Dear Members and Colleagues:

As we approach the half-way mark of the bar year, it seems appropriate to take a look at what the section has planned for the remainder of the year as well as reviewing what has been done since the year began. First, I would like to report the exciting programs the section has planned for the coming months.

The International Law Section will host a symposium on Africa at the Charles H. Wright Museum of African American History in Detroit on May 19, 2010, from 4:00 until 7:00 P.M., followed by a reception at the Museum. The symposium will focus on aspects of human and civil rights, political and economic development, and foreign investment in sub-Saharan Africa. Speakers will include economists, lawyers, and political scientists discussing economic legal and political developments in sub-Saharan Africa and opportunities for US persons to support development in the region.

The International Law Section will also conduct our annual meeting in September, which is still in the planning stages. We will be sending you communications regarding this important meeting and program in the next few months.

To summarize the first half of the year, the new officers of the Section assumed their positions on October 1, 2009: Jeffery F. Paulsen as Treasurer, Margaret A. Dobrowitsky as Secretary, Cameron S. DeLong as Chairperson Elect and I as the Chairperson.

Our first meeting and program were held in the offices of Brinks, Hofer, Gibson & Leone in Ann Arbor on November 17, 2009. Ms. Deborah Burand, Director, International Transactions Clinic at the University of Michigan Law School along with several third year law students who had recently completed the clinical program were our speakers. An article prepared by Ms. Burand and her students is included in this edition of the MIL.

The second section meeting and program of the year were held on January 17, 2010, at the offices of Butzel Long in Detroit, at which our speakers were
Michigan International Lawyer

Submission Guidelines

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

The Michigan International Lawyer invites unsolicited manuscripts in all areas of international interest. An author is encouraged to submit a brief bio and a photograph for publication. An article, including footnotes, should contain between 1000 and 3000 words.

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

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

Submissions should be forwarded to: Professor Qin, Faculty Editor
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Telephone: (313) 577-3940
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Kind regards,

Richard G. Goetz
Chair

John Monk, managing director of Autopolis whose discussion topic was A New Automotive Industry and Alternative Fuels and section members Margaret A. Dobrowitsky, Linda J. Armstrong and Debra Auerbach Clephane who provided their insights as to intellectual property and immigration issues that are likely to be affected by the changes and new dynamics in the New Automotive Industry.

Before any more of the year passes by, I want to encourage all of our members to get involved in at least some aspect of the section. Whether that is in writing an article for the Michigan International Lawyer, joining a section committee or attending section meetings, your contribution and participation are vital to the continuing success of the section and the continuing growth of each of us as international lawyers.
China's New Merger Review Regime under the Antimonopoly Law: A Protectionist Tool?

By Wentong Zheng, Associate Professor of Law at University at Buffalo Law School, The State University of New York

It has been a little more than a year and a half since China's new Antimonopoly Law ("AML") went into effect on August 1, 2008.1 Adopted in August 2007 after a nearly thirteen-year drafting process, the AML is China's first comprehensive antitrust legislation and has been hailed as a milestone in China's march towards a market economy.

The AML has all major elements of the antitrust laws of the Western countries: prohibition of horizontal agreements, prohibition of abuse of dominant market position, and a merger review regime. This essay will discuss China's merger review regime under the AML and assess recent charges that it is being used as a protectionist tool against foreign investment.

China's New Merger Review Regime

Prior to the AML, an antitrust review process was in place for foreign acquisitions of Chinese companies, but no comparable process existed for mergers and acquisitions among domestic companies. The framework for a new merger review regime is laid out in chapter four of the AML. By not limiting its reach to foreign acquisitions, as the previous regulation governing merger reviews did, chapter four of the AML brings within its purview mergers and acquisitions among domestic companies as well.

Chapter four of the AML specifies a list of the substantive factors that will be considered in merger reviews: (1) the market share of the undertakings (meaning business operators or parties) involved in the relevant market and their ability to control the market; (2) the degree of market concentration in the relevant market; (3) the effect of the concentration on market entry and technological progress; (4) the effect of the concentration on consumers and other undertakings; (5) the effect of the concentration on national economic development; and (6) other factors affecting market competition as determined by the antimonopoly enforcement agency.2 Furthermore, chapter four of the AML provides that a merger that otherwise would be prohibited may be allowed if it has competitive effects that outweigh its anticompetitive effects.3 A merger that otherwise would be prohibited may also be allowed if it is "in the social or public interest."4

Chapter four of the AML, however, only provides a sketch of the mechanics of the new merger regime.5 The details of the merger review regime are expected to be fleshed out in subsequent regulations. The first year of the AML saw a slew of regulations or proposed regulations relating to the merger review regime:

• On August 3, 2008, two days after the AML went into effect, the State Council (China's cabinet) issued a decree on the thresholds that would trigger merger notification requirements under the AML.6
• In March 2008, China’s State Council released a draft merger notification and review regulation for public comments, to which the American Bar Association’s Antitrust Section and International Law Section responded with extensive comments.7 The regulation that was eventually promulgated in August 2008, however, was a stripped-down version containing only notification threshold provisions.
• In May 2009, the Antimonopoly Commission (the inter-agency body charged with antitrust policymaking under the AML) issued guidelines on market definition under the AML, after soliciting public comments.8
• Currently, four other regulations pertaining to merger notification procedures, merger review procedures, investigation of mergers not notified as required by law, and investigation of mergers that do not reach the notification threshold are going through the rulemaking process.

What has emerged from this hodgepodge of regulations or proposed regulations is a merger review regime that in some respects resembles those of Western countries and in some other respects does not. On one hand, China's new merger review regime follows many of the common Western practices, such as the adoption of the Small but Significant and Non-transitory Increase in Price ("SSNIP") test for market definition and the utilization of notification thresholds based on the size of the parties to the transactions. On the other hand, the factors considered in merger reviews in China are apparently broader and less predictable than those considered in Western countries. The factors considered in China are broader because the merger authority can consider factors other than the effects of the merger on competition, including the effects of the merger on "other undertakings"9 (does it imply that China may want to protect the competitors, not the competition?) and the effects of the merger on "national
economic development”10 (does that give industrial policies a role in merger reviews?). The factors considered in China are less predictable because the merger authority can consider any factor that it may determine affects market competition, and factors as amorphous as “social or public interest.”11

As is true perhaps with every merger review regime, what is more important than the texts of the merger review laws and regulations is how the merger reviews are actually conducted. The Antimonopoly Bureau of the Ministry of Commerce (“MOFCOM”) has assumed responsibility for merger reviews under the AML. In August 2009, MOFCOM released official statistics showing that as of the end of June 2009 MOFCOM received more than one hundred merger notifications under the AML. Of those notifications, MOFCOM accepted fifty-eight of them for official review and completed its review for forty-six of the applications. Of the cases reviewed, forty-three were approved without any conditions, two were approved with conditions, and one was blocked.13 Since the publication of these statistics, MOFCOM announced its approval of three more merger applications with conditions. As of now, MOFCOM has blocked one transaction (Coca-Cola/Huiyuan),14 and approved five transactions with conditions (InBev/Anheuser Busch,15 Mitsubishi Rayon/Lucite,16 GM/Delphi,17 Pfizer/Wyeth,18 and Panasonic/Sanyo9).

The six merger cases that MOFCOM has blocked or approved with conditions involve three different types of merger: horizontal merger (InBev/AB, Mitsubishi Rayon/Lucite, Pfizer/Wyeth, and Panasonic/Sanyo), vertical merger (GM/Delphi), and conglomerate merger (Coca-Cola/Huiyuan). Unfortunately, the published decisions for those cases tend to be very cursory, and generally focus more on remedies than on the evidence that would support a conclusion of competitive harms.20

One thing that is clear from these cases is that MOFCOM has demonstrated its readiness to impose both structural remedies (such as the divestitures ordered in Mitsubishi Rayon/Lucite, Pfizer/Wyeth and Panasonic/Sanyo) and behavioral remedies (such as the restrictions on the acquisition of additional equity stakes in Chinese beer companies imposed in InBev/AB).21 But in terms of how MOFCOM would evaluate available evidence to draw inferences about competitive harms, MOFCOM has not revealed a pattern of thinking in the decisions it has published so far.

