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PRACTICUM: FORM AND POLICY

The *International Law Practicum* is a semi-annual publication of the International Law & Practice Section of the New York State Bar Association. The *Practicum* welcomes the submission of articles prepared by practicing attorneys. The length of an article, as a general rule, should not exceed 3,500 words, footnotes included. Shorter pieces, notes, reports on current or regional developments, and bibliographies are also welcomed. All manuscripts must be sent in laser printed triplicate accompanied by a 3 1/2" disk formated in Microsoft Word or WordPerfect 5.1 or 6.0 to: The *Practicum*, c/o Daniel J. McMahon, Esq., New York State Bar Association, One Elk Street, Albany, N.Y. 12207-1096. Both text and endnotes must be double-spaced. Endnotes must appear at the end of the manuscript and should conform to *A Uniform System of Citation* (15th ed.) (the Harvard Bluebook). Authors are responsible for the correctness of all citations and quotations. Manuscripts that have been accepted or published elsewhere will not be considered. The *Practicum* is primarily interested in practical issues facing lawyers engaged in international practice in New York. Topics such as international trade, licensing, direct investment, finance, taxation, and litigation and dispute resolution are preferred. Public international topics will be considered to the extent that they involve private international transactions or are of general interest to our readership.

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The Offshore Technical Service Contract

By Claude R. Breese

I. Introduction

The growing importance of services in international trade, particularly for U.S. exporters, has helped to reduce the overall U.S. trade deficit by offsetting the trade deficits in manufactured goods. Indeed, in many instances selling services has become more profitable than selling products.[1] While the United Nations Convention on Contracts for the International Sale of Goods (the "Vienna Convention") has now been widely adopted by major trading nations, there is no comparable agreement with regard to the sale of services.[2] This pattern of greater focus on legal rules applicable to the sale of goods as opposed to services can also be observed in domestic legal systems. Thus decades ago the Uniform Commercial Code was enacted in the various states with regard to the sale of goods while the common law rules still apply to the sale of services in the U.S. One possible explanation for this divergence may be that services are highly variable and thus more difficult to categorize than goods.

The author's experience has involved services in foreign countries relating to the installation, repair and maintenance of heavy electrical equipment. This bias will color that which follows. Certainly such services are readily distinguishable from services such as banking, insurance, underwriting, medicine, etc. However, there may still be parts of this discussion which bear on such diverse services.

The approach followed herein will be to discuss a variety of issues that might arise, making reference to the sample terms and conditions contained in Appendix 1 relating to a fictional ABC International Technical Service Company, Inc. The basic assumption is that the technical services in question are, in the main, to be performed in the foreign country.

II. Contract Formation

The ideal is to have a contract that is mutually agreed upon in all respects. In reality, in a commercial world of conflicting or incomplete conversations, written forms or, to a growing extent, Internet messages, such a complete understanding often does not occur. Under the common law in the U.S., the so-called "last shot" rule applies to services. Thus, in the event of conflicting forms, the last one received before performance by the recipient will be controlling.[3] Unlike the sale of goods, where some written documentation is required under the Uniform Commercial Code, verbal contracts for services will be enforced. The importance of reaching a fully negotiated, written agreement cannot be underestimated.

The ABC form seeks to deal with the contract formation issue in its initial paragraph by establishing a finite duration for the proposal, measured from its date, and by objecting in advance to any additional or different provisions from the customer. Of course, should the customer respond with significant conflicting or additional provisions, ABC should send a "last shot" document which reinstates its original proposal. Even so, under classical analysis, there probably is no "meeting of the minds" at this stage. If ABC were to send its employees to the foreign country, it could be met with a customer which legitimately denies that there is a binding agreement. This again emphasizes the importance of a fully negotiated understanding, particularly should substantial travel and preparation expenses be involved in sending employees abroad.

Except for matters of public policy, most legal systems give the parties reasonable freedom to set the terms of their deal, even to the point of contravening what would otherwise be the law. Also, in many countries, the law is not fully developed. This militates in favor of detailed agreements, despite the bias in some parts of the world in favor of "handshake" agreements—or agreements to agree in the future on significant points.

III. Various Aspects of Contracts

A. Governing Law

Unless otherwise specified in the proposal, Article 17 of the ABC form makes controlling the law of the site where the work is to be performed. This is in recognition of the fact that it is typically impractical to try to avoid the law of the host country with regard to services performed there. Rules regarding taxes, visas, licenses, liability and any public policies of the host country are apt to override any attempt at circumvention. The best solution is to become familiar with local rules and evaluate the risk and cost of compliance.[4]

In addition, attempts to choose as governing the law of a jurisdiction that does not have a "reasonable" or "substantial" relationship to the transaction may be attacked.[5] However, Article 17 does allow the seller's proposal to specify a law other than that of the site. In international contracts, the choice of a law of a country having no relationship to the transaction had been sustained where there is no attempt to circumvent the "mandatory rules" of the host country.[6]

B. Definition of Services

The detailed enumeration of the services to be provided is not set forth in Appendix 1, since it is anticipated that such a description would be contained in a proposal document to which Appendix 1 would be attached. The careful formulation of the services is obviously important. Ambiguities and glowing superlatives are to be avoided in favor of closely hewed descriptions to the extent this is possible.

C. Governmental Involvement

Paragraph A of Article 2 of the ABC form makes ABC's performance subject to U.S. export control laws. The first sentence of Paragraph B generally puts the responsibility for obtaining all permits, licenses and the like on the customer. As a practical matter, it may become necessary to modify this broad allocation of responsibility, especially with regard to items such as authorization of ABC to do business in the foreign country, any required professional licenses for ABC employees, visas, etc. This language is designed to put the onus on the customer unless otherwise agreed.

Article 4 places the burden of non-U.S. governmental taxes and charges on the customer when assessed against ABC, its subcontractors and the non-resident employees of both. Provision is made for conversions to dollars should ABC be required to pay in local currency.[7] The rationale is that ABC's prices do not include the costs in question, so the customer should pick them up.

D. Payment

No doubt there are infinite ways in which payment can be accomplished. Article 3 sets forth the gold standard for payment in dollars under an irrevocable letter of credit. Most of the nuances in this provision (*e.g.*, no setoff, U.S. bank acceptable to ABC, payment on receipt of invoice, etc.) are the result of experience in providing offshore services. Of course, a service provider could always take payment in foreign currency on an open account subject to some sort of customer approval, often slow in coming, and suffer the consequences when things do not go quite as planned.[8]

E. General Conditions

Article 5 contains a variety of specific provisions relating to the details pertinent to the services being provided, most of which should be self-explanatory. These provisions can be used as a checklist for possible issues for a given service business.

Certain provisions merit further discussion. In the service business, customers often become enamored of a specific employee with whom they are familiar and who knows their business. The right in Paragraph E to replace an employee may become significant. Likewise, Paragraph J is intended to protect ABC against the hiring away of its employees during performance and for six months thereafter. This could be particularly important in a time of low unemployment for technically trained personnel, especially since the cost of training could be substantial. If this is a major concern, the law of the foreign site should be reviewed to determine its validity. The provision selecting New York courts as the forum for this issue may be attacked, but there is authority for its validity.[9]

Safety conditions in certain foreign countries may not measure up to what is normally expected. Paragraphs F and G provide protections for ABC employees, with the latter being useful in the not uncommon event of unsettled conditions in the foreign country.

Paragraph H is designed to try to negate any claim that ABC has complied with a boycott in violation of U.S. antiboycott laws and regulations. Paragraph I sets up a general rule that ABC is not to be found to have received secret or confidential information from the customer unless specifically agreed to in writing. Such confidentiality agreements are common, but they should be negotiated and administered with care to avoid a claim of theft of trade secrets, which, in some jurisdictions, could involve criminal sanctions.

F. Delays

Article 6 excuses ABC for a variety of delays. The reason for this "laundry list" is that the law of force majeure is either restrictive or undeveloped in many countries. Paragraph B adds reimbursement for ABC's delay costs where the customer is the cause, whether such delay is excusable or not, and Paragraph C sets an outside parameter of sixty days of delay, whereupon ABC may terminate the contract.

G. Customer Changes

Article 7 provides ABC with both time and money for any changes by the customer, which changes must be agreed to in writing. Customers may want the authority to make changes within the general scope of the work without being obliged to obtain the service contractor's consent. Depending on the nature of the job, this may be acceptable so long as resulting additional time and money are provided for.

H. Warranties

Article 8 is designed to clearly delineate and limit ABC's warranty responsibility. The warranty is of competence for services and freedom from defects for any materials, ending one year after completion of the services. The exclusive remedy is to reperform or repair, making it clear that the primary risk of loss, usually covered by insurance for structures and equipment, rests with the customer. Perhaps out of an excess of caution, the capitalized sentence in Paragraph B is intended to be a "conspicuous" disclaimer as required under the Uniform Commercial Code in the U.S., which relates to the sale of goods.

