(c) **Paid-in Capital.** It is the actual paid-in capital in respect of which the company has issued stock to its stockholders. At the time of incorporation, 25% of the capital stock must be paid-in and the remainder within two years. Once all the capital is paid-in, the company may issue shares, but if it is not fully paid the company may issue scrip certificates which may be traded on the stock exchange, provided that the subscribed capital covered thereby and the term for payment of the unpaid amount are clearly stated.

The minimum capital of a corporation is U.S.$10,000 and the minimum face value of the shares must be U.S.$1.00.

Equity contributions may be in cash or in kind, and the latter in personal or real property; personal loans may also be made to this end.

Shares, Ownership and Transfer

(a) Shares must be issued for their actual value, which may not be lower than the face value or higher than the contributed capital. Shares must be registered. Definitive certificates may be issued for not fully paid-up shares. Shares the value of which is fully paid are called paid-up shares.

Shares may be common or preferred as established in the company's incorporation charter. Common stock confers the fundamental rights recognized by law for shareholders. Preferred stock does not have voting rights but may enjoy special rights in respect to the payment of dividends and liquidation of the company, and may not exceed 50% of the subscribed capital of the company.

The stock may not be split.

(b) **Ownership.** The stockholder is the person appearing as such in the Stock and Stockholders' Ledger. This is why any transfer of stock shall be reported to the company's legal representative for entry in the Stock and Stockholders' Ledger.

(c) **Transfer of Stock Shares.** The ownership of the shares is transferred through a notice of assignment signed by the transferor or the person or brokerage firm representing the holder. The assignment must be recorded in the stock certificate itself or on a sheet attached thereto. However, in the case of certificates deposited for clearing or settlement, the assignment may be made through the arrangements established therefor.

Transfer of stock ownership has legal effects with regard to third parties and against the company, only as of the date of registration of the transfer in the Stock and Stockholders' Ledger.

The right to freely negotiate the shares is not subject to any limitations, and any provisions imposing requirements or formalities not provided for under the law will be null and void.

According to the conditions established in the law and with the effects provided therein, corporations may buy their own stock.

Stockholders' Rights

The fundamental rights of the stockholders and of which they cannot be deprived, are:

- The status of stockholders.
- To participate in the company earnings, wherefore the same treatment for holders of the same class of stock is provided.
- To participate likewise in the distribution of the corporate stock in the event of the winding-up of the company.
- To take part in the general stockholders' meetings and to vote when they hold voting shares, according to the charter.

- To be part of the administrative or oversight bodies of the company upon being elected according to the law and the charter.
- To subscribe shares, on a preferential basis, in the event of capital increases.
- To question the resolutions of the general stockholders' meetings and of any other company bodies in the manner and in the cases provided by the law.
- To freely negotiate their stock.

Governance and Administration

(a) **The General Stockholders' Meetings.** The general meeting comprised of the legally convened and assembled stockholders is the highest-ranking body of the company. The stockholders' meeting has authority to resolve on all matters relative to the corporate business and to make the most appropriate decision in the best interests of the company.

The powers of the stockholders' meeting, the stock classes and the quorum, voting rights, mandatory nature of its resolutions, nullity of the meetings, etc., are regulated by the Companies Act.

(b) **Management.** A corporation is managed by attorneys-in fact who may be replaced at any time, and who may be company shareholders. Company administrators may be known as managers, directors, agents, etc., and they may act individually or jointly as a group. When there are several administrators in the company, the charter must clearly specify who will have the legal, judicial and extrajudicial representation of the company. If the representation pertains to a collegiate body, it shall act through a president.

The appointment and designation of the administrators are authorities of the general stockholders' meeting, if the charter does not assign this power to another company body.

Every appointment of an administrator must be registered in the Mercantile Register and may not exceed a five-year term as from the date of registration, but the individual may be reappointed indefinitely or removed from office at any time. The administrator will continue discharging his/her duties, even if the term of appointment has expired, until the successor has taken office.

The administrator's legal representation of the company extends to all matters and acts relating to the commercial and civil business operations thereof. Any limitation to the powers of the representative shall be ineffective with regard to third parties and the effects thereof will only be internal.

Oversight

The oversight of corporations is performed by examiners who may be shareholders and who may be replaced at any time. There are two examiners, unless otherwise provided in the charter.

Examiners have one-year appointments unless otherwise provided in the charter and may be indefinitely re-elected. The stockholders' meeting may revoke the appointment of an examiner, even if the item is not on the agenda. An examiner will remain in office for an extended term until legally replaced by the new appointee.

The duties and rights of examiners are established in the Law on Companies.

Control

Corporations are subject to the total and partial supervision and control of the Office of the Superintendent of Companies, but corporations, 30% of whose subscribed and paid-in capital belongs to at least 25 shareholders, are subject to total supervision and control.

Issuance of Debentures

Debentures are securities issued by corporations or limited liability companies, which acknowledge or create a debt for their own account.

The Securities Market Act regulates the issuance of debentures.

2. Limited Liability Companies

Concept and Nature

A limited liability company is a company whose capital is divided into shares (quotas) and is comprised of the contributions of the shareholders who are solely liable for the amount of their contributions.

Capital, Quotas, Ownership and Transfer

The capital of a limited liability company is divided into shares (quotas) whose certificates are not negotiable in the market. Any transfer of those shares requires the unanimous approval of the shareholders at the General Shareholders' Meeting and it is carried out under a public deed registered in the Mercantile Register.

The capital of a limited liability company cannot be less than U.S.$5,000 and the face value of a share must be one dollar or a multiple of one dollar.

Limited liability companies may not issue preferred shares as corporations may.

Capital contributions to the company may be made in cash or in kind, and in the latter case in personal property or real property. Personal loans may also be made to this end.

The establishment of a limited liability company must comprise not fewer than *two* and not more than 15 shareholders, and if subsequently the number exceeds 15, the company must become a corporation or be dissolved. It should be noted that banks, insurance, capitalization and savings companies and foreign corporations may not be shareholders in limited liability companies.