China’s New Merger Regime: A Protectionist Tool?

Of all of MOFCOM’s published merger decisions, the Coca-Cola/Huiyuan decision issued in March 2009 remains the most controversial one. In that decision, MOFCOM blocked Coca-Cola’s acquisition of Huiyuan Juice Group, China’s largest fruit juice maker. The decision evoked foreign investors’ concerns that MOFCOM might be using the merger review process as a protectionist tool, concerns that were first raised when the AML was still being drafted.

MOFCOM based its decision to block the proposed Coca-Cola/Huiyuan deal for three reasons. First, the deal would allow Coca-Cola to leverage its dominant position in the carbonated soft drink market to lessen competition in the fruit juice market. Second, the deal would allow Coca-Cola to own two popular fruit juice brands in China and therefore would significantly raise the barrier to market entry. Finally, the deal would severely limit the ability of China’s small- and medium-sized fruit juice companies to engage in innovation and competition in the fruit juice market.22

MOFCOM’s decision in Coca-Cola/Huiyuan is troubling. Although MOFCOM did not conduct an explicit market definition analysis, apparently it believed that carbonated soft drink and fruit juice belong to different product markets. A merger between firms that do not compete with each other in the same market—or a conglomerate merger—does not usually raise antitrust concerns. Especially, when the products of the merging firms are complementary, as seems to be the case in Coca-Cola/Huiyuan, the merger would actually lead to lower prices according to the “Cournot effect” and thus would benefit consumers. Therefore, if the goal of antitrust is to protect competition and enhance consumer welfare, a conglomerate merger should not be viewed as anticompetitive merely if it will lead to elimination of some competitors.

Many commentators, understandably, have suspected that the real reason behind MOFCOM’s decision is protectionism and nationalism. Huiyuan Juice is a household name in China, and given the rising economic nationalist sentiments in China in recent years, it would not be surprising if MOFCOM blocked the Coca-Cola/Huiyuan deal out of nationalist concerns. Further, China’s domestic fruit juice industry, which would stand to lose if the Coca-Cola/Huiyuan deal went through, lobbied hard against the deal before MOFCOM.

However, absent direct evidence of MOFCOM’s protectionist intent in blocking the Coca-Cola/Huiyuan deal, it would be very difficult to prove protectionism, as it would entail proving the negatives, i.e., MOFCOM did not block the deal for any legitimate reason. Could MOFCOM have blocked the Coca-Cola/Huiyuan deal out of genuine antitrust concerns, even if its rationales do not comport with the “correct” view of conglomerate mergers? As the Chinese business media reported, MOFCOM’s Coca-Cola/Huiyuan decision is indeed modeled after a 2003 decision by the Australian Competition and Consumer Commission to block the proposed acquisition of Australia’s largest fruit juice maker by Coca-Cola’s subsidiary in Australia.23 In addition, MOFCOM’s rationales in Coca-Cola/Huiyuan are similar to some of the rationales uphold
by the United States Supreme Court in *FTC v. Proctor and Gamble* back in 1967.\(^{24}\) And of course, another famous—or infamous, depending on your point of view—example of a conglomerate merger being blocked is the European Union’s rejection of the GE/Honeywell merger in 2001. Certainly, the fact that there are close parallels between MOFCOM’s rationales and the rationales employed in other jurisdictions does not necessarily make MOFCOM’s rationales any less protectionist. But it does show that MOFCOM’s decision joins a line of merger decisions by world’s major antitrust authorities that indicate differences of opinion as to the anticompetitive effects of conglomerate mergers.

In addition, one has to look beyond one specific case to determine whether there is a pattern or trend of protectionism under the AML. There may be strong suspicions, if not strong evidence, that MOFCOM acted out of protectionist concerns in the Coca-Cola/Huiyuan case. But suspicions of protectionism will become less strong if the frame of reference is extended to all of the mergers that have been reviewed by MOFCOM so far. As we know, of all of the mergers for which review has been concluded, MOFCOM approved the vast majority of them without conditions. We do not know the identity of the parties to those approved mergers, because MOFCOM did not publish its merger decisions for them. However, there is indication that a significant number of mergers reviewed by MOFCOM—if not all of them—involve foreign investors. Domestic Chinese enterprises that are large enough to meet the merger notification thresholds are typically state-owned-enterprises, and mergers between China’s state-owned-enterprises likely do not undergo formal merger review by MOFCOM. The Coca-Cola/Huiyuan merger turns out to be the only blocked foreign-related merger out of many that have been reviewed by MOFCOM.

The picture becomes even more favorable for the argument of little or no protectionism if the frame of reference is extended to all aspects of the AML, not just merger review. Before the AML took effect, the fears of the international business community were largely about proactive enforcement actions against multinational corporations such as Microsoft under the new law.\(^{25}\) More than one year later, however, none of the feared enforcement actions has taken place. The Chinese media reported that certain disgruntled consumers have filed lawsuits against Microsoft or petitioned government agencies to launch investigations into Microsoft. But as of now, the courts and the government have not acted on any of such lawsuits or petitions.

As conclusion, a final point that will help us keep things in perspectives is that whether the AML itself harbors a protectionist agenda does not tell the whole story in a country like China where numerous government restraints on competition exist outside of the purview of formal antitrust law. The Chinese government has so many ways to limit foreign competition that in many situations it does not even need to resort to the AML to keep unwelcome foreign investors away. Chief among the non-AML hurdles to foreign competition are market entry prohibitions in various industries. Although China made commitments at the World Trade Organization to ease some of its market entry restrictions, many of them are not affected and will be here to stay. Furthermore, the Chinese government can always call off a proposed merger between a foreign investor and a state-owned-enterprise through exercising its power as the owner and as the political superior of that state-owned-enterprise. It is no coincidence that the Coca-Cola/Huiyuan merger—the only merger that has been blocked under the AML so far—involves a private Chinese company in an industry that has no market entry restrictions. It is an irony that in this sense, a rejection of a merger under the AML—meaning there are no other ways for the government to reject the merger—perhaps should be viewed as a sign of progress.  

About the Author

Mr. Wentong Zheng is an Associate Professor of Law at University at Buffalo School of Law, The State University of New York. He holds a J.D. and a Ph.D. in economics from Stanford University, where he was an executive member of Stanford Law Review. Mr. Zheng practiced law at the Washington, DC office of Steptoe & Johnson LLP prior to joining University at Buffalo Law School in 2009. His research interests include law and economics, international trade, Chinese competition law, law and development, and commercial law.
Understanding the U.S. Buy American Restrictions and Their Potential Impact on Non-U.S. Suppliers

By Patrick Fazzone, Butzel Long Tighe Patton, PLLC

The United States has a number of laws that have restricted the ability of non-U.S. suppliers to sell goods to U.S. federal, state, and local governments. While the WTO Government Procurement Agreement and bilateral arrangements like the Australia-U.S. Free Trade Agreement (“AUSFTA”) have removed some of these restrictions for certain U.S. trading partners, important limitations continue to apply. Most recently, Buy American restrictions included in the 2009 stimulus legislation, also known as the American Recovery and Reinvestment Act of 2009 (“ARRA” or “Recovery Act”), limit procurement opportunities for non-U.S. suppliers and have created uncertainty as to how those funds may be spent. The remainder of this article summarizes key U.S. buy American restrictions and examines issues arising out of the ARRA provisions.