I. Liability Limitation

Article 9 contains a number of provisions protecting ABC against liability. These are particularly important in service businesses where the revenue received may be relatively small in relation to the risk associated with the work. (Fire and burglary alarm businesses are classic examples of this disparity.) Paragraph A sets a financial ceiling of the greater of the contract price or US$10,000. The latter amount comes into play in cases where there is no specific price (*e.g.*, time and materials contacts).

Paragraph B excludes liability for what would be called "consequential damages" under U.S. laws. The detailed listing is needed because the concept of consequential damages is different or uncertain in many foreign jurisdictions. Also, to deal with "pass through" cases where ABC's customer is not the ultimate end customer, the ABC customer indemnifies ABC against any such claims from entities down the distribution chain. Of course, if the governing law allows such claims from remote parties, this indemnity is only as good as the solvency of the ABC customer and any insurance that it might have. Thus, Paragraph D requires the customer that resells to obtain contractual protection for ABC as a third-party beneficiary.

Paragraphs F and G are intended to deal with situations where the scope of the work is informally expanded during the job or free advice is given, both without adequate incorporation into the contract and its liability limitations.

Keep in mind that local law may prohibit the exclusion of certain grounds for relief or may render unenforceable certain limitations on liability or exclusions of certain remedies. An example in the United States is the Magnuson-Moss Consumer Product Warranty Act and the applicable regulations, which prohibit the exclusion on implied warranties during any time period when express limited warranties are valid in connection with the sale of consumer products.

J. Customer Financial Problems

Article 10 relates to customer financial difficulties. The first sentence allows ABC to cancel the contract based on a reasonable judgment that the customer has encountered financial difficulties, as opposed to the alternative of continuing to work until the customer has actually defaulted.[10] The balance of the paragraph deals with the customer's bankruptcy or insolvency.

K. Customer Responsibilities

Article 11 contains the enumeration of various responsibilities undertaken by the customer. These tend to be highly specific to a particular industry. Exporters of services need to give consideration to what is required in their specific circumstances, especially where personnel are being sent to a remote location.

L. Miscellaneous Provisions

Articles 12, 13, 14 and 16 contain provisions that are common to commercial agreements and should be self-explanatory.

M. Dispute Resolution

Last, but certainly not least, is the question of how any disputes will be resolved. Typically, businessmen find this topic of little interest, particularly at the stage of contract negotiation. However, attention to this subject can bear major dividends should the parties have a falling out. Basically, there are three main options: litigating in a foreign court; international arbitration; or using a forum selection provision.[12]

While there are exceptions, in most cases, litigating in a foreign land is to be avoided. Possible problems include corruption in a weak legal system, inexperience with technical or commercial issues, bias against foreigners, and the expense that may be involved in a distant location. Forum selection clauses can be difficult to sell, impractical where the evidence and key witnesses may be abroad, and can involve problems in seeking to enforce a U.S. judgment abroad.

This leaves arbitration—which has been aptly described as "the best of a bad lot." Article 15 provides for the optional attachment of an arbitration provision. There is no point in providing for arbitration if an award will not be enforceable against the customer.[13] Article 15 establishes a four-year period for asserting claims in arbitration.

The arbitration attachment provides for a panel of three arbitrators to operate under the UNCITRAL rules—which are generally accepted in international trade.[14] While the parties can undertake to administer the arbitration themselves (and thereby save some money), the complications when the parties are at odds militate in favor of selecting an established arbitration agency such as the London Court of International Arbitration (selected here), the American Arbitration Association, or the International Chamber of Commerce in Paris.

There is a space on the arbitration attachment to insert the location of the arbitration. Much has been written concerning the advantages and disadvantages of particular locations around the world. The choice will depend on the specifics of the individual transaction.

Endnotes

1. *Services Becoming the Goods in Industry*, New York Times, 7 January 1997, p. C1.
2. The GATT negotiations in Uruguay did result in agreements relating to services from the point of view of governmental regulations. *See* Foote, *The International Regulation of Trade In Services Following Completion of the Uruguay Round*, 29 Int'l Law. 453 (1993).
3. *See Princess Cruises, Inc. v. General Electric Company,* 143 F.3d 828 (4th Cir.), *cert. den.*, 525 U.S. 982, 142 L. Ed. 2d 399 (1998).
4. For example, efforts to litigate interest or insurance provisions in the courts in Islamic countries are apt to founder.
5. Gruson, *Governing Law Clauses in Commercial Agreements—New York's Approach*, 18 Colum. J. Transnat. L. 323 (1979); Restatement (Second) of Contracts § 187. *Compare* Section 1-105 of the Uniform Commercial Code *with* New York's abrogation of the UCC "reasonable relation" rule for non-service contracts valued at not less than $250,000 in N.Y. Gen. Oblig. L. § 5.1401.
6. This is the rule appearing in Articles 3 and 7 of the European Economic Community's Convention on the Law Applicable to Contractual Obligations. *See also Scherk v. Alberto Culver*, 411 U.S. 506, 41 L. Ed. 2d 270 (1974).
7. *See Exchange Rates, Currency and Other Issues*, in A. Kritzer, ed., International Contracts Manual (Contracts Checklists volume) ch. 24, at 24 (1991) (hereinafter "International Contracts Manual").
8. Regarding letters of credit, *see Terms of Payment; Letters of Credit*, International Contracts Manual, note 7 *supra*, ch. 9, for more information.
9. *Bremen v. Zapata Offshore Co.*, 407 U.S. 1, 32 L. Ed. 2d 513 (1972).
10. This is similar to the assurance of adequate performance under Section 2-609 of the Uniform Commercial Code. *See also* Restatement of Contracts (Second) § 251. New York has adopted the concept for complex, long-term commercial contracts. *Norco Power Partners, LP. v. Niagara Mohawk Power Corp.*, 92 N.Y.2d 458, 682 N.Y.S.2d 664, 705 N.E.2d 656 (1998).
11. Note the reference to Incoterms 2000 in Article 13. This document defines many risk/insurance-related terms in international trade and should be at hand for any attorney dealing with international transactions.
12. See Article 5 J.
13. While the details of enforcing arbitration awards are beyond the scope of this article, a starting point is to determine if the host country has adopted the U.N. Convention on the Recognition and Enforcement of Arbitral Awards.
14. The American Arbitration Association has an acceptable set of rules for international cases, but foreign parties often tend to prefer what may be perceived as a more neutral administrator.

APPENDIX 1

ABC International Technical Services Company, Inc.

Terms and Conditions Applicable to Technical Advisory Services

Unless it states otherwise in writing, Company's proposal expires 60 days after its date and may be modified or withdrawn by Company prior to receipt of Purchaser's acceptance. The offer, order, acceptance or sale of any services or goods covered by this proposal is conditioned upon the terms and conditions contained herein. Any additional or different terms and conditions proposed by Purchaser are objected to and will not be binding upon Company unless specifically assented to in writing by Company's authorized representative.

1. Definitions

A. "Company"—ABC International Technical Service Company, Inc., or other entity issuing the proposal.

B. "Purchaser"—the entity to which Company's proposal is directed.

C. "Contract"—the contract between Company and Purchaser resulting from the proposal.

D. "Material"—the goods and/or equipment to be sold to Purchaser by Company in accordance with the Contract.

E. "Site"—the premises where the Services are to be performed.

F. "Services"—all the services to be performed or provided by Company in accordance with the Contract.

G. "Technical Advisory Services"—technical advice and counsel from Company Technical Advisors based on good engineering, manufacturing, installation and operation practices as applicable to the equipment. To the extent specified in Company's proposal, such services may also include testing, adjustments programming and other similar services. Technical Advisory Services do not include supervision or management of Purchaser's employees, agents, or other contractors.

2. Governmental Authorizations

A. Company's obligations to provide Services or Material hereunder shall at all times be subject to the export control laws and regulations of the U.S.A., including any amendments thereto. Purchaser agrees that it shall not make any disposition of U.S.A.-origin products or technical information furnished by Company, by way of trans-shipment, re-export, diversion, or otherwise other than in and to the country of ultimate destination specified on Purchaser's order or declared as the country of ultimate destination on Company's invoices, except as said laws and regulations may expressly permit.

B. Purchaser shall be responsible to obtain and maintain all licenses, permits and authorizations necessary for the performance of Services or the supply of Material, including, without limitation, any required U.S.A. export license. Company shall assist Purchaser in obtaining such authorizations when reasonably feasible. Company shall not be liable if any authorization of any government is delayed, denied, revoked, restricted or not renewed, and Purchaser shall not be relieved thereby of its obligations to pay Company for Services or Material or any other charges which are the obligation of Purchaser hereunder.

3. Payments

A. Unless otherwise provided in Company's proposal, payment will be due in U.S. Dollars upon receipt of Company's invoice without any setoff whatsoever (including, without limitation, setoff under other contracts with Company or its affiliates).

B. Unless otherwise provided in Company's proposal, Purchaser shall promptly establish, at its expense, a letter of credit in an amount equal to the Contract price or the estimated Contract price. The letter of credit shall (i) be in favor of Company, irrevocable and unrestricted; (ii) be issued or confirmed by a U.S. bank acceptable to Company; (iii) permit partial payments; (iv) provide that payments therefrom be made solely against presentation of Company's invoices directly to the bank; and (v) be valid for 120 days after the estimated period of performance. Purchaser shall promptly increase the amount in the letter of credit and have its validity period extended if notified by Company that such action is necessary to provide for the payment of any amounts which may become due hereunder.