The same rules applying to corporations are applied with regard to spouses and unemancipated children as well as to attorneys-in-fact.

Shareholders' Rights

Rules very similar to those pertaining to corporations apply.

Governance, Administration, Oversight and Control

Rules very similar to those pertaining to corporations apply, except that the term used for shareholders, "socios," is different from "accionistas," stockholders.

With regard to control, the Office of the Superintendency exercises partial control of limited liability companies, save for the exceptions appearing in the Companies Act.

Issuance of Debentures

Limited liability companies cannot issue debentures.

Contributions

Funds to cover expenses with respect to the Office of the Superintendency of Companies come from the fees paid by the companies subject to its oversight and control and are based on the actual assets of these companies.

The fee is payable on an annual basis and is established by the Superintendency before the first day of August. The companies must make payment of the fee before September 30 of each year.

External Audit, Rules Applying to Both Types of Companies

Companies Subject to External Audits

Domestic companies and the branches of companies or other foreign companies organized as juridical persons and any partnerships they may establish and whose assets exceed the amount determined under a resolution of the Office of the Superintendency of Companies, which amount shall not be less than U.S.$100,000 shall undergo an external audit of their financial statements each year. The audited financial statements must be submitted in order to apply for loans from the institutions belonging to the Ecuadorian financial system, negotiate their shares and debentures in the Stock Exchange, request the benefits of Development Laws, participate in public invitations to tender, submit competitive bids, price tenders, enter into contracts with the State and file income-tax returns.

For the purposes of this law, the natural or juridical persons conducting the audit must be qualified by the Superintendency and be listed in the register maintained by the Superintendency, pursuant to the resolution it may issue thereon.

The Office of the Superintendency of Companies may, in the exception, direct that a company with assets lesser than the amount required but higher than U.S.$100,000, submit its financial statements to an external audit if there are doubts regarding its actual financial condition, on the basis of a prior inspection report warranting the audit or upon request by the examiners of the company.

Taxation

There are no differences with regard to taxation. The Law on Internal Taxation provides for the same treatment; the corporate tax is 25%.

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* * *

European Union

Security Breaches: Legal Requirements in Europe

In January 2006 Andre Bywater and I spoke at a special meeting of the NYSBA ILPS Privacy Law Sub-Committee on security breach legislation. The year's events have proven that this is a topic which just will not go away. As more and more U.S. states continue to enact legislation following the California legislation and with more U.S. federal activity following the Veterans' Administration debacle it is worth another look at how developments in the U.S. are being seen in Europe.

Global Background

Security breach legislation was headline news again in Europe recently with a debate on the topic at the W3C in Edinburgh. The W3C conference came to the UK for the first time with around 1,500 delegates gathered in Edinburgh. W3C is "*the body who invented the internet*" and speakers at this year's event included Sir Tim Berners-Lee and Jack McConnell. An extensive program of internet security sessions looked at a number of initiatives to increase public confidence in online trade and some of the many issues involved.

We have followed with interest developments in the U.S. House of Representatives toward a federal data breach reporting bill and high profile incidents like that compromising the personal details of more than 26 million American military veterans when an analyst's laptop went astray. At the same time concern has been expressed about non-accidental security breaches, the most notable being the allegations made against the Society for Worldwide Interbank Financial Telecommunications, or SWIFT. Complaints have been lodged with privacy regulators in 32 countries alleging that SWIFT violated local data protection laws by providing authorities in the U.S. with confidential information about international money transfers.

It is clear that the number of reported security breaches is also on the increase. A study in July by CA of 642 large North American organizations showed that more than 84% had experienced a security incident over the past 12 months and that the number of breaches continues to rise. As a result, 54% of organizations reported lost workforce productivity; 25% reported public embarrassment, loss of trust/confidence and damage to reputation; and 20% reported losses in revenue, customers or other tangible assets.

The European Position

There are as yet no direct equivalents of the legislation enacted in the United States, either at an EU level or within Europe. That is not to say there is no law on the reporting of breaches in Europe. Whilst a number of countries have been looking at the increasing number of security breaches, in the main the response has been to use existing privacy legislation to take action.

In Europe too there has been significant press comment on the security practices of well-known organizations. For example, in the United Kingdom on January 2006 the Grand Hotel in Brighton (which 20 years earlier had been the scene of one of the most infamous terrorist attacks on the UK mainland in the IRA's attempt to kill Prime Minister Margaret Thatcher and the British Cabinet) was at the center of what one expert described as "the biggest field day for identity fraudsters we have seen." In this incident, it was alleged that thousands of personal records were left outside the hotel in a waste skip. It was reported that the security of individuals employed by ExxonMobil, Toyota, Ericsson and the BBC had been compromised. In another infamous incident at the end of June 2005, security breaches were headline news after a newspaper exposed the fact that an Indian call center worker sold the bank account details of 1,000 UK customers to an undercover reporter for £4.25 each (around $7.50). It was implied that the operative had sold the details for ID theft.

Despite privacy laws being in place in Europe and elsewhere as a result of incidents like those described above, legislation following the California model has appeared on the "wish list" of privacy campaigners around the world—the Australian Privacy Foundation chairwoman Anna Johnston, for example, has called for similar legislation there saying that the only reason Australian customers found out in one incident that their credit card details had been compromised by a hacking was that California law forced disclosure.

Legislative Background in Europe

Currently more than 30 different European jurisdictions (including the 25 within the European Union) have some form of privacy or data protection law in place. Broadly speaking these laws protect the personal data (i.e., any data from which a living individual can be identified, whether from the data itself or from the data and other information in the possession of the person handling the data) of data subjects. Data subjects (those having privacy rights) are similarly broadly defined—in the United Kingdom for example the statutory definition of data subjects in s.1 of the Data Protection Act 1998 is "an individual who is the subject of personal data." Whilst data subjects in most countries are living individuals this is not always the case—in Italy for example, data subjects include individuals and legal entities and so company data (for example, that relating to clients, suppliers or even competitors) would also be subject to protection under privacy legislation.