Buy American Act Restrictions

The Buy American Act of 1933 (“BAA”) applies to all U.S. federal government agency purchases of goods valued at specified amounts. It does not apply to procurement of services. Under the BAA, all goods for public use (articles, materials or supplies) must be produced in the United States, and manufactured items must be produced in the United States from U.S. materials. 41U.S.C. 10(a-d). Many states and local governments include similar restrictions in their procurement rules.

The BAA does not create an absolute prohibition on all purchases of non-U.S. goods. Civilian procurements are subject to a price preference that favors “domestic end products” from American firms in the form of a 6 percent price evaluation penalty. When the awarding agency evaluates the prices of competing bids, an amount equal to 6 percent of the cost of the disfavored material is added to the evaluated bid price. Higher penalties apply where the local competitor is a small business from an area of high unemployment or in the case of defense procurement.

These preferences apply both to non-manufactured products mined or produced in the United States and manufactured goods produced in the U.S. in which the cost of its U.S. components exceeds 50% of the item. The BAA contains various exceptions such as where domestically produced items are unavailable in reasonable quantities at a reasonable cost. Nevertheless, the Act traditionally tended to create a purchasing bias against suppliers subject to its restrictions in most situations.

In recent years, the significance of the BAA restrictions has declined due to the effect of U.S. international trade commitments. Under the authority of Trade Agreements Act of 1979, implementing the GATT Procurement Code, the U.S. Government has granted waivers to certain trading partners which are intended to place their suppliers on an equal footing with domestic producers. Under bilateral agreements like the AUSFTA, eligible suppliers have similarly been afforded a waiver from the BAA pricing preferences on covered federal...
government procurements exceeding specified amounts. In addition, these undertakings have been adopted by many of the U.S. states, including the state governments of Michigan, California, Florida, New York, Pennsylvania and Texas. Thus, in at least these jurisdictions, non-U.S. companies from certain U.S. trading partners are permitted to sell to state governments on an equal footing with domestic suppliers. Other states and U.S. municipalities have not made the same commitments and are still free to maintain preferences for local suppliers.

Buy America Act Restrictions

A different set of rules continues to apply to procurements under the so-called Buy America Act. These provisions are applied to transit-related procurements valued at over US$100,000, for which funding includes grants administered by the Federal Transit Authority or Federal Highway Administration. Almost all large transportation contracts in the United States are federally funded, but are administered by state and local governments or private sector organizations. The Buy America Act provisions are a condition of U.S. federal grants to state, municipal or other organizations including transit authorities. These provisions contain absolute specified restrictions on non-U.S. content. For example, projects funded by the Federal Transit Authority require all steel and manufactured products to have 100% U.S. content and to be 100% U.S. manufactured. Similar conditions prevail for airport projects that receive funds from the Federal Aviation Administration as authorized by the Airport and Airways Facilities Improvement Act. Such projects require that all steel and manufactured products have 60% U.S. content and that final assembly occur in the United States.

Buy American Provisions in the Recovery Act

When it was under consideration in the U.S. Congress, the ARRA created considerable stir among U.S. trading partners because of its Section 1605, which contains a Buy American restriction (similar to that under the Buy America Act) applicable to projects funded by stimulus funds. As a result of this outcry, Section 1605 was amended to include a requirement that the Buy American provisions be applied “in a manner consistent with United States obligations under international agreements.” Guidance issued by the U.S. Administration since has made clear that the WTO Government Procurement Agreement and bilateral free trade agreements are examples of such “international agreements.” The government has also made clear that the Buy American conditions and the limitations set forth in Section 1605 are to apply both to direct procurements by U.S. federal agencies and to projects funded by the federal government and administered by the states and municipalities. Nevertheless, the language of Section 1605 and approach taken by the Administration in applying and interpreting Section 1605 so far has created a number of uncertainties for non-U.S. suppliers.

Section 1605 Provisions

Section 1605 of the Recovery Act specifies that in any project funded under the ARRA for the construction, alteration, maintenance or repair of a public building or public work, all of the iron, steel and manufactured goods used in the project must be produced in the U.S. The Administration’s guidance indicates that the terms “public work” and “public building” are very broad and include “without limitation, bridges, dams, plants, highways, parkways . . . power lines, pumping stations, . . . railways, airports, terminals, docks” and similar projects. There are several waivers or exemptions to the Buy American provisions. These include unavailability of the items in question, unreasonable cost, or inconsistency with the public interest. Waivers or exemptions may be granted by the U.S. federal procuring entity on an individual-project basis. In addition, non-manufactured goods are not subject to the ARRA’s Buy American conditions, although an interim final rule amending the Federal Acquisition Regulation clarifies that these products are still subject to the 6 percent price evaluation penalty under the BAA (where applicable).

In addition to the waivers and exemptions applicable to all suppliers, companies from signatories of the Government Procurement Agreement or bilateral agreements like AUSFTA may benefit from the provisions of those trade deals. Thus, for example, in construction projects valued in excess of US$7,443,000, where the procurement is directly by a U.S. federal government agency, Australian suppliers are afforded the same treatment and opportunities as domestic contractors. Australian suppliers are also to be afforded equal treatment as U.S. domestic contractors where the funds are administered by one of the thirty-one states that have agreed to be bound by the AUSFTA commitments.

Areas of Uncertainty

While the Administration has sought to clarify the Buy American and other conditions in the ARRA, various issues remain that make pursuing opportunities in this area potentially difficult. One issue relates to how a product qualifies in origin to benefit from the government procurement benefits of the U.S. government procurement undertakings. The Administration’s Interim Final Guidance issued in April 2009 indicates that origin will be determined under the “substantial transformation” test, a principle borrowed from the U.S. customs law. Goods that are substantially transformed in Australia for example will be eligible for the benefits of the AUSFTA in qualifying projects. “Substantial transformation” does not require that all productive steps take place in the eligible country. Rather, the article must be sufficiently transformed in that country so as to take on an identity, function and use that distinguish it from its components imported from other countries.
The use of the case-specific substantial transformation test has created considerable uncertainty for contractors and suppliers. This has created considerable pressures in what is emerging as a competitive race for Recovery Act projects. Non-U.S. suppliers seeking to sell end products to U.S. contractors will need to conduct their own review to be able to demonstrate that their goods are of the requisite origin under the substantial transformation test. Where third country parts or components are incorporated, the exporter will need to be able to demonstrate (and quite possibly certify) that the end product is of eligible origin. Suppliers from countries like Australia or other signatories of government procurement agreements will not be able simply to arrange for the supply of end products made in third countries for ARRA-funded projects.

The rule of origin for manufactured goods relates only to the place of creation of the end product, i.e., each item in the form in which it is delivered to the work site. No country is excluded as a source of components or sub-components of such products, nor are manufactured products required to contain any minimum level of domestic component content. Thus, components or sub-components of any country including those subject to BAA restrictions are permitted to be used provided the end product has been “manufactured in the United States” or in a country benefiting from trade agreement provisions on government procurement. This provision may create some uncertainty in projects administered by states which have not adopted U.S. government procurement commitments as well as in municipal projects and those falling below the thresholds covered by the relevant trade agreements. The term “manufactured in the United States” has not been defined either in the ARRA or in the Administration’s interim regulations or guidance. In the absence of any particularized definition, the substantial transformation test will presumably be applied. Again, this will require non-U.S. suppliers to become familiar with the nuances of this principle of U.S. customs law in evaluating whether they will be eligible to bid on projects in which the “manufactured in the United States” standard is relevant.

A related challenge facing non-U.S. suppliers has arisen as a result of the lack of any final formal guidance on these origin issues and the novelty of imposing a substantial transformation test in an unfamiliar domestic setting. Reportedly, an increasing number of U.S.-based government contractors are requiring a certificate of compliance with the Buy American requirements to protect themselves in the event of possible controversy later. Cautious contractors prefer to avoid possible liability under U.S. anti-fraud laws (such as the False Claims Act) or grounds for a successful bid protest later on by insisting on a warranty of compliance even where a non-U.S. product can be supplied under the standards set forth in the Administration’s final interim rules and guidance.