C. Presentation of an acceptable letter of credit to Company is a condition precedent to departure of Company's Technical Advisors or commencement of Material procurement or shipment.

D. If Purchaser fails to fulfill any condition of its payment obligations, Company may (i) withhold deliveries and suspend performance or (ii) continue performance if Company deems it reasonable to do so. In any event, the costs incurred by Company as a result of Purchaser's nonfulfillment shall be payable by Purchaser upon submission of Company's invoices therefor. Company shall be entitled to an extension of time for its performance equal to the period of Purchaser's non-fulfillment, whether or not Company elects to suspend performance. If such non-fulfillment is not corrected by Purchaser promptly upon notice thereof, Company may cancel the Contract and Purchaser promptly shall pay Company its reasonable charges far cancellation upon submission of Company's invoices therefor.

4. Taxes, Duties, Fees, Charges or Assessments

A. Any taxes (including income, stamp, turnover or value added taxes), duties, fees, charges or assessments of and nature levied by any governmental authority other than the United States of America or any governmental unit existing in the U.S.A. (including its territories and possessions) in connection with this transaction, whether levied against Purchaser, against Company or its employees who are not permanent residents of the country of the Site, or against any of Company's subcontractors or their employees who are not permanent residents of the country of the Site, shall be the responsibility of Purchaser and shall be paid directly by Purchaser to the governmental authority concerned.

B. If Company, its subcontractors, or the employees of either are required to pay any such levies or assessments (including any associated fines or penalties) in the first instance or as a result of Purchaser's failure to comply with any applicable laws or regulations governing the payment of such levies, the amount of any such payments, plus the expense of any required currency conversion, shall be promptly reimbursed in U.S. Dollars by Purchaser upon submission of Company's invoices therefor. If Company has paid in local currency, the exchange rate will be that most favorable to Company which was in effect at the time Company made any payment in local currency.

5. General Conditions

A. In general, Company personnel will have at least one day of rest in any seven consecutive days. However, with Company's written consent and where the nature of the assignment requires, Company personnel may work seven days a week for a maximum of ninety days. Unless prior written agreement is obtained from Company's headquarters, Company personnel shall not work more than 140 hours in any two consecutive weeks or sixteen hours in any one day.

B. If the services of a Technical Advisor are required for a period longer than three months, Purchaser shall pay Company for round-trip expenses (including baggage charges, visa fees, and travel charges associated with obtaining and renewing visas) incurred by Company in connection with travel between the Site and the respective residences of such members of the immediate family of the Technical Advisor as Company may authorize to visit.

C. A Company administrative charge of ten percent shall be added to amounts billed under paragraph B above, paragraph B of Article 4, and paragraphs B through D of Article 11, if such items are provided by Company.

D. Should any Technical Advisor serve twelve consecutive months under this Contract, such Advisor will be entitled, at Company's option, to a vacation not exceeding thirty days, exclusive of travel time. In such event, Purchaser will pay travel and living expenses for said Advisor while traveling between the Site and his or her residence, as well as paying Company's established rate for such Advisor while in transit. If Purchaser desires a substitute Advisor during the aforementioned vacation period, Purchaser will pay the established rate (plus travel and living expenses) for such substitute while in transit to and from the Site and while at the Site.

E. Company reserves the right the replace any Technical Advisor assigned to Purchaser and to supply a qualified replacement at Company's expense. An overlap may be arranged when this right is exercised.

F. Purchaser shall at all times exercise all necessary precautions for the safety of Company employees at the Site. Company may, from time to time, conduct safety audits to insure safe conditions exist and make recommendations to Purchaser concerning safety. Neither the conduct of safety audits nor the making of any recommendation by Company shall relieve Purchaser of the responsibility to provide a safe place to work. In the event Company personnel require medical attention, any local Purchaser facilities will be made available to Company personnel for the duration of such needs.

G. If, in Company's opinion, the safe execution of Services at the Site is, or is apt to be, imperiled by local conditions, Company may evacuate its personnel and Purchaser shall assist in said evacuation, which shall be considered to be excusable under Article 6 below.

H. Company shall not comply with any law, regulation or requirement which would subject Company to criminal or civil penalties or loss of tax benefits under any federal, state or local law or regulation of the U.S.A., and the furnishing of any quotation or acknowledgment of any order does not constitute the furnishing of, or an agreement to furnish, any information which would subject Company to any of the above mentioned penalties or loss of tax benefits.

I. Any information, suggestions or ideas transmitted by Purchaser to Company in connection with performance hereunder are not to be regarded as secret or submitted in confidence except as may be otherwise provided in a writing signed by Company's duly authorized representative.

J. In the interest of supporting the effective performance of the Contract, Purchaser agrees that neither it nor any person or firm acting on its behalf, including its subcontractors, will solicit the employment of or employ any Company employee engaged in the performance of the Contract during the period from the date of the Contract until six months after such performance of the entire Contract is complete. Purchaser agrees that Company will be entitled to enforce this provision in the courts of the country of the Contract's performance or in the state or federal courts in New York State, U.S.A., and Purchaser consents to the jurisdiction of the New York courts for this purpose, notwithstanding any arbitration provision in the Contract. Purchaser will take necessary steps to assure that this provision is binding on its subcontractors, agents and employees.

6. Delays in Performance

A. Company shall not be liable for delay in performance or failure to perform due to (i) causes beyond its reasonable control; (ii) acts of God, acts of Purchaser, prerequisite or concurrent work of others, acts of civil or military authority, governmental priorities, war, insurrection, local hostilities, riot, sabotage, delays or failure to deliver by carriers, fires, strikes or other labor disturbances, floods, epidemics, earthquakes, unusually adverse weather conditions, or similar causes; or (iii) inability to obtain, or delay in obtaining, due to causes beyond its reasonable control, suitable personnel, materials or facilities required for this Contract. In the event of any such delay, the time of performance shall be extended for a period equal to the time lost by reason of the delay.

B. In the event Company's performance is delayed or interfered with by (i) late delivery of equipment, parts, or supplies covered by any other contract of Purchaser; or (ii) prerequisite or concurrent work of others; or (iii) by the act (or failure to act) of Purchaser, its agents or employees, Company shall be entitled to a price adjustment for increased costs resulting therefrom, in addition to an extension of the time of performance.

C. If there is a delay of more than sixty calendar days in the schedule due to any cause beyond the reasonable control of Company, it shall be entitled to immediate payment of all sums then owed by Purchaser, including any retention, and it shall also have the right to terminate the Contract unless Company and Purchaser agree otherwise.

7. Changes, Deletions and Extra Work

If Purchaser makes any change in the work within the general scope of the Contract, and such change results in increased cost to Company, or will require additional time for performance of Company's obligations, or if Company is otherwise adversely affected by such change, then the schedule, warranty, price, and other terms and conditions of the Contract shall be equitably adjusted. In no event shall Company be obligated to proceed with any change unless the foregoing contract modifications have been agreed upon in writing.

8. Warranties

A. Company warrants to Purchaser that any Services shall be performed in a competent manner and in accordance with any mutually agreed specifications. In addition, Company warrants to Purchaser that any Material furnished hereunder will be free from defects in material, workmanship and title. Subject to the provisions of Article 9, if any failure to meet the foregoing warranties appears within one year from the completion of the Services, if promptly notified in writing of the failure, Company shall reperform any defective Service to the extent necessary and feasible and shall, at its option, either repair or replace any defective Material, provided such Material is made available to Company. Except for compliance with the foregoing warranties, risk of loss of, or damage to, any Material or other equipment being worked upon shall remain with Purchaser, regardless of where Services take place.

B. The foregoing sets forth the exclusive remedies of Purchaser and the sole liability of Company for claims based on failure of, or defect in, Services or Material, whether a claim, however instituted, is based on contract, indemnity, warranty, tort (including negligence), delict, quasi-delict, strict liability or otherwise. THE FOREGOING WARRANTIES ARE IN LIEU OF ALL OTHER WARRANTIES, WHETHER WRITTEN, ORAL, IMPLIED OR STATUTORY, INCLUDING ANY WARRANTY OF MERCHANTABILITY.

C. Company does not warrant any products or services provided by others. Any claim that Services provided hereunder are furnished under any warranty or other obligation of Company or its affiliated companies must be asserted prior to the date of the Contract; otherwise, any such claim shall be deemed to be waived.

D. Company shall have no obligation for damage which results because Purchaser fails to store, operate or maintain the Material or equipment being worked upon in accordance with (i) generally approved industry practices, or (ii) the provisions of this Contract, or (iii) the provisions of any storage, operating or maintenance instructions furnished to Purchaser.