The first myth about data protection law in Europe is that it starts and ends with the main European Community Directive, the Data Protection Directive (95/46/EC) ("the Directive"). Many countries in Europe had data protection law before the Directive came along—in the United Kingdom, for example, data protection legislation pre-dates the Directive by a full 10 years. The second misconception is that every EU country adopts the Directive. Firstly the Directive only applies to countries that are in the European Union (although others have used it as a template). Secondly, secondary in-country legislation is required to bring the Directive into force in each country. This secondary legislation often adds to the Directive imposing country-specific requirements, which go over and above those of the Directive. It is these country-specific requirements that generally impose additional data security obligations—for example in Italy where a separate data security code exists. In the case of the reporting of security breaches it is also those country-specific requirements which impose a reporting obligation where one exists.

The starting point then in looking at a security breach which touches on Europe should be the data protection legislation in the country concerned—in the United Kingdom for example, the Data Protection Act 1998 includes the 7th data protection principle:

> Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data.

The definition of the word "processing" is a wide one and it will include obtaining, recording, destroying, altering or holding the data. Section 4 of the UK Act makes it a duty of a data controller to comply with the data protection principles in relation to all personal data that he controls.

There are obvious similarities with the equivalent legislation in other European countries for example, with the equivalent Austrian legislation Article 14, para 1:

> Measures to ensure data security shall be taken by all organisational units of a controller ("Auftraggeber") or processor ("Dienstleister") that use data. Depending on the kind of data used as well as the extent and purpose of the use and considering the state of technical possibilities and economic justifiability it shall be ensured that the data are protected against accidental or intentional destruction or loss, that they are properly used and are not accessible to unauthorised persons.

As we have already said some countries in Europe have additional domestic provisions dealing with security. There are some parallels here with the security obligation imposed in California—in Italy, for example under ss.31 and 32 of the Italian Privacy Code the obligation is that:

> personal data shall be processed and controlled, taking into account its nature, the specific features of the processing as well as the technological innovations in security measures and devices in such a way as to minimise the risk of destruction or loss of data, whether by accident or not, as well as of any unauthorised access to the data or processing operations that are either unlawful or inconsistent with the purposes for which the data have been collected. Where there is a particular risk of a breach of network security, the provider of a publicly available communications service must inform subscribers and, if possible, users concerning that risk and, when the risk lies outside the scope of the measures to be taken by the provider the provider must give details of possible additional measures including an indication of the likely costs involved.

This information must also be provided to the Italian Privacy Authority and the Italian Authority for Communications Safeguards.

Mandatory Reporting Provisions

As a general rule, mandatory reporting provisions like those in the United States are the exception rather than the rule.

In Norway, the unauthorized disclosure of personal data must be reported to the Danish Data Protection Agency ("Datatilsynet") but not to the data subject. Sections 2–6 of the Norwegian Personal Data Regulations provide (using the official translation):

> Discrepancies
>
> Any use of the information system that is contrary to established routines, and security breaches, shall be treated as a discrepancy.
>
> The purpose of discrepancy processing shall be to re-establish the normal state of affairs, eliminate the cause of the discrepancy and prevent its recurrence.
>
> If the discrepancy has resulted in the unauthorised disclosure of personal data where confidentiality is necessary, the Data Inspectorate shall be notified.
>
> The result of discrepancy processing shall be documented.

No time limit is given for the report although the Datatilsynet have said privately that they envisage that a report will be made within about a week of the breach.

In Hungary the Hungarian Data Protection Act (Act LXIII of 1992 on The Protection of Personal Data and the Publicity of Data of Public Interest) contains provisions similar to those in other EU countries, which require that information be given to data subjects about the processing of their data. Section 6(2) of the Hungarian Act provides:

> 2) [A data subject] shall be notified of the purpose of data handling and of the identity of the persons who will handle the data.

The Hungarian Parliamentary Commissioner for Data Protection and Freedom of Information's office has interpreted that to mean the mandatory reporting to data subjects of a security breach. No time limits are however set out by the Commissioner.

Whilst other data protection authorities have not been so explicit in using similar provisions to those in Hungary to mandate the reporting of security breaches it is likely that, in any investigation, they will consider whether or not a report has been made. Some countries have formalized what they consider to be best practice—for example in Belgium a non-binding guidance note on responding to a breach has been issued by the Commission de la protection de la vie privée. Some other countries also have complex provisions which could lead to mandatory reporting—for example, in Malta if a Personal Data Representative ("PDR") has been appointed the PDR could be obliged to make a report to the Data Protection Commissioner under Article 31(2) of the Maltese Act in some circumstances. Similar obligations can arise in Sweden.

The German system is also similar in some respects to that in Malta and Sweden. In Germany, the official supervisory authority both in private and in public companies can be replaced by a data protection officer. The data protection officer can be an employee of the company or an external person with experience in the field of data protection law. This data protection officer is responsible for the compliance with the German Data Protection Act (Bundesdatenschutzgesetz; BDSG) within the company. If a security breach occurs, the data protection officer is obliged to stop the security breach independently. He would determine the need to report the breach either to the relevant data protection authority or to the data subjects themselves.

Other Reporting Obligations

The other main way in which privacy law could come into play might be after intervention by a data subject. The data subject (perhaps suspecting a breach) could make a subject access request which might of itself force disclosure of a security breach—for example a data controller is mandated in most jurisdictions to disclose who has seen the data. It is important to remember that these requests must ordinarily be answered within a short space of time prescribed by law. This is especially relevant given that some of the U.S. disclosures seen so far have come months after the suspected breach. In many cases, it would be open to pressure groups or business competitors to use the subject access request mechanism to force disclosure of a suspected security breach.