Finally, the situation has been made even more complex by the fact that the various federal agencies have developed their own interpretations of the interim guidance provided by the Administration, especially on the issue of what constitutes a “manufactured” good falling within the ARRA’s Buy American restriction. Non-U.S. suppliers interested in selling to a specific federal agency, and U.S. contractors interested in sourcing foreign made goods should be careful to consult with a qualified adviser as to the particular standards applied by that department.

Conclusion

The opportunities afforded not only by the Recovery Act but also other U.S. government procurement projects are considerable and enticing. However, companies should be careful to understand the “fine print” in the form of the various requirements and restrictions that exist under the U.S. laws and regulations relating to government procurement. Not the least of these are the origin restrictions included in the various U.S. federal and state procurement rules.

About the Author

Patrick B. Fazzone is a partner at Butzel Long Tighe Patton, PLLC in Washington DC. He specializes in sophisticated commercial transactions, corporate law, technology transfers and International trade law. His clients include U.S., Australian, Asian and European private and quasi-governmental entities, including those in high technology, manufacturing and energy industries. Through the firm’s global network of offices and associated firms Mr Fazzone advises and assists clients doing business or seeking to enter new markets around the world including in Asia Pacific, Africa and Europe. He also advises non-U.S. companies in connection with their intended business activities in the United States as well as on the protection of their intellectual property rights, on pre-financing structuring of U.S. start-up companies, on the structuring and establishing of joint ventures and other commercial arrangements, and in connection with business and asset acquisitions and dispositions, and the drafting of sales and technology agreements.

On the government relations front, Mr. Fazzone advises clients in their dealings with the U.S. federal and state governments. He has advised and assisted numerous U.S. and non-U.S. clients in connection with regulatory and policy issues as well as in connection with their efforts to sell goods and services to U.S. government departments and agencies including the Department of Energy, the Federal Aviation Administration, and the Department of Defense.

Mr. Fazzone is a Member of the DC Bar as well as the American Bar Association and Inter-Pacific Bar Association. He is the founder and Chairman of the Trade and Government Committee of
the American Chambers of Commerce in Australia. Mr Fazzone has taught at the University of Sydney Law School and the Duke University School of Law. He is a 1981 graduate of Duke University School of Law where he was Note and Comment editor for the Law Journal. He has twice been a Fulbright Scholar -- first in International Trade Law in Geneva, Switzerland, and later in International Law in Sydney, Australia.

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The listserv for the International Section is the primary means to receive notices and announcements about upcoming events and programs within the Section. The listserv is not discussion based, rather, it includes only important section-wide announcements and newsletters. Those who sign up can expect to receive 1-2 e-mails per month.

Section members are automatically signed up for the listserv when they provide their e-mail address to the State Bar of Michigan. In addition, section members can sign up for the listserv by accessing the International Law Section page on the State Bar website. Section members may also contact Heather K. Anderson, at handerson@mail.michbar.org, to be added to the listserv.

You must be a member of the International Law Section to sign up for the listserv.

Join the Fun . . . Join a Section Committee

We have many great ideas but need your help. Make a commitment to give the Section 5-10 hours of your time each year. Think about it: the equivalent of no more than one working day. Please join a committee of the Section and support the objectives of the Section:

- International Business and Tax
- International Trade
- Emerging Nations
- International Employment Law & Immigration
- International Human Rights

We have made great strides but we cannot sustain the progress without greater involvement from our Section members. Contact information for committee chairs and co-chairs is available at the back of the newsletter.
An Early Lesson from Toyota's Crisis—Where’s the Board?

By Bruce Aronson, Associate Professor of Law at Creighton University

Last month Toyota, one of the most highly respected corporations in the United States and throughout the world, plunged into a full-blown crisis over car quality and safety. Problems with sudden unintended acceleration and other issues resulted in a recall of over six million vehicles in the United States and over eight million worldwide within a two-week period. The fallout has included a dramatic drop in car sales, halts in vehicle production, ongoing investigations by the National Highway Traffic Safety Administration (“NHTSA”), a spate of lawsuits, and a public appearance by the President of Toyota Motor Corporation, Akio Toyoda, before the House Committee on Oversight and Government Reform on February 24th.

In his testimony, Mr. Toyoda attributed the mounting problems to the company’s excessive emphasis on growth and profits in recent years at the expense of its traditional focus on quality and product safety. Others have cited cultural factors to help explain Toyota’s sudden and startling troubles, including: a culture dominated by deliberate engineers who are good at the gradual development and incorporation of improvements but who fear public recalls and are poor at crisis management, a sense of complacency after years of outstanding results, poor information flows (particularly involving bad news) and corporate secrecy. These factors combined to create a situation where Toyota repeatedly underestimated the seriousness of quality issues, alienated the NHTSA, and finally was forced to make unprecedented recalls in the United States.

In an opinion published earlier in the Washington Post, Mr. Toyoda outlined steps he is taking to address Toyota’s crisis and repair its public image, including internal and external reviews of operations and quality controls, more vigorous investigation of consumer complaints, more effective internal sharing of information, and better communications with regulators. Early this month Toyota named Rodney Slater, former U.S. Transportation Secretary in the Clinton Administration, to lead a new panel of independent experts to advise Toyota on quality issues.

Conspicuously absent from Mr. Toyoda’s list of worthy measures is the role of governance institutions—particularly the role of Toyota’s board of directors in corporate governance. The structure and functions of a typical Japanese corporate board reinforce the penchant for corporate secrecy in Japan and other factors which are often cited as a cause of Toyota’s problems.

In both the United States and Japan the board of directors has a legally mandated function to ensure a corporation’s compliance with law. In both countries case law provides that directors have a duty of oversight, as part of their fiduciary duties owed to the corporation and its shareholders, to establish and monitor an information and reporting system designed to ensure such compliance. In the United States the duty of oversight in Delaware stems from the well-known Caremark decision, while in Japan it results from a shareholder derivative suit related to the $1.1 billion trading loss scandal in Daiwa Bank’s New York branch in 1995. Statutes in both countries also provide for broader systems of internal controls. In this case Toyota’s systems failed badly.

In Japan the legal duty of oversight often clashes with the traditional structure of Japanese boards—large, hierarchical boards in which directors are all insiders and retain “line” management responsibilities. As a result, any problem can appear to be limited to the director(s) “in charge” of a particular area despite the common fiduciary duty owed by each director.

The Toyota case is particularly interesting because Toyota has been held out in Japan as the prime example of the strength of this “traditional” system of Japanese corporate governance. This system relies on competition in product markets, team production alliances with suppliers, and “main banks” to monitor the performance of corporate management, as opposed to “Western” approaches such as independent directors and a market for corporate control.

A “Western” approach appeared in Japan in 2002 as part of an ongoing debate on reform of corporate governance following Japan’s “lost decade” of the 1990s. An amendment to Japan’s corporate law at that time provided Japanese companies with an option to replace their German-inspired, traditional positions of representative director (a director chosen by the board to represent the corporation, much like a president) and internal corporate auditor (elected by shareholders to monitor directors’ performance) with an “American-style” system of executive officers and board committees with independent directors. Very few Japanese companies have adopted this new system, although the number is slowly increasing.

Until recently Japanese often contrasted the success of Toyota, the champion of traditional Japanese governance, with the poor performance of Sony, which adopted the “American-style” board committee system and now has a foreigner as its CEO. This popular comparison was always somewhat exag-
gerated. For example, in 2003 Toyota modified its governance system through the introduction of “non-board managing officers,” a reduction in the number of directors on its board (from over 40 to 29), and other measures. However, even today every area of the company is represented by a senior manager on the board of directors and there are no outside directors. Given Toyota’s current problems and its prominence, it will be interesting to see if Japanese companies will now reconsider this traditional system and incorporate a greater element of independent monitoring of management.