9. Limitations of Liability

A. The total liability of Company, its employees, subcontractors or suppliers on all claims of any kind (excluding claims for death or bodily injury), whether based on contract, indemnity, warranty, tort (including negligence), delict, quasi-delict, strict liability or otherwise, resulting from this Contract, its performance or breach, or from any Services covered by or furnished under this Contract or any extension or expansion thereof (including remedial warranty efforts such as the cost of any replacement of services or repair or replacement of material under Paragraph A of Article 8), shall in no case exceed the Contract price or U.S. $10,000, whichever is greater. Except as to title to any Material furnished, all such liability shall terminate upon the expiration of the warranty period specified in Paragraph A of Article 8.

B. In no event, whether in contract, indemnity, warranty, tort (including negligence), delict, quasi-delict, strict liability or otherwise, shall Company, its employees, subcontractors or suppliers be liable for loss of profits or revenue; loss of use of the equipment being worked on or any associated equipment or facilities; cost of capital; cost of purchased power; cost of substitute equipment, facilities or services; downtime costs; any special, consequential, incidental or exemplary damages; or claims of customers of Purchaser for any of the foregoing items, and Purchaser will indemnify Company, its employees,, subcontractors and suppliers against any such claims from Purchaser's customers.

C. Unless otherwise agreed by Company's authorized representative, Services and Material furnished hereunder are not intended for use in connection with any nuclear facility or activity. If so used, Company disclaims all liability for any nuclear damage, injury, or contamination, and Purchaser shall indemnify Company, its employees, suppliers and subcontractors against any such liability, whether in contract, indemnity, warranty, tort (including negligence), delict, quasi-delict, strict liability or otherwise.

D. If Purchaser is furnishing Company's Services or Material to a third party by contract, Purchaser shall obtain from such third party a provision affording Company, its employees, subcontractors and suppliers the protection of paragraphs A, B and C of this Article.

E. Except where Company has expressly and in writing assumed design responsibility, Company shall not be liable for any loss or damage whatsoever arising from its failure to discover or repair latent defects or defects inherent in the design of the equipment being worked on. In no event shall Company be liable for loss or damage which results when equipment is put in use against its advice.

F. To assure adequate Technical Advisory coverage as defined in the proposal, Company personnel shall not be required to work on other units or projects during the duration of the Contract. The intent of this limitation is to assure that Technical Advisory Services are not extended beyond the capability of Company personnel. Variations and/or service extensions will be considered by Company's main office through the means of a separate proposal or a mutually acceptable modification to this Contract.

G. If Company furnishes Purchaser with advice or assistance concerning any products, systems or work which is not required pursuant to the Contract or any other contract between the parties hereto, the furnishing of such advice or assistance shall not subject Company to any liability, whether in contract, indemnity, warranty, tort (including negligence) delict, quasi-delict, strict liability or otherwise.

H. In the event of any conflict, this Article shall take precedence over any other Article in the Contract. The invalidity, in whole or part, of any of the foregoing paragraphs will not affect the remainder of such paragraph or any other paragraph of this Article.

10. Financial Condition

If the financial condition of Purchaser at any time does not, in the reasonable judgment of Company, justify continuance of the work to be performed hereunder on the terms of payment agreed upon, Company may require full or partial payment in advance or it shall be entitled to cancel the Contract and receive reimbursement for its reasonable and proper cancellation charges. In the event of the bankruptcy or insolvency of Purchaser, or in the event any proceeding is brought by or against Purchaser under any bankruptcy or insolvency laws, Company shall be entitled to cancel the Contract at any time within thirty days after Company receives notice of such proceeding, and Purchaser shall pay Company its reasonable and proper cancellation charges. Company's rights under this paragraph are in addition to all other rights available to it.

11. Purchaser's Responsibilities

A. Purchaser shall render all reasonable assistance to Technical Advisors in connection with the rendering of Services at the Site, including necessary space and facilities adjacent to the work area for use as a field office and for the safe and secure storage of drawings, tools and material. Purchaser shall also furnish equipment, supplies and competent language interpreters or translators as needed to accomplish the work.

B. Unless otherwise agreed by Company, Purchaser shall furnish first class living accommodations and food to Company personnel at the Site equal to that of Purchaser management personnel or other comparable technical personnel working at the Site. Living accommodations shall be such as to provide a reasonable degree of comfort and rest. Food shall be of a quantity and quality which will insure the continued health and well-being of Company personnel.

C. Unless otherwise agreed by Company, Purchaser will be responsible for the cost of the following items for Company personnel: gratuities; postage; laundry; telephone and telex or other electronic means of communication service; entry and exit fees; visa, passport and similar fees (including costs associated with securing these items); travel (including all baggage charges) of Technical Advisors from U.S.A. residence or other point of origin to the Site and return to origin.

D. Unless otherwise agreed by Company, Purchaser shall furnish Technical Advisors with four-wheel drive vehicles for business and personal local transportation. Such vehicles will be safe, maintained in first-class condition, and will have insurance coverage equal to that for Purchaser's vehicles at the Site, and Company and its personnel will be named as insureds under such insurance.

E. Prices quoted do not include any allowances for the periodic rest and relaxation of Company personnel that may be dictated by local environmental conditions and/or Site practices currently established or adopted in the future. Purchaser shall be responsible for rest and relaxation arrangements, accommodations and considerations as set forth in Company's proposal with regard to its personnel.

F. Purchaser shall make available all necessary installation, hand and power tools, including heavy lift equipment, and instruments. Technical Advisors may bring certain tools, which will remain Company property. At Purchaser's request, Company may make available certain special test or installation instruments/equipment under Company's established rental provisions.

G. Unless otherwise agreed by Company, Purchaser shall supply, at its cost, any labor, including labor supervision, that may be required in connection with the services of Technical Advisors.

H. The operation of equipment at the Site is the primary responsibility of Purchaser. Purchaser shall indemnify and save Company, its employees and agents harmless from expense and liability (including reasonable attorney's fees) incurred by or imposed upon Company, its employees and agents based upon injury to persons (including death) or damage to property (including Material) resulting from operation of equipment at the Site by Company personnel.

12. Assignment; Authority

Purchaser shall not assign any rights or delegate any duties under the Contract without Company's prior written consent. Any limitations on the authority of any employees and agents of Purchaser will be specified in writing to Company.

13. Title and Risk of Loss

Unless otherwise provided in Company's proposal, title to, and risk of loss of or damage to, Material shall pass to Purchaser Ex Works place of initial shipment in the country of origin in accordance with Incoterms 2000.

14. Complete Agreement; Amendments

This Contract contains the complete agreement between the parties. All previous and collateral agreements (including letters of intent and purchase orders issued by Purchaser), representations, warranties, promises and conditions relating to its subject matter are superseded by this Contract.

15. Arbitration; Time for Asserting Claims

The Contract shall include the arbitration provision in Attachment A, Arbitration, if said Attachment is attached hereto. Unless the applicable law provides for a shorter period, any claim, arbitration or other legal proceeding arising out of, or relating to, this Contract must be instituted within four years from the time that the events supporting the claim occurred; otherwise, redress for any such claim will be considered to have been waived.

16. Notices and Correspondence

Notices authorized or required under this Contract shall be in the English language and signed by a duly authorized representative of the party initiating such notice and shall be either delivered to an officer or authorized representative of the party to whom it is directed, or sent by regular or courier mail, delivery prepaid, or by facsimile transmission or telex, to the following addresses (which may be changed by written notice from the party in question):

Purchaser: To the individual and the address to which Company's proposal was directed.

Company: To the individual and the address from which the Company's proposal was initiated.

Notices will not be effective until received.

17. Governing Law

Unless otherwise provided in Company's proposal, the law governing the Site shall be the governing law with regard to the validity, interpretation, and performance of the Contract.

* * *

Attachment A

Arbitration

Except as provided in paragraph J of Article 5, any controversy, claim or dispute between the parties to the Contract arising out of, or relating to, the Contract, or the breach, termination or validity thereof, which the parties are unable to resolve by mutual negotiation, shall be settled and determined by final and binding arbitration by three arbitrators in accordance with the UNCITRAL Arbitration Rules as then in effect and except as modified by explicit provision in this Article.

The parties may mutually agree to extend the time periods provided for in the UNCITRAL Arbitration Rules. Unless otherwise provided in Company's proposal, the appointing authority will be the London Court of International Arbitration, London, England.

Unless the parties agree otherwise or the arbitral tribunal directs otherwise, the locale of the arbitration will be __________________.* At its discretion, the arbitral tribunal may hold pre-hearing conferences or adopt other procedures (including reasonable discovery). The right to reasonable examination of opposing witnesses in oral hearing will not be denied. The English language shall be used in the arbitral proceedings. Each party will bear its own costs of presenting or defending its position in the arbitration.

The award of the arbitral tribunal shall be final and binding and may be confirmed by any court having jurisdiction thereof. If Purchaser is a governmental entity, it agrees to waive any governmental immunity against enforcement and execution of the award or any judgment thereon. The parties further agree that such award or judgment, if unsatisfied, shall be enforceable in the courts of any nation in accordance with its laws.

* If the arbitration is held in England, the parties agree to exclude any right of application or appeal to the English courts in connection with any question of law arising in the course of the arbitration or with respect to any award made.