As well as in-country data protection legislation, as in the United States, there may also be additional regulation for certain types of activity which will be relevant to a business's information security policy. There are no Europe-wide direct equivalents of HIPAA or GLB but as an example in the United Kingdom, the Financial Services Authority (FSA) has said that it intends to keep a close eye on the security practices of e-banking sites and it will call the operators to account for any breaches. The Japanese FSA took similar action against one online bank in 2004 using Japanese banking law to ensure compliance. UK websites which collect credit card payments online will also have to meet the Payment Card Industry Data Security Standard which imposes the requirement of a 12-step security audit every three months.

Other criminal legislation could also have a role to play. Many countries in Europe and others further afield (like Singapore) criminalize hacking, and any resultant criminal prosecution might also lead to significant publicity for the original attack.

In many cases whilst there may not be a black-letter obligation to inform data subjects of a security breach the involvement of regulatory authorities is likely to lead to a "voluntary" disclosure being encouraged. This appears likely in the Grand Hotel incident although the UK Information Commissioner's office have said they will be launching an investigation. Deals seem often to be done behind closed doors but one high profile case in Spain concerned the Spanish version of the reality TV show *Big Brother*. In Spain, as in other parts of Europe, thousands of applicants sent their details in to the TV company with the hope of taking part. Some of the personal details of around 1,700 applicants appeared on a fan club website after an attack on the TV company's server. After regulatory activity the breach was publicly reported and in 2001 the Spanish data protection authority fined the production company behind the show the equivalent of around $1.2m for the breach. It should be noted that the Spanish data protection authority alone raised around $20m worth of fines in 2004.

Prior Registration

Most jurisdictions in Europe operate a prior registration scheme (also called notification) for the processing of personal data. Here, the corporation handling personal data must register with a state authority—for example, the Commission de la protection de la vie privée in Belgium, the Commission Nationale de l'Informatique et des Libertés (often known as CNIL) in France or the College Bescherming Persoonsgegevens (CBP) in the Netherlands. In some jurisdictions (like Austria and Hungary) the registration number it then obtains must be given to data subjects before data on them can be obtained. In many countries it is a criminal offence not to register. Penalties can be severe—for example up to 10 years' imprisonment for officers of the company.

Registration authorities are also increasingly using the registration mechanism to enforce information security standards. It is common for applicants to be required to specify the precautions they will take against disclosures of personal data as part of the registration process. The details sought increasingly include physical security (such as the burglar alarms installed at the premises and the locks on filing cabinets) as well as those protecting electronic data. It seems likely that a security breach in violation of the information security policy notified to the registration authority could also prove actionable—with the possibilities including personal prosecution of the individual who signed the registration application form warranting that those security procedures were in place and in force.

Possibility of Civil Actions

As in the U.S. the general scheme is to allow individuals to commence civil actions for losses sustained as the result of a security breach in addition to any action the regulatory authorities might take. Section 13 of the UK Data Protection Act 1998 for example creates a specific right of remedy:

> (1) An individual who suffers damage by reason of any contravention by a data controller of any of the requirements of this Act is entitled to compensation from the data controller for that damage.
>
> (2) An individual who suffers distress by reason of any contravention by a data controller of any of the requirements of this Act is entitled to compensation from the data controller for that distress if—
>
> (a) the individual also suffers damage by reason of the contravention, or
>
> (b) the contravention relates to the processing of personal data for the special purposes [defined elsewhere in the Act as the processing of data for journalistic, artistic or literary purposes].

In addition in many cases a contractual relationship will also exist between the parties which might also give rise to an action—for example under a written privacy policy on a website or under an employment contract. Civil actions across Europe are not common at present but at least one class action seems planned. Damages are unlikely however yet to approach the level of those sought in the VA action.

Manually Held Data

It is important to remember that, unlike the current California legislation, most of Europe applies data protection law equally to electronically and manually held data. Even here however there are differences from country to country. In Spain for example, manually held data will in general not fall within the scope of the main data protection legislation (Organic Act 15/1999 on Data Protection) until October 2007. In the meantime however a separate Royal Decree (Royal Decree 994/1999, of 11th June, on Security Measures) establishes mandatory security measures that must be taken by data controllers electronically processing data, and the Spanish authorities have said that they take the view that manually held data is covered by this secondary legislation.

Conclusion

In any consideration of the actions to be taken after a breach—even when that occurs in the United States—thought will need to be given to the effect this will have outside of the United States. In some cases aggrieved individuals outside of the United States will pick up on the breach, particularly when some Internet sites make it their business to feature every mandatory report made in the U.S. While there may not be a legal requirement to notify in all countries, from a practical customer relations perspective, it is hard to notify U.S. customers and not those outside the United States. Consideration must be given to making reports in Europe especially both to the individuals concerned and to the regulators where that is required by local law or possibly where it is not in the hope of leniency in any subsequent investigation. Caution must be exercised—a breach notification in the United States could reappear as evidence in a subsequent prosecution or regulatory proceeding in Europe so it will need careful drafting. No U.S. corporation can afford to expose its operatives in Europe to possible criminal prosecution through a poorly handled report. With the reporting of security breaches then, like great stand-up, timing is everything!

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Meeting News

ILPS Fall Meeting—Shanghai, October 18-22, 2006

The 2006 Fall Meeting held in Shanghai from October 18 to 22 continued the International Law and Practice Section's tradition of holding successful annual conferences in major legal centers of the world. Holding a meeting in Shanghai presented many obstacles:

- Shanghai is 7,383 miles away from New York;
- travel between New York and China is at least 18 hours each way;
- there are no direct flights from New York to Shanghai;
- the cost of travel to China is high;
- the practice of law in the People's Republic of China (the "PRC") is a relatively recent development—as recently as 1976, the PRC had no lawyers;
- few Chinese lawyers are fluent in English;
- few Western lawyers can communicate in Chinese;
- relationships are the currency of commerce in China, and few Western lawyers have built up a network of relationships in China;
- conflict between the Shanghai Bar Association and the overseas lawyers practicing in China came to the surface in April 2006, about six months prior to the opening of the Conference; and
- the Section's 2006 Fall Meeting was the first of its kind in Shanghai.