This is not to suggest that the apparent downfall of Toyota condemns the entire system of Japanese corporate governance. Every system has its corporate scandals. The result of scandals, such as Enron, in the United States has been an even greater emphasis on independent directors in the Sarbanes-Oxley Act and elsewhere. Such measures were not effective in preventing new scandals, such as those accompanying the financial crisis of 2008. For example, one oft-cited weakness at Citigroup was the board’s lack of industry expertise and experience, and its resulting inability to monitor traders’ risk management practices concerning complex financial products.

Japan has been shaken by Toyota’s crisis. Toyota is emblematic of Japanese quality, with practices such as “just in time” and “lean” manufacturing being rendered in Japanese simply as the “Toyota Production System.” Toyota is also Japan’s largest company by revenue, and is a substantial employer. The economic impact of any decline in Toyota’s fortunes will be significant.

The return to first principles promised by Mr. Toyoda, i.e., a renewed focus on quality, safety, and the customer rather than on costs and profits, should help. Nevertheless, Toyota’s response to its current troubles is striking because it has continued its rather narrow emphasis on manufacturing quality and production issues in the face of a full-fledged crisis. A problem of this magnitude is not simply a matter of a technical fix or of repairing Toyota’s public image. If an American company were in a similar situation, we would expect an examination of flaws in its governance system and improvements to prevent any future recurrence. Perhaps Mr. Toyoda and his colleagues should consider a plan for a greater role for the board of directors, compliance with law, and corporate governance issues within “the Toyota Way.” The NHTSA and Congress might even be interested in hearing about it.

### About the Author

Bruce Aronson is an Associate Professor of Law at Creighton University. He is a graduate of Boston University and Harvard Law School, and also studied at Waseda University and Doshisha University in Japan. He has long experience in private practice, having served as a corporate partner at the New York City law firm of Hughes Hubbard & Reed LLP (1989-2000), and for two years as a foreign associate at Nagashima Ohno & Tsunematsu in Tokyo. Prior to his current position, Professor Aronson was an Associate Research Scholar at Columbia Law School (2002-2004), and a Visiting Associate Professor (2004) and Fulbright Senior Researcher and Visiting Scholar (2000-2002) at the University of Tokyo.

Professor Aronson’s areas of practice are corporate law, finance law and international and comparative law. He has previously taught at the law schools at Georgetown, Boston University, Temple (Tokyo campus), and Michigan. His main areas of research are comparative corporate governance and the legal profession. He is fluent in Japanese.

### Endnotes

1. For the full text of Mr. Toyoda’s testimony, see, e.g., http://uk.reuters.com/article/idUKTOE61N041201001224.


3. Caremark International Inc. Derivative Litigation, 698 A. 2d 959 (Del. Ch. 1996). The Chancery Court’s finding of a director’s duty of oversight was later affirmed by the Delaware Supreme Court in Stone v. Ritter, 911 A.2d 362 (Del. 2006), although the Supreme Court recharacterized the duty of oversight as falling within the duty of loyalty (for conscious disregard of a known duty) rather than the duty of care.

4. A court decision in 2000 in two-related suits awarded $775 million in damages to the plaintiffs for directors’ breaches of fiduciary duties. Nishimura v. AbeKawa (Daiwa Bank Case), 1721 Hanrei Jiho 3 (Osaka Dist. Ct., Sept. 20, 2000). In the first case, the court found that the Daiwa directors’ failure to establish an appropriate internal control system, which could have prevented or discovered the $1.1 billion loss resulting from unauthorized trading in the bank’s New York branch, was a breach of the oversight component of their duty of care. In the second case, the court found a breach of the directors’ duty to comply with law in connection with concealment of losses and failure to report criminal activity to U.S. authorities in the timely manner that United States law requires.


Information on Toyota’s governance can be obtained on its website: its annual report filed with the SEC in the U.S. on Form 20-F (see http://www.toyota.co.jp/en/ir/library/sec/index.html) and an English translation of a corporate governance report which Toyota files with the Tokyo Stock Exchange (see http://www.toyota.co.jp/en/ir/library/cg/index.html).
Doing Good While Doing Deals: Early Lessons in Launching an International Transactions Clinic

By Deborah Burand, Director of the International Transactions Clinic and Clinical Assistant Professor, University of Michigan Law School

In the fall of 2008, the University of Michigan Law School launched its International Transactions Clinic (“ITC”) – the first of its kind in the United States and possibly the world. Like other law clinics, the ITC provides students with real world experiences working on real matters for real clients. What sets the ITC apart from many other clinics, however, is the ITC’s international transaction focus.

As the Director of this newly launched clinic, I worried about two issues in the months leading up to our clinic’s launch. First, I wondered whether it was possible for law students sitting in Michigan to provide high quality legal services to clients transacting business in places as far flung as Uganda, Tajikistan, and Morocco. Secondly, I asked myself whether participating students would find this kind of clinic to be a meaningful learning experience as they launched their international legal careers.

One year later, here is my answer. Not only is it possible, but law schools can play a necessary and relatively unique role in providing legal support to the growing community of internationally-focused social entrepreneurs who are trying to do good in the world while also doing well financially.¹ Even more importantly, the students participating in the ITC appear to have grown tremendously in their capabilities and understanding of what it takes to be an international deal lawyer.

That is not to say that the launch of this clinic was easy. Four of the most challenging issues the ITC faced in its first year of operation were: 1) developing a client pool, 2) defining client projects so as to be appropriate to student clinicians’ skill levels and capacity, 3) making use of efficient and inexpen-

### Developing the Client Pool

The ITC, as initially envisioned, was expected to become a training ground for highly qualified lawyers who graduate from law school already experienced at representing clients’ interests in an increasingly globalized world. When launching the ITC, Dean Evan H. Caminker of the University of Michigan Law School explained that the clinic would concentrate on teaching students skills that are critically important to their professional development as they enter into practice areas that involve international transactions. These include drafting and negotiating skills as applied to cross-border transactions, exposure to ethical issues that arise in the international commercial context, structuring and documenting investments in enterprises that primarily work in emerging markets, and an understanding of international economic and financial policy.²

The target clientele of the ITC was defined early in the planning process. For instance, the ITC’s founders predicted that “ITC clients might include microfinance providers working in the developing world, socially responsible investors, or others interested in investing in businesses operating at the base of the economic pyramid.”³ In addition, “[t]he clinic also plan[s] to match micro with macro, because ITC clients are expected to include multinational corporations and small- and medium-sized entrepreneurs seeking help with increasingly large – and increasingly complex – cross-border transactions.”⁴

This guidance, while offering useful information to students considering applying to the ITC and generating the keen interest of alumni of the Law School, offered only general direction as I began looking for prospective clients. As I began to learn about the clientele targeted by other transactional law clinics with a more domestic focus, I realized that I was at risk of stumbling over many of the current challenges confronting clinical legal educators.⁵ This prompted me to ask, could the ITC operate both as a center for skills training and experiential learning and a site for social justice lawyering? Second, could the ITC grow the next generation of “citizen-lawyers” able to put parochial interests of clients aside if necessary to confront larger societal challenges? And third, could the ITC translate its goals and pedagogy across borders, particularly to developing countries where many of its clients were working?

The answers to all of these questions seemed to rest on figuring out who should be targeted as clients for the ITC.
If we got the clients right, then much else should follow. This is why initially we paid as much, if not more, attention to figuring out who should be clients of the clinic as we paid to thinking about what services the ITC could offer them. My own non-profit background also influenced these discussions. As a result, we made a decision to focus our efforts on recruiting the ITC’s initial clients from an arena I knew well — the microfinance sector.