Madrid Bound: The United States Approaches Ratification of the Madrid Protocol

By John L. Welch

I. Introduction

The United States is moving ever closer to ratification of the Madrid Protocol. U.S. adherence to the Protocol would have a significant impact on the procedural aspects of trademark practice. The Protocol creates a "one stop" international application and registration system that, according to its advocates, would make it easier and less expensive for American businesses to protect their trademarks as they expand into the global marketplace. A single international application, with a single set of fees, could be filed in English in the U.S. Patent and Trademark Office. Foreign protection could be obtained without retaining a local agent or filing a separate application in each country. Renewal and assignment of the International Registration would each be accomplished by filing a single request with a single fee.

The principal roadblock to U.S. accession—a dispute with the European Community over voting rights of intergovernmental organizations—has apparently been resolved. The White House, in a 31 May 2000 press release issued during the United States/European Union Summit, indicated its support for the Madrid Protocol, and the U.S. State Department is reportedly preparing the ratification documents for submission to the Senate. The President will have one year after Senate approval of the treaty to deposit the United States instrument of ratification with the World Intellectual Property Organization (WIPO). This delay is believed to be necessary to allow the U.S. Patent and Trademark Office (PTO) ample opportunity to prepare and implement the appropriate rules and procedures for operating under the Protocol. Thus, the United States may become a member of the Madrid Protocol by the end of the year 2001.

In February 2000, the U.S. Senate Judiciary Committee favorably reported the Madrid Protocol Implementation Act (S. 671) to the full Senate. The U.S. House of Representatives had passed an identical bill (H.R. 769) on 14 April 1999 without opposition. Passage of the implementing legislation, which had languished in the 104th and 105th Congresses, would have no legal effect unless and until the United States accedes to the treaty. But supporters of the Madrid Protocol believe that passage of the Implementation Act would provide a certain impetus toward ratification.

Accession to the Madrid Protocol by the United States would come more than one hundred years after the Madrid Agreement created the first international registration scheme.

II. The Madrid Agreement

In 1891, the Madrid Agreement Concerning the International Registration of Marks established an international registration system, now operated under the auspices of WIPO. As of May 2000, there were fifty-two parties to the Agreement. The United States and other major countries are not parties because of several troublesome aspects of that Agreement. For example, the international application may be filed only after *registration* of the mark in the home country. The protection resulting from the International Registration remains dependent on the validity of the "basic" or "home" registration: if the basic registration is terminated for any reason within five years after its issuance (referred to as a "central attack"), all registrations based on it cease. In addition, the allowance of a period of only twelve months during which a national office may notify WIPO of the unacceptability of the mark is unworkable in a country like the United States, where the examination process often requires considerably more time. Moreover, the international application must be filed in French, and the fees designated by the Agreement are less than corresponding fees in the United States.

III. The Madrid Protocol

In an effort to address these perceived shortcomings and thereby attract more countries to the Madrid Union, the parties to the Madrid Agreement signed the Madrid Protocol in June 1989. The Agreement and the Protocol are parallel but independent treaties. The total membership of the Madrid Union—countries that have signed one or both treaties—is sixty-six.

The Madrid Protocol took effect in April 1996 and currently binds forty-six countries, including Japan, the United Kingdom (but not the European Community), and twelve other countries that likewise are not party to the Madrid Agreement. Perhaps the most significant difference between the Protocol and the Agreement concerns the basis for filing an international application. A *home application*, not just a registration, may serve as the filing basis. Thus, the Madrid Protocol provides an international *application and registration* scheme. Moreover, the "central attack" problem under the Madrid Agreement has been mitigated: if a home application or registration fails within five years of the international registration date, the owner does not lose all related international registration rights, but may transform the International Registration into national applications benefiting from the filing date and any priority date of the International Registration. The time limit for a country to refuse registration may be extended to eighteen months, and even longer if an opposition is filed. The international application may be filed in English or French, and a member nation may charge fees that are equivalent to its national fees.

Although the United States has not yet ratified the Madrid Protocol, it has made a number of important changes to U.S. trademark law in the past dozen years that harmonize U.S. law and practice with that of many foreign nations and facilitate eventual adherence to the Protocol. For example, pursuant to the Trademark Amendments Act of 1988, an application may be filed based upon a bona fide intention to use a mark. That act also reduced the registration term from twenty to ten years. In 1999, the Trademark Law Treaty Implementation Act greatly eased the minimum requirements for obtaining a filing date and modified the renewal procedure to comport (at least literally) with international practice by removing the proof-of-use requirement from the Section 9 renewal application itself (while adding it to Section 8).[1]

IV. The Madrid Protocol Implementation Act

The Madrid Protocol Implementation Act would amend the Trademark Act by adding a new Title XII, containing Sections 60 through 74. The Implementation Act is intended to make procedural, not substantive, changes to U.S. trademark law. By its terms, the Act will take effect on the date on which the Madrid Protocol enters into force with respect to the United States.

A. U.S.-Based Applications and Requests for Extension

The Implementation Act, at Section 61, would permit the filing of an international application with the United States Patent and Trademark Office by the owner of a U.S. application or registration, provided the owner is a U.S. national or domiciliary or has a real and effective industrial or commercial establishment in this country. The application would not be filed directly with WIPO, although the form of the application is prescribed by WIPO. Instead, the PTO would examine the international application to certify that the information therein corresponds to that of the basic application or registration, and, if so, would transmit the international application to the International Bureau of WIPO. Pursuant to Section 62 of the Implementation Act, the relevant information would then be forwarded by WIPO to each country designated by the applicant, where the examination and registration procedures of that country are applied. When the process is completed, the applicant would own a bundle of foreign rights, all bearing the same international number.

The International Registration would be issued by WIPO if all WIPO filing requirements are met, and the mark is then published in the *WIPO Gazette of International Marks*. The International Registration would bear the date on which the international application was filed with the office of origin, provided the application is received by WIPO within two months after that filing date; otherwise, it will bear the date of receipt by WIPO. An International Registration is effective for a period of ten years and is renewable for further ten-year periods.

However, the International Registration alone has no legal effect. It is the extension of the International Registration to a particular country that has legal force. After WIPO has issued the International Registration, the requests for extension of protection are forwarded to the specified countries. A request for extension may be filed concurrently with the international application or at any time during the life of the International Registration.

With respect to an application for International Registration based on a U.S. application or registration, the PTO will be required to notify WIPO whenever that basic application or registration has been restricted, abandoned, or cancelled, or when it has expired, with respect to some or all good or services, either (i) within five years after the international registration date assigned by WIPO, or (ii) more than five years after the international registration date if the restriction, abandonment, or cancellation resulted from an action that began before the end of the five-year period.[2] If the International Registration is consequently cancelled, the holder may file corresponding national applications which may benefit from the international application date and its applicable priority date.

The owner of an International Registration that is based on a U.S. application or registration might seek an extension of protection of the registration to other nations by filing a request either directly with the International Bureau of WIPO or by filing with the PTO for transmittal to WIPO.[3]

B. Foreign-based Requests for Extension of Protection

Pursuant to Section 66 of the Madrid Protocol Implementation Act, an owner of an International Registration who requested extension of that registration to the United States would have to include a verified statement of a bona fide intention to use the mark in commerce. Interestingly, the Implementation Act does not address the possibility that the owner has already used the mark in the United States. The request would be examined in the same manner as an application for registration on the Principal Register. If entitled to an extension of protection, the mark would be published for opposition in the *Official Gazette of the United States Patent and Trademark Office*. If an opposition were not filed, a certificate of extension of protection would issue, giving the owner the same rights as the owner of a U.S. registration on the Principal Register.[4] An extension of protection would remain in force for the term of the International Registration. However, pursuant to Section 71 of the Act, a Declaration of Use under Section 8 of the Trademark Act would be required at the sixth anniversary of the issuance of the certificate of extension, and at each tenth anniversary of the issue date. Pursuant to Section 73, Section 15 incontestability is available. An extension of protection would be assignable, along with the goodwill appurtenant to the mark, only to a person who is a national of, is domiciled in, or has a bona fide and effective industrial or commercial establishment in, a country that is a party to the Madrid Protocol.[5]

If a mark would not be eligible for protection on the Principal Register, the request for extension would be refused, pursuant to Section 68(a) of the Implementation Act. Pursuant to Section 68(b), the PTO would have to send a notification of refusal to WIPO stating the grounds for refusal. This notification would have to be sent within eighteen months after WIPO's transmittal of the request for extension of protection; an additional seven months would be allowed for refusal if the PTO notified WIPO that an opposition may be filed after expiration of the first eighteen-month period. In responding to a refusal, the holder of the International Registration would have to designate a domestic representative resident in the United States.

Pursuant to Section 70(a) of the Implementation Act, an extension of protection issued by the United States would be cancelled, in whole or in part, if the PTO received notification from WIPO that the corresponding International Registration had been cancelled as to all or some of the goods or services. If the International Registration is not renewed, the corresponding extension of protection in the United States is invalidated.