Despite these obstacles, the Fall Meeting was a success in that:

- after the 2005 Fall Meeting in London and the 2004 Fall Meeting in Santiago de Chile, the Shanghai meeting was the best attended in the history of the Section with 240 registered attorneys, speakers, spouses and guests;
- a delegation of approximately 35 members from the ABA Foundation Delegation attended the opening reception on Wednesday, October 18, and approximately 25 law students from Shanghai Jiaotong University attended the Plenary Session on Saturday, October 21;
- speakers from 100 different firms made presentations at the conference, including 70 Chinese and overseas lawyers with offices in Shanghai, Beijing or Hong Kong;
- each of the major Chinese law firms participated in the conference with about 30 Chinese speakers;
- the Shanghai Bar Association was listed as a supporter of and participant in the Meeting and the Director of its International Division made introductory comments at the inauguration of the conference;
- two high-ranking Chinese government officials, Mr. Gao Xiqing, Vice Chairman of the National Council for the Social Security Fund of the PRC, and Mr. Sun Chao, Secretary of the Communist Party of Minhang District, Shanghai, were featured speakers at the conference. Each spoke with eloquence and poignancy about the rule of law; and
- the gala dinner was held at the Shanghai Museum, one of China's national treasures.

The 2006 Fall Meeting in Shanghai followed in the footsteps of the Section's recent successful meetings. The Meeting began at 10 a.m. on Wednesday, October 18, 2006, with a Chapter Chair meeting that Jonathan Armstrong chaired with grace, humor and punctuality. Approximately 20 people attended the Chapter Chair meeting. After the meeting, Jonathan's law firm, Eversheds, hosted a lunch for the attendees at Kathleen's, a restaurant in the Shanghai Art Museum across the street from the J.W. Marriott at Tomorrow Square.

The Section's Executive Committee met from 3 p.m. to 5 p.m. on Wednesday afternoon. Mark H. Alcott, President of the New York State Bar Association, gave an insightful and thought-provoking summary of the proposed rules governing advertising by lawyers and how those rules might affect international lawyers.

On Wednesday evening approximately 170 people, including a delegation from the American Bar Foundation, attended the opening reception at the J.W. Marriott. A dinner followed at the J.W. Marriott, at which Consul General Kenneth Jarrett gave an eloquent presentation on the issues surrounding China's increasingly important role in world economic affairs.

At the inauguration of the meeting on Thursday morning, President Alcott made opening remarks on behalf of the New York State Bar Association and Director David Dali Liu, Director of the Foreign Affairs Committee of the Shanghai Bar Association, made opening remarks on behalf of the SBA.

Mr. Gao Xiqing, a rising star in China, issued an inspirational keynote address. Mr. Gao said that he was one of the first people to be trained as a lawyer in the PRC. After receiving a Master's in Law in China in 1981, Mr. Gao obtained his J.D. from Duke University in 1986 and thereafter practiced at a large Wall St. law firm. He told us that when he returned to China to work in government, the Chinese custom officer asked him what he had been doing abroad. He said that he had been studying law. "What good is that?" the officer asked. Mr. Gao then told the group that his father had been put in prison for five years without a hearing or an explanation. And then without reason or explanation, his father was released. Mr. Gao is a public servant who is working within the Chinese government to promote the rule of law.

The Fall Meeting consisted of Plenary Sessions on Thursday, Friday and Saturday mornings and 27 other MCLE programs in three tracks (Corporate, Intellectual Property, as well as Trade and Other Areas) on Thursday and Friday.

Thursday's Plenary Session was a survey of hot topics in Chinese law presented by lawyers from three prominent Chinese law firms: King & Wood, Jun He Law Offices and Zhong Lun Law Firm. Former President of the NYSBA, Kenneth G. Standard, moderated the Plenary Session. Mr. Standard was instrumental in arranging for his firm, Epstein, Becker & Green, P.C., to be a $25,000 Platinum Sponsor of the Fall Meeting.

President Alcott was the speaker at Thursday's luncheon. He gave a stirring address on the independence of the judiciary. He said that critics should freely criticize judicial decisions with which they disagree, but should not reflexively attack the judge who wrote the decision. President Alcott saw the increasing politicization of attacks upon judges as a threat to the independence of the judiciary.

A reception and dinner were held on Thursday evening at Lu Bo Lang [Green Wave], a traditional Chinese restaurant in Old Shanghai near the Yu Gardens. The dinner began with a brief introduction to the different regional cuisines in China. The dinner offered Shanghainese specialties that are rarely available in the United States.

Friday's Plenary Session, the General Counsel's Session, began at 8 a.m. Three China based general counsel from major Western companies (Owens Corning, Rhodia and Goodyear) provided a lively, practical survey of problems that frequently arise in China. Co-chair of the Plenary Session, Carole Basri, moderated the session with excellent questions and comments about best practices. A number of attendees recommended that the Friday Plenary Session in future meetings be dedicated to general counsel issues.

Friday's luncheon speaker was Mr. Sun Chao, Secretary of the Communist Party, Minhang District, Shanghai, another rising star in China.

Like Mr. Gao, Mr. Sun was one of the first lawyers in the PRC and like Mr. Gao received a J.D. from a top U.S. law school, Washington University in St. Louis. From August 1989 to January 1991, Mr. Sun was a visiting scholar at the Law Center of Georgetown University. Mr. Sun described the efforts to provide more transparency in governmental decisions for the people in his District. He said that 50 years ago, the Communist party needed a gun to govern; now the party needs a lawyer. Like Mr. Gao, Mr. Sun is working to promote the rule of law.