Microfinance, the provision of small-scale financial services and products to unserved and underserved populations around the world, is a growing sector that now reaches as many as 190 million people living on US $2 a day or less. Today’s over 10,000 providers of microfinance can take many forms ranging from not-for-profit organizations that limit their product offerings to credit-only services, to specialized microfinance banks that operate on a for-profit basis and are licensed to offer a range of financial services, including taking deposits from the general public.

A microcredit can be as small as a loan of US $25 to be used, for example, by an African woman to buy a second-hand (or third-hand, for that matter) sewing machine so that she can expand her tailoring business in the village where she lives. This microcredit is not a handout, however. Rather, it is a loan, albeit a very small loan, that will bear interest and will amortize over a several month period, requiring the borrower to make multiple principal and interest payments before it is fully repaid.

The real power of microfinance, however, often goes beyond that of a purely financial transaction. In many places, microfinance builds the social capital of a community as well as its financial capital.

I learned this lesson when I visited a group of microfinance customers in Tanzania several years ago. As we were preparing to disburse microcredits to our clients, a Tanzanian woman approached me, through a translator, thanked me for the microcredits we already had extended to help her grow her business. The thank you she offered, however, was oddly framed so at first I did not understand what she was saying. According to the translator, this woman was thanking me for her “soft knees.” When I shook my head in confusion, the translator explained. Because of the microcredits we had lent to this woman, she no longer needed to kneel in front of her husband to ask for money for her children’s food and education. Instead, she was paying for those expenses out of the profits of her growing business — a business that we had helped her build by extending small loans for her working capital needs.

Such a story about the power of a small loan to change the lives of the poor would not come as a surprise to Professor Yunus, winner of the Nobel Peace Prize in 2006 for his ground-breaking work in Bangladesh in microfinance and the founding of the Grameen Bank, which shared the Nobel Peace Prize with him. As microfinance has grown in the last several decades since Yunus first lent US $27 from his own pocket to women in Bangladesh, so too has the circle of stakeholders in microfinance. Microfinance has grown to meet their needs for loan capital. Microfinance appeared to offer a rich array of potential clients for the ITC — such as providers of microfinance to the poor, investors in these microfinance providers, and policymakers building enabling legal and regulatory environments for microfinance, to name a few.

That calculation proved correct. By the end of the first year, the ten (10) clients of the ITC included, among others, a microfinance institution in Tajikistan, two microfinance networks — one global and one regional (focused on Russia), several socially responsible investors in microfinance, a rating agency that specializes in rating microfinance institutions, and a newly formed company that focuses on hedging the foreign exchange risks assumed by microfinance institutions when they borrow internationally to meet their needs for loan capital.

Many of the ITC’s initial clients already enjoyed legal support and services. As a result, a decision to use the ITC sometimes was a decision to forego other, perhaps more proven, legal talent and expertise. The fact that the ITC offers its services on a pro bono basis was useful but not a huge spur as most of the ITC’s not-for-profit clients already had obtained pro bono legal support. Generally, the most convincing client pitch occurred when the client saw its broader social objectives as inextricably linked to the mission and objectives of the ITC, namely, the development of the next generation of international legal talent capable of addressing global challenges like poverty. One of the ITC’s most eloquent clients put it this way when explaining why he was willing to use the ITC to respond to some of his organization’s legal needs: “[t]he traditional rules of international business were written for banks and other big players, and not for investments in microfinance. The next generation of lawyers should use the law to promote the global effort to reduce poverty. We are delighted that the University of Michigan has taken on this challenge.” Robert Bragar, General Counsel, Oikocredit (The Netherlands).

At the end of our first year of the ITC, I approached each of our clients and asked them to evaluate their experiences with the ITC. Among the feedback we received was the following: “[t]he international transactions clinic did a superb job reviewing our local transaction documents, identifying risks, and offering solutions . . . . It’s exciting to see a cadre of talented young lawyers engaging in the microfinance space.” Camilla Nestor, Vice President, Microfinance, Grameen Foundation (USA).

This is high praise, but the best evidence of our clients’ satisfaction is that nine of our ten clients returned after the first year and asked the ITC to continue offering them legal services and support.

**Defining Client Projects**

While the initial focus of our clinic’s launch was on targeting appropriate clients, once we started conversations with willing clients, it did not take long for
those clients to ask what legal support our student clinicians could offer. In scoping out client projects for the ITC, we aimed to expose each student to three distinct areas of transactional-related work: 1) promoting enabling legal and regulatory frameworks for investing in microfinance, 2) developing forms of cross-border documentation, and 3) conducting live cross-border transactions. By weaving together all three of these assignments, students were able to work on two to three projects at a time. We tried to assign students to a combination of projects—a mix of time sensitive projects as well as some that are less time critical. We also considered the varying complexity of the matters that were assigned to students. Finally, we required students to work in teams. Our goal was to ensure that no single student would be overwhelmed by client demands while still mimicking much of what happens in the real world.

Of these three areas, the hardest for the students was tackling "enabling environment" projects. This, with hindsight, makes sense as most of these projects presupposed a body of knowledge and expertise that even many mid-level attorneys might lack.

From a pedagogy point of view, it was with the "form development" projects that students appeared to learn the most. Here, freed from the time pressures of closing a deal, we could practice "slow motion" law and spend the time necessary to craft provisions and documents that served our clients' interests. This appears to have been the second year as a student attorney at Baker & McKenzie (Vietnam) wrote to me after her first week at work to say, "[t]he real value of my experience in the ITC became apparent on my first day of work when I was confronted with documents similar to those I had spent hours studying and often drafting under ITC supervision. As a new lawyer, it is important to walk into the office on your first day feeling confident and ready to take on whatever they give you. [The] ITC has made my adjustment into firm life much smoother.”

Ganya Chiranakhon, a December 2009 graduate of the Law School, recently described her experience in the ITC. "[a]s a student attorney in the inaugural year of the ITC, I had the opportunity to work on a variety of matters that I wouldn't have been exposed to in any other clinical program. . . . Student attorneys are given a great deal of responsibility, and communicate directly with clients to direct the scope and management of projects. I also had the opportunity to collaborate with associates at two different law firms. It was an amazing learning experience to be able to work with attorneys who have specialized knowledge of the specific types of agreements the clinic was working on. Not only does the ITC provide students with real transactional experience, but it also fosters the development of team-building, communication, and time-management skills.”

And Ji-Yeon Suh, another December 2009 graduate of the Law School, shared this observation about her experience in the ITC. “[d]uring my year in the ITC (Fall 2008 to Winter 2009), we were immersed in international law in a unique and socially crucial way: under the prism of microfinance, a major and robust social investment phenomenon that is an utmost force for positive socio-economic change around the world. As we served a global clientele of think tanks, microfinance financiers, microfinance rating agencies, even universities interested in constructing their own microfinance contributions, the clinic placed its student clinicians squarely in the international law arena. . . . Truly, the ITC imparted its student clinicians with a sophisticated awareness and respect for the increasingly fluid cross-border environment in which lawyers serve their clients.”

As these students indicate, the ITC is building a professional and legal foundation for our student clinicians that may prove to be not only powerful, but also transformational. If those of us shaping and guiding the ITC do our job well, the lawyers who emerge from this clinical ex-
experience will have a greater understanding of the world about them and of the range of roles they can play in that world. The ITC should deepen and broaden our students’ sense of what is possible in their career paths, their pro bono practices, and, even, their philanthropy. As Dean Caminker said upon the launch of the ITC, “[t]his is an exciting opportunity to involve a new generation of bright legal minds in cross-border transactions that will train our students for a lifetime of international business dealings, and that can also make an enormous difference in the lives of the people in the developing world.”

Dean Caminker has it exactly right. The launch of the ITC marks a generational shift. We say we have launched a new clinic here at the University of Michigan Law School, but we also have launched a new community -- a world-changing community of international transactional attorneys who have experienced firsthand, before even graduating from law school, an opportunity to apply their growing legal talents and skills on a global scale while also helping to improve the lives of the world’s poorest people. ☀

About the Author

Deborah Burand joined the faculty of the University of Michigan Law School in 2008, as a Clinical Assistant Professor, to direct the launch of the Law School’s International Transactions Clinic (ITC).