The holder of an International Registration cancelled in whole or in part may file an application for registration under Section 1 or Section 44 of the Trademark Act for the cancelled goods and services that were covered by the U.S. extension of protection, and may claim a priority right if the application is filed within three months of the International Registration cancellation date.[6]

V. Source Material

A wealth of information and material regarding the Madrid Agreement and the Madrid Protocol may be harvested from the Internet. The text of the Madrid Agreement and of the Madrid Protocol, as well as the relevant regulations, practice guides, forms, and more, may be found at the WIPO Web site at www.wipo.org. U.S. legislative material regarding the Implementation Act, including the texts of H.R. 769 and S. 671 and related Congressional reports, may be found at the www.thomas.loc.gov Web site.

Recent developments regarding United States ratification of the Madrid Protocol may be followed at the International Trademark Association website at www.inta.org, as well as at the U.S. Patent and Trademark Office Web site at www.uspto.gov.[7]

VI. Some Considerations Regarding Filing Under the Protocol

As explained above, if all goes well the international applicant will secure a bundle of foreign rights under a single International Registration number, without the expense of hiring foreign lawyers or agents. Renewal and recording of an assignment of the International Registration would each be effected in a single filing. So are there any reasons why a U.S. applicant or registrant would not take advantage of the Madrid Protocol? There are important issues other than potentially lower cost that should be considered before taking that step. Several of those issues will be discussed here.

A. Limitations on the Scope of Coverage

Perhaps the principal drawback for Americans who would resort to the Protocol relates to the scope of goods or services that may be covered. Pursuant to Article 6 of the Protocol, the scope of coverage of an International Registration under the Protocol is tied to the scope of the home application/registration for at least the first five years of life of the International Registration. Because American trademark law requires that the identification of goods and the recitation of services in a registration be relatively specific, the scope of the corresponding International Registration will likewise be limited. If the U.S. application or registration was restricted or terminated during the five-year period following the International Registration date, or was subsequently restricted or terminated as a result of an action commenced during that five-year period, the U.S. Patent and Trademark Office would so notify the World Intellectual Property Organization (WIPO), and the coverage of the International Registration would be correspondingly reduced or terminated.

This drawback in the use of the Protocol stems, of course, from the fundamental tenet of American trademark law that trademark rights are based upon actual use of the mark. Generally speaking, trademark rights in this country are only as broad as the particular goods or services with which the mark is used. Although in recent years the United States has amended its trademark law in a number of respects to comport more closely with international practice—for example, by reducing the requirements for securing a filing date—the requirement of actual use remains. An American applicant must verify that the mark has been put into use before a registration will issue, and the goods or services covered by the registration will be limited specifically to those with which the mark is actually used. One cannot, for example, obtain a registration for goods broadly defined as "clothing" or "computer software" because the PTO will require the applicant to specify the types of clothing and the types of software. Even a foreign applicant who obtains a registration relying upon Sections 44(d) or 44(e) of the Trademark Act without a showing of actual use in this country must verify that it has a bona fide intention to use the mark in commerce. Moreover, in order to avoid cancellation of the registration after its sixth anniversary, a Declaration Under Section 8 must be filed, verifying that the mark has been put into use in this country.

The broad language found in the foreign application or registration will have to be narrowed in the U.S. application before a registration will issue:

> Foreign registrations will often include broad statements of the identification of goods and services. In many cases the identification is merely a repetition of the entire general class heading for a given class. These broad identifications are generally unacceptable in United States applications.[8]

Thus U.S. trademark registrations are characterized by relatively narrow identifications of goods and recitations of services. This difference in scope of coverage arises out of the basic difference in theory between the American system, based on actual use, and the systems prevalent in most countries of the world, based on registration. After all, from the latter point of view, if a showing of actual use is not required to obtain or maintain a registration, why should there be any limitation on the goods or services covered by the registration?

This brings us to the heart of the question facing the U.S. applicant or registrant contemplating an international filing program: Should it file under the Madrid Protocol in order to save money, or should it file individual, national applications in some or all of the desired Protocol jurisdictions to maximize the scope of the protection available? In a 1992 article in the *Trademark Reporter*, Allan Zelnick opines that American applicants would choose the latter course.[9] Indeed, he concludes that either the United States should not adhere to the Protocol, or it should modify American law to permit broader specifications of goods and services. A recent article by David C. Gryce, however, contends that the potentially lower costs available through the Madrid System would likely overshadow this drawback relating to scope of protection.[10]

The answer to the preceding question, however, is not so clear-cut in either direction. Some U.S. companies will likely file under the Protocol, some will not, depending on a number of considerations. Andrew Baum discusses various situations in a 1996 article.[11] He points out that companies that launch new products internationally, like pharmaceutical companies, have probably conducted extensive clearance searches, and are not likely to encounter objections in foreign countries. Thus the Protocol will be attractive to these companies. Baum recognizes that most companies, however, begin with a product in this country and subsequently take the product abroad. Because a commitment has been made to the mark, such a company is not likely to conduct further searching, and is therefore more likely to meet an objection in a foreign application. The savings from a Madrid Protocol filing will then evaporate when a local representative must be hired to respond to the objection.

Baum also recognizes the concern over the scope of foreign rights. He opines, however, that many companies will not be concerned if the foreign protection is limited to the scope of the U.S. registration. But for some, he notes, it is desirable to have coverage for a broad line of goods—like clothing—even though the U.S. registration may be limited to a narrow line of goods—like jeans—because the company may want to stake its claim for future expansion of the product line. One can imagine other variations on Baum's theme. For example, a company that owns a house mark or a famous mark would likely be willing to spend the additional money for national filings in order to obtain broad protection for the mark; an ordinary mark for a single product would surely be treated differently. A company with a broad line of goods might want even broader protection for its mark than an applicant content with a single product or a narrow line of services.

It has been noted that the Protocol may not be as attractive to companies choosing relatively descriptive marks, since such marks are rejected in some jurisdictions unless secondary meaning is shown,[12] while another author argues that, except for companies that have already searched and confirmed the availability and registrability of their marks, filing under the Protocol is like rolling dice: with luck, a company will not have to hire local representation and will save money on its foreign filing program.[13] Moreover, because of the many grounds for cancellation available in this country, the potential for a successful "central attack" on the home registration—thus forcing the American registrant to transform the International Registration into costly national filings—may dissuade the American mark owner from filing under the Protocol.

Perhaps the most that can be confidently stated is that the decision as to whether to seek foreign protection via an international application under the Protocol is one that must be made on a company-by-company, product-by-product, mark-by-mark, and country-by-country basis.

One rather curious way in which a U.S. company might wind up with relatively broad foreign protection under the Protocol but narrow protection in this country might be as follows. An intent-to-use application might be filed in this country, along with a corresponding application for International Registration, identifying a "laundry list" of goods (or services) that includes many individual elements: *e.g.*, shoes, shirts, socks, shorts, hip-huggers, and so forth. Examples of these extended lists may be observed in the Patent and Trademark Office's *Official Gazette Trademarks*, particularly in class 9 and class 25. If the U.S. application survives examination and the opposition period, a Notice of Allowance will issue; the applicant may extend the time for filing the Statement of Use for up to three years. Meanwhile, the requests for extension of the International Registration in the various designated Protocol countries will have been examined, and the extensions of protection likely granted. In fact, each country or organization (*e.g.*, Benelux) must examine the request for extension before the expiration of, at most, eighteen months from the International Registration date. In this country, however, the applicant may file its Statement of Use at the very end of the three-year post-allowance period. It is not uncommon for a period of more that two years to pass between the filing of an application and the issuance of the Notice of Allowance, so the Statement of Use may ultimately be filed after the fifth anniversary of the International Registration. Under the Protocol, the International Registration is then no longer tied to the U.S. basic application. Even if this hypothetical applicant deletes some of the goods at the time of filing the Statement of Use—one suspects that, with regard to these "laundry list" applications, many of the goods are deleted when the Statement of Use is filed—the International Registration retains the original broad list of goods. The same would be true if the U.S. applicant simply abandoned the application at the end of the last extension period, or if the PTO found, when the specimens of use were finally submitted, that the mark was highly descriptive or generic, and unregistrable.

The interaction of the five-year dependency rule under the Protocol, and the potential delay of more than five years for completion of prosecution of an application in the United States—whether resulting from a successful appeal from a refusal to register, a successful defense of an opposition, or the scenarios mentioned above—may yield consequences that are unique for American trademark owners.

B. Limitations on Assignability

Another significant drawback of the Madrid Protocol concerns the limitation it imposes on recordation of an assignment of an International Registration and, more importantly, the impact of national laws on the legality of such an assignment.

Under the Madrid Protocol, the assignment of an International Registration may be recorded in a single filing with a single fee. It is also possible to record an assignment of the Registration as to some of the contracting jurisdictions, or as to some of the goods and services.[14] But in every case, the new holder must be a person who would be entitled to file an international application under Article 2(1): a person who is a national or a domiciliary of, or has a real and effective industrial or commercial establishment in, a contracting state. While this limitation affects only recordation of an assignment, rather than the legality or validity of an assignment, it is obviously a significant limitation for a purchaser who wants to be able to record an assignment of the rights purchased. The inability of a potential purchaser of trademark rights to record the assignment may have a significant impact on whether and in what form a business deal is completed.