The Section held a reception on Friday night at Bar Rouge, a chic nightclub on the Bund featuring an outdoor terrace with spectacular views of the Huang River and Pudong, the 522-km2 area across the river on which a financial center of Asia has been built during the past decade. To give just one example of the dynamic growth of Shanghai, in 1989, the first tunnel across the Huang River opened. In 1991, the first bridge crossed the river to the north and in 1993, a second bridge crossed the river to the south. In 2006, there are four major bridges and several tunnels crossing the river and several more tunnels are planned.

Saturday morning's Plenary Session started at 9:30 a.m. to an overflowing audience. Former Section Chair James P. Duffy III chaired the Session on Professional Responsibility: Ethical Dilemmas Across Borders in a "Borderless World." Professor Wei Zhou, Dean of Shanghai Jiaotong University (SJU), was the featured speaker and approximately 25 law students from SJU attended the Session. Mr. Duffy made an eloquent presentation on the *rule of law* and its difference from *rule by law*. Professor Zhou gave a survey of the rule of law in China. The third panelist, Edward Kelly, a U.S. lawyer practicing in Thailand, presented a counterpoint position: given the widespread corruption, slave trade and child prostitution in certain Asian countries, isn't the rule of law a dream of impractical lawyers? Mr. Kelly suggested rhetorically that the ends justified the means.

President Alcott, Chair Zulack and former Chair Duffy met with faculty of the SJU for lunch on Saturday. They learned that SJU is one of the oldest and most prestigious universities in China. SJU is essentially the MIT of China and has recently started a law center in conjunction with New York University Law School. President Alcott and the Section representatives talked about selecting members of the NYSBA to be visiting lecturers at SJU.

Two sightseeing events were offered on Saturday afternoon. One event was a visit to a lake village about an hour from Shanghai and the other was a tour of Jewish Shanghai given by Dvir Bar-Gal, an Israeli journalist and historian of Jews in Shanghai. Mr. Bar-Gal, in a moving part of the tour, asked why Shanghai became home to approximately 20,000 Jews who fled the Holocaust prior to 1941. One reason is that Shanghai was one of the few locations that would accept the Jews, in part because of the relative lack of anti-Semitism in Shanghai and in part because immigrants to Shanghai did not require any documentation to settle in Shanghai given the long-standing arrangement between the British, French and American concessions in Shanghai.

The Gala reception and dinner were held on Saturday evening at the magnificent Shanghai Museum, a modern museum that is the sister museum to the Smithsonian and follows many practices of New York's best museums, such as the Metropolitan Museum and the Museum of Modern Art. Those who attended the reception were able to take audio guided tours of the museum's Bronze Age collection—the greatest of its kind in the world—and the museum's extraordinary porcelain collection. The bronze collection features works of great craftsmanship and artistic beauty dating back to the 16th century B.C.

The Gala dinner was a celebratory Chinese dinner catered by the highly professional staff of the J.W. Marriott, who provided continuous service through three speeches. The first speech was given by Michael Breun, an art historian, formerly with Sotheby's, who gave a survey of Chinese art. In the second speech, President Alcott praised the organization of the meeting and the Section's representatives who planned and implemented the meeting.

Finally in the third speech, Section Chair Jack Zulack thanked program chairs Larry Darby, Yingxi Fu Tomlinson, Joel Harris and Bob Leo for the countless hours they spent in planning the meeting. Chair Zulack stated that the level of the programs at the 2006 Fall Meeting in Shanghai was extraordinary, due to the high quality of speakers, whom the program chairs selected.

Chair Zulack also thanked the other members of the Steering Committee: Chair-Elect Oliver Armas, Executive Vice-Chair Marco Blanco and the Section's Secretary, Michael Galligan and Nava Bat-Avraham and James Jiang (Jiang Yiwei), two more important members of our Steering Committee.

Ms. Bat-Avraham led the Section's sponsorship efforts with the efficiency and tenacity that resulted in raising $114,000, the largest amount of sponsorship in our Section's history.

Mr. Jiang, a partner at the Chinese law firm of King & Wood in New York, used his extraordinary intellectual and diplomatic skills to help the meeting's organizers understand and navigate many of the cultural obstacles of planning a meeting in a foreign country 8,000 miles away from its base in New York.

Chair Zulack then thanked the sponsors. He told the audience that as high as the registration fees were, the fees typically only fund half to two-thirds of the cost of the meeting. Chair Zulack noted that to be financially neutral, barspeak for breaking even, the Section relies upon its sponsors. Chair Zulack then thanked Epstein Becker & Green and Flemming Zulack Williamson Zauderer LLP, the two $25,000 Platinum Sponsors of the 2006 Fall Meeting in Shanghai.

Chair Zulack thanked four of the five $10,000 Gold Sponsors: Alston & Bird; Eversheds; Tannenbaum Helper Syracuse and Hirschtritt; and Thacher Proffitt & Wood. Chair-Elect Oliver Armas thanked the fifth Gold Sponsor, Curtis, Mallet-Prevost, Colt & Mosle, LLP.

Finally, Chair Zulack thanked the two $5,000 Silver Sponsors: Phillips Nizer, LLP and Winston & Strawn LLP for their support, and thanked the four Meeting Supporters: Dewey Ballantine LLP, Kirkland &Ellis International LLP, Meeks & Sheppard and Weil, Gotshal & Manges LLP.

The final thanks were reserved for the staff of New York State Bar Association and the staff of the J.W. Marriott Hotel. Chair Zulack recognized that thanks to the tireless efforts of Linda Castilla and Juli Turner, no glitches ever materialized during the meeting.

Chair Zulack noted that Ms. Castilla has been planning meetings for the Section since 1990. Chair Zulack said, "None of our prior meetings could have succeeded without Linda. Nor could this one. I congratulate myself for one thing above all: to have the good judgment to defer to Linda and to follow her advice on all matters."