Burand was one of five topic leaders for the 2009 Clinton Global Initiative (CGI). She co-led the Finance track, “Financing an Equitable Future,” at CGI’s annual meeting in September. When not teaching at the Law School, she also is a freelance writer.

Prior to joining the law faculty at the University of Michigan, Burand’s career has spanned, in nearly equal seven-year parts, senior management positions in the microfinance sector, senior internationally-focused legal and policy positions in the US government, and an international corporate law practice.

Endnotes

1 There are many definitions of the terms social entrepreneur and social entrepreneurship. Bill Drayton, founder and CEO of Ashoka, is recognized as first coining the term “social entrepreneurship” nearly 30 years ago in the early 1980s. Paul Light most recently wrote that “[l]ike business entrepreneurship, social entrepreneurship involves a wave of creative destruction that remakes society.” See generally Light, “Social Entrepreneurship Revisited,” Stanford Social Innovation Review (Summer 2009).

2 In its second year of operation the ITC tapped three adjunct law professors to offer part-time supervisory support. They include Timothy Dickinson, Jennifer Drogula, and Carl Valenstein. This has allowed the ITC to expand the number of student clinicians in the ITC to 14, with an approximate professor to student clinician ratio of 1:7.


6 See generally Moran, “President’s Message; Transformation and Training in the Law; Serving Clinical Legal Education’s Two Masters,” 2 009-2 AALS News 1 (May 2009)(Moran notes three challenges: 1) focusing on skills training may undermine the social justice origins of clinics, 2) creation of clinic traditions may slow the accommodation of diversity and change in the legal profession, and 3) globalization of clinical legal education may complicate the relationship between pedagogy and social justice).

7 Prior to joining the faculty at the University of Michigan Law School, I had divided my professional career nearly in equal thirds – nearly seven years in a large New York law firm, Shearman & Sterling; seven years in the US Government as a central bank lawyer at the Federal Reserve Board and as a senior advisor on international financial matters at the US Treasury; and more recently, seven years in the microfinance sector as a member of the senior management teams of two global microfinance networks – FINCA International (www.villagebanking.org) and Grameen Foundation (www.grameenfoundation.org).


9 That 10th client did not return because it did not have any further cross-border deals that required international legal support.
Minutes of Regular Council Meeting - January 27, 2010

A meeting of the Council (“Council”) of the International Law Section (“Section”) of the State Bar of Michigan (“State Bar”) was held on January 27, 2010, at the offices of Butzel Long located at 150 West Jefferson Avenue, Detroit, MI 48226.

The following voting members of the Council were present in person: Richard G. Goetz, Cameron S. DeLong, Margaret A. Dobrowitsky, Jeffrey F. Paulsen, Debra Auerbach Clephane, Reed A. Newland and Tricia Roelofs, and by phone: Michael E. Domanski.

The following ex-officio (nonvoting) member of the Council also attended the meeting: Sonia A. Salah and past Chairperson, Nicholas Stasevich.

Several other Members of the Section and State Bar of Michigan liaison Peggy Costello also attended the meeting as guests. Names and contact information for each attendee will be filed with the minutes of the meeting.

Call to Order

Richard G. Goetz, Chairperson of the Council, called the meeting to order at 5:00 p.m.

Introductions

At the Chairperson’s request, attendees introduced themselves and described their professional affiliations.

Notice and Quorum

The Secretary presented a written notice of the meeting that was mailed or delivered to all members of the Council and to Members of the International Law Section in accordance with the Section’s Bylaws. The Secretary said that the notice will be filed with the minutes of the meeting. The Secretary declared that a quorum was present at the meeting, without objection.

Approval of Agenda

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

Approval of Annual Meeting Minutes

The Secretary circulated a draft of the minutes of the Council meeting held on November 17, 2009. After discussion, upon motion made and supported, the Council approved the minutes without correction.

Treasurer’s Report

The Treasurer, Jeffrey F. Paulsen, presented the final financial statement of the Section for the 3-months ending December 31, 2009 and the related detailed trial balance for the same period, prepared by the Finance & Administration Division of the State Bar.

The Treasurer noted that income for the Section for the three months ending December 31, 2009, was $11,430.00 with total expenses for the same period of $649.67, resulting in net income for the period of $10,780.33. The Section’s fund balance from October 1, 2009 increased from $26,599.73 at the beginning of the Section’s fiscal year to $37,380.06 as of December 31, 2010.

Michigan International Lawyer

Michele Burns at Wayne State Law School has graciously consented to overseeing the publication of the Michigan International Lawyer, whose next publication date is expected to be in March 2010.

Chairperson’s Report

The Chairperson lead a discussion in which various Council Members expressed the opinion that due to the increasing globalization of the legal practices of many of the Section Members it is important as a policy matter to raise the profile and increase the exposure of the Section within the International Bar community, and that one way to do this is through Section representation at International Bar events. The Council approved the Section sending a representative to the upcoming International Bar Association Annual Meeting and the expenses incurred by the past Chairperson in attending the last IBA Annual Meeting in Madrid. The Council approved the expenses incurred by the past Chairperson in the amount of $3,010.90 for the IBA registration fee and $1,664.40 for lodging. It was noted that the past Chairperson paid his own travel expenses to the IBA meeting. The Council also approved payment of $89.00 to renew the Section’s IBA annual membership.

Annual Meeting and Program Location, Timing and Topics

The Chairperson Elect lead a discussion to plan the 2010 Annual Meeting of the Section. Members of the Section gave their views on whether or not to hold the ILS Annual Meeting in Grand Rapids in parallel with the State Bar of Michigan’s Annual Meeting. The Chairperson Elect passed out a list of possible topics for the Section’s Annual Meeting and asked for any other ideas and suggestions for topics from the Members. The Members discussed several possible topics. The Chairperson Elect suggested that decisions on the Section’s Annual Meeting’s location, timing and topics will be made and ideas further developed through follow-up e-mails and by conference calls with various Members of the Section.
Treasurer’s Report

For the four months ending January 31, 2010

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Scheduled April 6 (Nuclear Disarmament) and May 19 (Africa) and Programs Expense Approvals

The Chairperson lead a discussion related to the upcoming April 6 Section Meeting on Nuclear Disarmament and the May 10 Section Meeting on Africa. The Council approved expenditures up to Fifteen Hundred Dollars ($1,500) for travel and accommodations for speakers, for rental of the Alumni House in Dearborn and food and refreshments. The Chairperson suggested that other decisions relating to these two meetings will be made and ideas further developed through follow-up e-mails and conference calls with various Members of the Section.

Section Input re Amendments to Uniform Act

The Chairperson led a discussion related to the Section providing input on proposed amendments to Michigan’s Alternative Dispute Resolution Act. The Members thought that input on the proposed amendments from the Section is important because many foreign entities prefer to resolve disputes in the United States using ADR rather than through court proceedings. Kelly Parfitt volunteered to assist the Chairperson in drafting the Section’s comments to the proposed amendments. The Chairperson accepted Ms. Parfitt’s offer to help and will send her more information through follow-up e-mails and phone calls.

Post-Meeting Reception and Program

The Chairperson reminded attendees that a reception would be held immediately after the adjournment of the meeting.

John F. Monk, Managing Partner of autoPOLIS gave a presentation entitled “A New Automotive Industry and Alternative Fuels.”