As to the legality of an assignment of an extension of protection in a particular country, and the impact of the refusal by WIPO to record the assignment, national law governs.[15] Section 72 of the Madrid Protocol Implementation Act, as now being considered by Congress, states that an extension of protection to the United States may be assigned only to a person who meets the Article 2(1) eligibility requirements. Just as a foreign applicant for extension of protection in this country should consider the impact of this provision of U.S. law, an American applicant or registrant contemplating a Madrid Protocol filing would be wise to consider the national laws regarding the assignability of extensions of protection in the contemplated jurisdictions.

C. Designating Protocol Countries

Still another consideration in contemplating a Protocol filing is the determination of which particular countries to include in the international application. In countries whose representatives charge relatively low fees, direct filing of a national application may be the preferred route, in order to secure the broadest protection at a still low cost. In a country with relatively high agent fees, like the United Kingdom and Japan, an international applicant may choose to designate that country under the Protocol even though the ultimate scope of coverage may be restricted to that obtained in the basic U.S. registration. If Canada accedes to the Madrid Protocol—reportedly not likely to happen soon because of the current backlog in the Canadian Trade-marks Office—it would exemplify a jurisdiction where fees are low but coverage is restricted. So one might as well designate Canada under the Protocol rather than file a national application, in order to enjoy the initial saving of local agent fees.

VII. The Impact of U.S. Accession on American and Foreign Practitioners

American trademark practitioners would initially be bypassed by those who designated the United States for an extension of protection of the International Registration. The request for extension would be transmitted by the International Bureau of WIPO directly to the receiving office (the PTO), without the need for a local representative. This feature yields perhaps the major cost saving provided by the Protocol.

Under the Protocol, if the receiving office refuses to grant the requested extension of protection—and such refusal may be based only on Paris Convention grounds—the office may require that any response be filed through a representative located within its territory. However, the United States implementation legislation does not require that the applicant respond to a refusal through a local representative. Section 68(d) does state, however, that at the time of responding to a notification of refusal, the holder of the International Registration must designate a person resident in the United States on whom may be served notices or process in proceedings affecting the mark (a "domestic representative").[16] But will a foreign applicant hire a United States trademark lawyer at the refusal stage? Most likely.

Other Trademark Rules narrow the foreign applicant's choices. Rule 2.11 currently states that "the owner of a trademark may file and prosecute his or her own application for registration of such trademark, or he or she may be represented by an attorney or other individual authorized to practice in trademark cases under Section 10.14 of this subchapter. " Section 10.14, in turn, lists those who may practice before the PTO in trademark cases: first, an individual who is an attorney, the term "attorney" being defined in Rule 10.1 (c) as a member in good standing of the bar of any United States court or the highest court of any state; second, certain non-attorneys (called "agents") who were recognized to practice before the PTO prior to 1 January 1957; and third, foreign attorneys or agents whose own patent or trademark office allows reciprocal privileges to those permitted to practice before the PTO in trademark cases.[17] Section 10.14(e) reiterates that an individual (even though not a lawyer) may appear in a trademark case in his or her own behalf. Otherwise, an individual who is not a lawyer may appear only on behalf of a firm of which the individual is a member, or on behalf of a company or association of which the individual is an officer.

Thus U.S. law does not *require* that an American representative appear on behalf of the holder of an International Registration in order to respond to a refusal of protection. However, it does *not* permit a foreign representative to appear, and it *does* require the appointment of a domestic representative. It seems very likely that most foreign holders will hire an American trademark lawyer to serve both as domestic representative under Section 68(d) and as legal representative before the PTO in further proceedings involving the refused request for extension.

American trademark practitioners may expect some loss of revenue from direct U.S. filings during the first six months or so after implementation of the Protocol. However, since most U.S. applications are refused registration on the first examination for one reason or another, American practitioners will probably recover much of this lost revenue at the examination stage by appropriately setting the service charges for taking over an application at the point of refusal—including the cost of introducing the application into the attorney's filing and docketing system, and including the fees for reviewing the request for extension, consulting with the client, and preparing an appropriate response. In fact, if the total number of United States filings from the Protocol jurisdictions increases, American practitioners may see a surge in revenues, albeit a bit delayed in time, when these increased filings result in more refusals to register, more appeals, and more *inter partes* proceedings.

Foreign practitioners will likely see a drop in revenue resulting from the loss of national filings on behalf of American applicants, a loss that may not be recovered. Foreign requests for extension in many countries may be expected to encounter considerably less difficulty than requests filed in this country. Some foreign countries conduct little or no examination of a trademark application, and so practitioners in those countries will be least likely to recoup their lost revenues. One author argued that the Protocol will not only harm national offices and trademark owners, but will "decimate" the ranks of trademark practitioners.[18] But another author has set out a detailed rebuttal, pointing out that national applications filed on behalf of foreigners are typically a small percentage of a country's total filings, and speculating that, even if all such national filings were "lost" to the Protocol, the "downstream" legal activity would still continue, and the overall increase in global trademark activity may well compensate for the lost revenue from national filings.[19] In countries that do provide more detailed examination of an application—like Japan and the United Kingdom—practitioners may be expected to recoup lost filing fees during the examination stage.

VIII. The Impact of Accession on the U.S. Patent and Trademark Office

In a recent conversation with a PTO official, the author was told that the United States PTO does not expect a flood of additional "applications"—*i.e.*, requests for extension—as a result of this country's accession to the Madrid Protocol. If this were a concern, the United States could reduce the number of requests for extension by invoking Section 14(5) of the Protocol. That Section allows an acceding country to declare that pre-existing International Registrations may not be extended to it.[20]

The United States PTO received 240,308 trademark applications in fiscal 1999 (October 1998 through September 1999); 44,549 of those applications, or 18.5 percent of the total, were filed by residents of foreign countries.[21] Thus, 28,236 applications, or 11.7 percent of the total, emanated from Madrid Protocol countries, and 16,313 from non-Protocol countries. Therefore applicants from Protocol countries have not had a major impact on the business of the PTO, and it is believed that the availability of the Protocol route will not bring about an increase in filing so significant as to present a serious problem for the PTO. Many of the requests for extension to the United States probably would have been filed as national applications in any event. Any increase in the number of total filings (national plus Protocol) is expected to remain within the capacity of the recently expanded PTO staff and resources.

IX. Suggested Further Reading

As American practitioners give more serious attention to the Madrid Protocol, one may expect an increasing flow of analytical writing and commentary regarding the desirability and impact of the Madrid scheme. This paper is an attempt to precipitate just such discussions. The articles cited above, as well as those noted below, will provide a sound foundation for an understanding of the history of the Madrid Protocol and its future role in American trademark practice.[22]

Endnotes

1. *See* Welch, *Modernizing for the Millennium: The 1999 Amendments to the Trademark Law*, 13 Int'l L. Practicum 34 (2000).
2. Madrid Protocol Implementation Act (hereinafter "Implementation Act") § 63.
3. Implementation Act § 64.
4. Implementation Act § 69.
5. Implementation Act § 72.
6. Implementation Act § 70(c).
7. An informative, if somewhat dated, article on the history of this country's attitude toward the Madrid Agreement and the Madrid Protocol is available at www.ladas.com under the title *Trademarks—The Madrid Protocol: A Non-European View*.
8. Trademark Manual of Examining Procedure § 1009.04.
9. Zelnick, *The Madrid Protocol—Some Reflections*, 82 Trademark Rep. 651 (1992).
10. Gryce, *A Brave New World*, IP Worldwide 46 (June/July 2000).
11. Baum, *Madrid Protocol: Will United States Join? If So, What Will It Mean For U.S. Companies?*, N.Y.L.J., 20 May 1996.
12. Leaffer, *The New World of International Trademark Law*, 2 Marq. Intellectual Prop. L. Rev. 1 (1998).
13. Controne, *The United States and the Madrid Protocol: A Time to Decline, A Time to Accede*, 4 Marq. Intellectual Prop. L. Rev. 75 (2000).
14. Protocol Art. 9.
15. *See* Guide to the International Registration of Marks Under the Madrid Agreement and the Madrid Protocol ¶60.07.
16. *See* Trademark Act § 1(e) and Trademark Rule 2.24.
17. As to the third category, only Canada has such reciprocal rights with the United States, but Canada is not a party to the Protocol.
18. Brown, *Does the Madrid Protocol Put Trademark Rights in Peril?*, IP Worldwide (May/June 1997).
19. Machado, *Unfounded Fears Cloud Madrid Protocol*, IP Worldwide (May/June 1997). Bruno Machado is Director of WIPO's International Registrations Department.
20. Three countries—Estonia, Hungary, and Turkey—have invoked that provision.
21. U.S. Patent and Trademark Office, Century of American Invention: A Patent and Trademark Office Review (1999).
22. For a discussion of the interests and negotiations that led to the Madrid Protocol, see *The Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks*, 82 Trademark Rep. 58 (Jan.-Feb. 1992). Additional background regarding national trademark systems may be found in Schulte, *The Madrid Trademark Agreement's Basis in Registration-Based Systems: Does the Protocol Overcome Past Biases? (Part I)*, 77 J.P.T.O. Soc. 595 (1995); Schulte, *The Madrid Tradement Agreement's Basis in Registration-Based Systems: Does the Protocol Overcome Past Biases?* (Part II), 77 J.P.T.O. Soc. 728 (1995). In Port, *Trademark Harmonization: Norms, Names and Nonsense*, 2 Marq. Intellectual Prop. L. Rev. 33 (1998), the author provides an interesting discussion of the objectives and ramifications of trademark law harmonization.