John Northern, the General Manager of the J.W. Marriott at Tomorrow Square, and his staff provided gracious, unparalleled service from the moment that attendees arrived at the front door of the hotel until they left. The J.W. Marriott staff anticipated the Section's needs and requests, including negotiating the release of 12 boxes of program materials that were tied up in customs for over a week prior to the commencement of the meeting. Last year, this hotel won its coveted fifth star that is awarded only to the greatest hotels in the world. In the November 2006 issue of Condé Nast Traveler, the J.W. Marriott is the highest rated hotel in Shanghai (there are two slightly higher ranked 5 star hotels across the river in Pudong). The staff at the J.W. Marriott demonstrated why their customers hold them in such high esteem.

The hotel upgraded Chair Jack Zulack and his wife Laura Mack from a standard room to the Chairman's Suite, a large luxurious apartment on the 58th Floor of the J.W. Marriott Hotel with 180 degree views of Shanghai, probably in part because Meeting participants booked around 80 rooms per night at the hotel, far surpassing the 25 rooms per night that the Section originally guaranteed. The hotel also upgraded Mark and Susan Alcott to the President's Suite and upgraded a number of other attendees of the conference.

The Chairman's Suite was the perfect site for a party, so receptions were held there for early arrivals on Tuesday, October 17, from 6 pm to 8 pm, on Thursday, after the dinner in Old Shanghai, and on Saturday, after the Gala Dinner.

Jack Zulack spoke at the end of the meeting about the importance of perspective when attempting to understand a foreign legal system. He noted that although lawyers may be a recent development in the PRC, for most of the past 4,000 years, Chinese civilization has been the most accomplished in the world. More people have lived together for a longer period in a large area known as China than in any other place in the world. In addition to gunpowder and printing, the Chinese created bureaucracy based on meritocracy more than 2,000 years ago. Chair Zulack noted that speakers Mr. Gao and Mr. Sun were products of that meritocracy. Chair Zulack concluded by thanking two shining examples of the Chinese meritocracy, two lawyers from Kaye Scholer's Shanghai office, Yingxi Fu Tomlinson, a Co-Program Chair, and Ting Ting Shi, without whom the 2006 Fall Meeting in Shanghai would not have been a success.

Committee News

London Chapter

The London Chapter of ILPS got in the mood for Shanghai on the 12th September with an informal networking supper at Ping Pong, one of London's foremost Chinese restaurants. This is the second event in London since the ILPS meeting in October last year and the aim was to try and get a keen core of members to meet regularly and to invite NYSBA members from around Europe, or even those passing through London from further afield, to join in.

This time around all of the people were UK based but some had travelled 300 miles to be there. Not many said they had heard of ILPS but most said they would join and were particularly impressed by the quality of the ILPS newsletters which were handed out to each table. We also invited a potential sponsor who may fund our programme for next year—watch this space!

The event was organised by London Co-Chairs Randal Barker, Anne-Moore Williams and Jonathan Armstrong with Michelle Cowper at Eversheds LLP managing the event on their behalf. The night featured good company and lively discussions on a wide range of subjects. Some of us were especially pleased to see a queue of well-known UK "celebrities" (think our equivalents of Paris Hilton) being bypassed by the NYSBA group who were ushered to the front of the line.

The London Chapter is looking at similar events at different venues around the City four or five times a year—all NYSBA members are welcome—for details just email jonathanarmstrong@eversheds.com. They are also exploring a welcome system for NYSBA members relocating to London either permanently or temporarily—if this is of interest, please let us know.

Jonathan Armstrong
Eversheds LLP
Leeds, United Kingdom

Request for Contributions

Contributions to the *New York International Chapter News* are welcomed and greatly appreciated. Please let us know about your recent publications, speeches, future events, firm news, country news, and member news.

Oliver J. Armas
Editor

Richard A. Scott
Co-Editor

Member and Firm News

Lombardi Cambra Co. Announces New Partner (Panama)

The Panama law firm of Lombardi Cambra Co. announces new partner.

(PRWEB) June 14, 2006—Attorney Álvaro Javier Aguilar joined the Panama law firm of Lombardi Cambra Co. http://www.lombardicambra.com as a partner. Mr. Aguilar has advised multinational and local clients in real estate purchases and development, international mergers and acquisitions, tax planning, real estate investment funds, joint ventures, trusts, foundations, software licensing, e-commerce, and electronic transfer of funds.

Transactions where Mr. Aguilar has advised include the purchase of real estate by a U.S. retailer, purchase by a U.S. finance entity of a stake in a Central American bank, tax arrangements and sale of a property to a Panama-U.S. joint venture and the structuring of a real estate joint venture for U.S. investors.

Mr. Aguilar has published articles on intellectual property, taxation of low-tax transactions, banking law, as well as other business law matters in several international publications. He has lectured before the Panama and New York Bar Associations and the Panama College of Accountants.

Mr. Aguilar served as board member of the Panama Bar Association, representing the group in the negotiations of the Free Trade Agreement with the United States and the implementation of the 2005 Tax Reform. He serves as Chair of the Commission of Foreign Trade and International Relations of said Association, board member of the Panama-American Chamber of Commerce and country co-chair of the New York State Bar Association chapter in Panama.

He graduated from Universidad Santa Maria law school in Panama and received his LLM in International Trade Banking from Washington College of Law in Washington, D.C.

As part of the growth strategy of the law firm, Aguilar joins attorneys Jorge Lombardi and Ricardo Cambra in the partnership, which will change its name to Lombardi Cambra Aguilar.

Pana Vestor

* * *

Demarest e Almeida's Competition Practice Group

Demarest e Almeida Competition Practice Group is in full activity. It is involved in one of the most important cartel cases in the history of the Brazilian experience. In addition, Demarest e Almeida's team is involved in several notifications of mergers and other transactions as well as in some of the leading conduct cases. Demarest e Almeida has also provided several clients with either competition compliance training programs or competition/antitrust audits interviews and reposts.