Debra Auerbach Clephane, Partner at Vercruysse Murray & Calzone, P.C. gave a presentation entitled “H-1B Anti-Fraud Initiatives”

Linda Armstrong, Shareholder at Butzel Long gave a presentation entitled “H-1B Public Access File Investigations and Employment Eligibility Verification: Form I-9”

Margaret A. Dobrowitsky, Shareholder at Brinks Hofer Gilson & Lione gave a presentation entitled “It’s Good to be Green”

Adjournment

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

Respectfully submitted,
Margaret A. Dobrowitsky, Secretary
International Law Section
Event Calendar:
Meetings, Seminars, & Conferences of Interest

April 9, 2010
20th Annual Fulbright Symposium-
“International Law in a Time of Change”
San Francisco, CA
http://www.ggu.edu/school_of_law/
academic_law_programs/llm_jd_programs/
llm_sjd_international_legal_studies/2008_
ASIL_Fulbright_Symposium

April 13 - 17, 2010
2010 Spring Meeting
New York, NY
http://www.abanet.org/intlaw/spring2010/

April 21, 2010
Ligitation v. Arbitration in International
Business Disputes
http://www.abanet.org/cle/connection.html

April 22-24, 2010
Joint ABA International/AIJA Conference:
“Trusts Under Attack”
St. Julian’s, Malta
php?id=266

May 5 -7, 2010
2nd Annual National Institute on Internal
Corporate Investigations and In-House
Counsel, Washington, DC
http://new.abanet.org/calendar/internal-
corporate-investigations-and-forum-for-in-
house-counsel/Pages/default.aspx

May 13-14, 2010
Joint ABA International/Lewiatan Court
of Arbitration Conference: “Dispute
Resolution in M&A Transactions: Tactics,
Challenges, Defenses, Warsaw, Poland
conference13-14may2010

May 20 -21, 2010
Joint ABA International/IBA Conference
on “Global Investments in Real Estate:
Trends, Opportunities, and New Frontiers”
Vienna, Austria
http://www.abanet.org/intlaw/calendar/
Vienna%202010%20Preliminary%20
Program%2020091216.pdf

May 30 - June 2, 2010
Israel Bar Association Annual Conference
Eilat, Israel
http://new.abanet.org/calendar/
israelbarprogramming/Pages/default.aspx

June 14-15, 2010
5th Annual Fordham Law School
Conference on International Arbitration
and Mediation, New York, NY
http://law2.fordham.edu/html/
cal-2009c-20calendar_viewsitem. html?id=10727&template=cal

June 20 - 21, 2010
Joint ABA International/German
Bar Association International Section
Conference: “Transatlantic Deals &
Disputes: How to Avoid Shipwrecks in
U.S.-German Business”
Frankfurt, Germany

August 4 -5, 2010
2010 Section Leadership Retreat
Berkeley, CA

August 6-9, 2010
2010 ABA Annual Meeting
San Francisco, CA

August 24-28, 2010
48th Annual AIJA Congress
Charleston, SC

March 23, 2010
World Bank Administrative Tribunal
30th Anniversary Symposium: The
Development and Effectiveness of
International Administrative Law
Washington, DC
http://www.asil.org/activities_calendar.
cfm?action=detail&rec=114

March 24, 2010
7th Annual ITA-ASIL Spring Conference -
Arbitration: The End of the Golden Age?
Washington, DC
http://www.asil.org/activities_calendar.
cfm?action=detail&rec=105

April 8 - 9, 2010
Conference on The Security Council
and Contested Territory - Contrasting
Approaches, Contexts, and Manner of
Implementation
Middle East Technical University
http://www.psir.ncc.metu.edu.tr/postgrad/
postgraduate.html

April 9 - 10, 2010
Teaching International Humanitarian Law
Workshop, Berkeley, CA

April 23, 2010
International Justice in the 21st Century:
The Law and Politics of the International
Criminal Court
Chicago, IL
http://www.jmls.edu/
events/042310lawreview.shtml.

May 3 - 7, 2010
ESF-LiU Conference on Violations
of Human Rights and Humanitarian
Law: Investigation and Prevention of
Torture and Death in Custody
Scandic Linkoping Vast, Sweden
http://www.esf.org/conferences/10318

March 23-24, 2010
Two Day International Conference on
India-United States Nuclear Cooperation
Agreement
http://www.reading.ac.uk/123agreement/

May 6-7, 2010
WIPO Workshop for Mediators in
Intellectual Property Disputes
Geneva, Switzerland
http://www.wipo.int/amc/en/events/
workshops/2010/mediation/
May 13-14, 2010
Arbitration and National Courts: Conflict and Cooperation, Houston, Texas
http://www.utcle.org/conferences/IA10

March 25-26, 2010
International Maritime Law Conference
Connecticut, USA
http://www.int-bar.org/conferences/conf327/

April 14, 2010
IBA Bar Leaders Conference
Santiago, Chile
http://www.int-bar.org/conferences/312

April 14-16, 2010
Biannual IBA Latin American Regional Forum Conference, Santiago, Chile
http://www.int-bar.org/conferences/311

April 14-16, 2010
Managing Complex Litigation: The View from Inside the Corporation
Washington, DC
http://www.int-bar.org/conferences/conf321/

April 15-16, 2010
4th World Womens Lawyers Conference
London, England
http://www.int-bar.org/conferences/conf318/

April 22-23, 2010
8th Annual Anti-Corruption Conference
Prague, Czech Republic
http://www.int-bar.org/conferences/conf319/

April 25-28, 2010
Biennial Conference of SEERIL
Toronto, Canada
http://www.int-bar.org/conferences/conf304/

May 11, 2010
Anti-Money Laundering - A Threat to the Independent Lawyer?
Sao Paulo, Brazil
http://www.int-bar.org/conferences/conf340/

May 16-18, 2010
16th Annual Global Insolvency and Restructuring Conference
Hamburg, Germany
http://www.int-bar.org/conferences/conf324/

May 16-19, 2010
21st Annual Globalisation of Investment Funds Conference, Boston, MA
http://www.int-bar.org/conferences/conf317/

May 17-18, 2010
21st Communications & Competition Law Conference
Barcelona, Spain
http://www.int-bar.org/conferences/conf307/

June 4-5, 2010
13th Annual Criminal Law Conference
Paris, France
http://www.int-bar.org/conferences/conf328/

April 9 2010
AILA Midwest Regional CLE Conference
Chicago, IL
http://www.aila.org/content/default.aspx?docid=31149

April 13, 2010
Counseling the Married and Almost Married U.S. Citizen:The K-1 and K-3 Visas
Web Seminar
http://www.aila.org/content/default.aspx?docid=31226

April 17, 2010
Citizenship Day 2010
Nationwide
http://www.aila.org/content/default.aspx?docid=24543

May 6, 2010
Immigration Consequences of Criminal Entanglement for the Business Immigration Lawyer
Web Seminar
http://www.aila.org/content/default.aspx?docid=31228

Other AILA events
http://www.aila.org/content/default.aspx?bc=1010

Other ABA Section of International Law Events
http://www.abanet.org/intlaw/calendar/home.html

Other ASIL Events
http://www.asil.org/events/calendar.cfm

Other IBA Events
http://www.ibanet.org/conferences/Conferences_home.cfm
The International Law Section of the State Bar of Michigan invites you to attend its

Upcoming Symposium

Developments in Sub-Saharan Africa and Their Impact on Foreign Investment

Museum of African American History, Detroit

Wednesday, May 19, 2010

Beginning at 4:00 p.m.

Our next program, a symposium on developments in sub-Saharan Africa and their impact on foreign investment, will be held at 4:00 PM on May 19 at the Museum of African American History in Detroit.

Our speakers will include,

Dr. Lisa D. Cook, Economist, Michigan State University

Laura Nyantung Beny, Law Professor, University of Michigan

Alan Shenk, Law Professor, Wayne State University

as well as other speakers, with firsthand experience running and counseling businesses in Africa.

A reception will follow the program.

Refreshments will be served following the Program

Registration

There is no charge to attend the Council meeting and program, however, seating is limited and registration is required.

Please RSVP to Peggy Hysick or Kim Hartkop at (313) 568-6811.
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