Mário Roberto Villanova Nogueira, a partner of the Competition Practice Group at Demarest e Almeida, is now advising some European clients with the filing in Brazil of one public offer that is still confidential. Mr. Nogueira is also coordinating the Brazilian notification of several multinational transactions. Mr. Nogueira was invited to speak in the 50th Congress of Salvador, Bahia, sponsored by the International Union of Lawyers. Mr. Nogueira will talk about distribution agreements and competition law.

Ricardo Inglez de Souza, a senior associate of the Competition Practice Group at Demarest e Almeida, is now involved in two important cases. Mr. Inglez de Souza is defending an important client in the auto parts industry against a supposed cartel case and he is also in charge of defending the interest of almost 20 tin producers in the vertical integration of their monopolist supplier of steel. Mr. Inglez de Souza is also conducting a routine antitrust audit for one of the clients of the firm. Mr. Inglez de Souza was appointed as co-coordinator and professor of the 1st Competition and Regulatory Law Course by the Law School of the Brazilian Bar Association.

Demarest e Almeida
Brazil

* * *

Daniel H. Erskine Selected to Present Paper

Daniel H. Erskine, Esq. was selected to present his paper entitled "Judgments of United States Supreme Court and the South African Constitutional Court as a Basis for a Universal Method to Resolve Conflicts Between Fundamental Rights," at the Human Rights Centre of Ghent University in Belgium on December 15 & 16, 2006. The Centre hosted an International Conference on Conflicts Between Fundamental Rights. The Keynote speaker was the pre-eminent jurist Judge Françoise Tulkens of the European Court of Human Rights.

Attorney Erskine engages in the private practice of law in White Plains, New York. He holds an LL.M. in International & Comparative Law from The George Washington University School of Law. He may be reached via email at erskined@erskine-law.com.

Daniel H. Erskine, Esq.
Attorney & Counsellor at Law
White Plains, NY, U.S.A.

Fraser Milner Casgrain LLP, one of Canada's leading business law firms, has made the following recent announcements:

(National) FMC appointed Michel Brunet, 55, CEO on July 1, adding these new responsibilities to his role as Chair, a position he has held since August 2005. Mr. Brunet joined the Montreal office as a partner in 1994, and was appointed Operations Managing Partner in 1999. A member of FMC's National Board, as well as the Montreal Regional Board, he has more than 30 years of experience in selling, acquiring and financing businesses and infrastructure projects, and was instrumental in designing the firm's North American strategy. Under this newly defined mandate, he is setting the firm's strategic direction while continuing his work as FMC's chief ambassador.

(Ottawa) FMC welcomed Christopher Kent, an international trade lawyer with significant expertise in Canadian and U.S. relations, to the firm to head its International Trade Practice Group. Mr. Kent will leave his practice in which he has acted as co-counsel on a number of high-profile international trade disputes with the globally reputed law firm of Wilmer Cutler Pickering Hale & Dorr LLP. He will enter FMC as a partner in its Ottawa office but will continue to hone and leverage his relationship with this global leader, as well as other leading global firms.

* * *

Sergio R. Karas re-elected as Vice-Chair of the Ontario Bar Association Citizenship and Immigration Section

Sergio R. Karas, from Karas & Associates in Toronto, Canada has been re-elected as Vice-Chair of the Ontario Bar Association Citizenship and Immigration Section. Mr. Karas also recently chaired and moderated a session entitled "When Your Client Comes to Canada: Taxation and Customs Issues," which included officials from Canada Border Services Agency, immigration lawyers and international tax practitioners. He was recently quoted in *The Globe and Mail*, Canada's national newspaper, on the issue of investigations of visa post employees overseas, and by *The National Post*, on the issue of deportations of international war criminals from Canada. He will be chairing a session at the annual meeting of the International Bar Association in Chicago in September 2006 on "Global Business Immigration Update," which will include prominent speakers from several countries.

Sergio R. Karas
Karas & Associates
Barristers and Solicitors—Immigration Lawyers
Toronto, Canada

* * *

Ricardo Ramirez joins Mexico City office of Thacher Proffitt & Wood LLP as Counsel

Thacher Proffitt & Wood LLP announced that Ricardo Ramirez has joined its Mexico City office, Thacher Proffitt & Wood S.C., as Counsel, effective September 1, 2006. This increases the total number of attorneys in the Mexico City office, led by managing partner Boris Otto, to 22. Ricardo will head the Latin American Trade Practice Group, and will be a member of the Latin American Dispute Resolution Group. Thacher Proffitt significantly broadened the scope of its Mexico City office earlier this year by almost doubling its number of attorneys in the areas of litigation, arbitration, and bankruptcy with the addition of Luis Enrique Graham's group, who joined the Firm for the same reason.

Ricardo Ramirez has extensive experience advising on trade agreements, negotiations, and dispute resolution proceedings. His practice focuses on NAFTA issues and free trade across Latin America, including international trade dispute resolution. Before joining Thacher Proffitt, Ricardo was the Deputy General Counsel for Trade Negotiations of the Minister of Economy in Mexico. For over 11 years, Ricardo advised on all trade agreements signed by Mexico, including all 11 Free Trade Agreements signed by Mexico, and represented the Mexican government in complex international trade negotiations with the governments of Chile; Nicaragua; Uruguay; El Salvador, Guatemala and Honduras; and Israel. He served as Mexican lead counsel in many proceedings under the WTO Dispute Settlement Mechanism and other trade agreements signed by Mexico involving a wide range of complex issues.

Ricardo received his law degree from Universidad Autónoma Metropolitana in 1992, and his LLM from American University Washington College of Law, studying international business law, in 1994. He is a member of WTO Indicative List of Panelists, and a panelist on the Trade Agreement between Mercosur and Colombia, Ecuador and Venezuela, the Trade Agreement between Mercosur and Bolivia, and the Free Trade Agreement between Costa Rica and Chile. He holds the International Trade Law Chair at National Autonomous University of Mexico (UNAM). Ricardo has been a panelist and roundtable member at several conferences on international trade law and dispute resolution.

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