    For another exchange of views on the impact and desirability of the Madrid Protocol, one that sheds some additional light on its workings, see Barreda, *The Madrid Protocol: Does it Require a Revision?*, Trademark World 29 (April 1996), in which the author, a Peruvian lawyer, asserts that the Protocol, seemingly beneficial on paper, is full of flaws and is biased against Spanish-speaking countries. Briton David Tatham responds rather effectively in Tatham, *The Madrid Protocol: Not an Expensive Ogre; a Benign and Helpful Friend*, Trademark World 15 (August 1996).

APPENDIX A

Members of the Madrid Union

Albania (A)
Algeria (A)
Antigua and Barbuda (P)
Armenia (A)
Austria (A&P)
Azerbaijan (A)
Belarus (A)
Belgium (A&P)
Bhutan (A&P)
Bosnia and Herzegovina (A)
Bulgaria (A)
China (A&P)
Croatia (A)
Cuba (A&P)
Czech Republic (A&P)
Democratic People's Republic of Korea (A&P)
Denmark (P)
Egypt (A)
Estonia (P)
Finland (P)
France (A&P)
Georgia (P)
Germany (A&P)
Greece (P)
Hungary (A&P)
Iceland (P)
Italy (A&P)
Japan (P)
Kazakhstan (A)
Kenya (A&P)
Kyrgyzstan (A)
Latvia (A&P)
Lesotho (A&P)
Liberia (A)
Liechtenstein (A&P)
Lithuania (P)
Luxembourg (A&P)
Monaco (A&P)
Mongolia (A)
Morocco (A&P)
Mozambique (A&P)
Netherlands (A&P)
Norway (P)
Poland (A&P)
Portugal (A&P)
Republic of Moldova (A&P)
Romania (A&P)
Russian Federation (A&P)
San Marino (A)
Sierra Leone (A&P)
Slovakia (A&P)
Slovenia (A&P)
Spain (A&P)
Sudan (A)
Swaziland (A&P)
Sweden (P)
Switzerland (A&P)
Tajikistan (A)
The former Yugoslav Republic of Macedonia (A)
Turkey (P)
Turkmenistan (P)
Ukraine (A)
United Kingdom (P)
Uzbekistan (A)
Viet Nam (A)
Yugoslavia (A&P)

(A) denotes a party to the Madrid Agreement (fifty-two in all)

(P) denotes a party to the Madrid Protocol (forty-six in all)

Protection may not be requested separately for Belgium, Luxembourg, or the Netherlands, but only for all three countries together (Benelux).

Enforceability of a U.S. Civil Judgment in Spain

By Charles C. Coward and Ana M. Gutierrez

I. Introduction

In order for a judgment rendered by a U.S. state or federal court to be eligible for enforcement in Spain, it must be first granted recognition in an "*Exequatur*" proceeding before the Spanish Supreme Court. Since there is no treaty between Spain and the United States on the recognition and enforcement of judgments, a plaintiff seeking a recognition order should be prepared to prove that an analogous Spanish judgment would *de facto* be granted comparable recognition and enforcement in the specific state of origin of the United States (*i.e.*, both as a matter of statute and of case law). Such proof may not be necessary unless the defendant presents evidence to negate the existence of reciprocity (*i.e.*, evidence that either as a matter of statutory law or of case law the specific state in question does not grant comparable recognition and enforcement to analogous Spanish judgments). In any event, it will be necessary to establish that:

- The judgment was rendered as a consequence of personal (*i.e.*, in personam) jurisdiction.
- The judgment was not a default judgment, unless the default was intentional for the defendant's own convenience.
- The underlying obligation(s) to be enforced through the judgment is (are) lawful in Spain.
- The judgment meets all the necessary requirements in the state where it was rendered to be considered valid and all the requirements under Spanish law to be valid in Spain. (In Spain, this requires that the judgment be authenticated by an "apostille" and translated into Spanish.)

Other requirements or conditions not expressly established by Spanish statutory law are that the judgment must: be final (*i.e.*, not subject to further appeal or review); deal with civil matters (as opposed to penal, administrative or other public law matters); and have been rendered in a proceeding that complied with satisfactory standards of due process. In addition, the Spanish court will consider whether the U.S. court in taking jurisdiction did so where there was no reasonable connection between the various elements of the litigation and the state where the judgment was rendered.

II. Generally

Before examining the requirements and proceedings that must be followed for a foreign judgment to be recognized and enforced in Spain, we should distinguish the consequences that may derive from a judicial decision.

A. The Foreign Judgment as Evidence

In this case, the foreign judgment will simply provide evidence of its existence and of the fact that, in the state were the judgment was rendered, the court adopted that decision on the matter. For example, a foreign judgment granting a divorce will give evidence that the wife and husband are deemed to be divorced in that state. In this regard, the foreign judgment can be used to establish a preliminary lawful appearance of the existence of the right granted by such judgment. For these purposes, according to articles 600 and 601 of the Spanish Civil Procedural Law (hereinafter, "CPL"), the foreign judgment must be apostilled (as provided in the Hague Convention dated 5 October 1961) and translated (unless challenged, the translation need not be authenticated by an officially certified translator).

B. "Recognition" of Foreign Judgments

The Spanish court must declare that the foreign judgment qualifies to be awarded the intended effects in Spain. Once the foreign judgment is "recognized," it will have the following effects.

- Res judicata effect: The parties to the proceedings will be bound by the decision contained in the judgment and it will not be possible to initiate another proceeding between the same parties and with the same cause of action.
- Eligibility for recording: A party may seek to have the decision contained in the judgment recorded in a Spanish Registry.
- Enforcement effect: The decision will be enforceable in Spain.

III. Recognition Systems of a Foreign Judgment in Spain

A. Conventional Recognition and Enforcement (Art. 951 CPL)

According to article 954 of the CPL: "Final and conclusive foreign judgments will have the force established by the applicable Treaty in Spain."[1] Spain is party to many bilateral and multilateral treaties on the recognition and enforcement of foreign judgments. The most important of these are the Brussels Convention of 1968 on jurisdiction and enforcement of judgments in civil and commercial matters and the Lugano Convention of 1988. Both of these prevail against prior bilateral treaties signed between the parties to such conventions. There is no treaty or convention between Spain and the United States dealing with recognition or enforcement of judgments.

B. Recognition on the Basis of Reciprocity (Arts. 952 and 953 CPL)

In the absence of an applicable treaty, a foreign judgment may be recognized and enforced in Spain, provided there is reciprocity between Spain and the state of origin of the judgment. Article 952 of the CPL states that, "Should there be no special Treaties with the State in which the foreign judgments have been rendered, [the foreign judgments] will have the same force that is given to Spanish judgments in the State of origin."[2] Article 953 of the CPL provides that, "If the enforceable judgment has its origin in any State in which, due to case law, judgments rendered by Spanish Courts are not enforced, such judgments will not have force in Spain."[3]

This reciprocity requirement must be analyzed from two perspectives:

- "Positive" Reciprocity (Art. 952 CPL): A foreign judgment will be recognized in Spain if it meets the same requirements that would be required by the courts of the state of origin for the recognition and enforcement of a Spanish judgment.
- "Negative" Reciprocity (Art. 953 CPL): Petitions for recognition of a foreign judgment will be dismissed when evidence is given that in the state of origin of the foreign judgment, Spanish judgments are *de facto* not recognized and enforced. This principle is an "objection" ("*excepción*") that can be used to oppose the recognition of the foreign judgment by the party against which the plaintiff attempts to enforce the foreign judgment. It is likely that a party opposing the recognition of a judgment will attempt to base its defense on the existence of negative reciprocity. A party alleging negative reciprocity would be charged with the burden of the proof for establishing negative reciprocity.

Under the reciprocity regime, the Spanish Supreme Court must analyze the system of recognition and enforcement that is applicable *de facto* to a Spanish judgment in the state of origin of the judgment. Spanish scholarly opinion and case law establish that the reciprocity must be:

- *specific* (*i.e.*, foreign judgments for which recognition is sought in Spain will be given the same legal treatment that in the state of origin of the foreign judgment would be given to a Spanish judgment of the same nature);
- *bilateral* (*i.e.*, there will be reciprocity provided that Spanish judgments, and not foreign judgments from other countries—*e.g.*, France—are recognized in the state of origin);
- *applicable in practice* (*i.e.*, it is not enough to give evidence that the law of the state of origin provides for the recognition and enforcement of Spanish judgments, but there is a need to analyze how this law is applied by case law);
- the reciprocity requirements must be met "*at the present time*" (*i.e.*, at the time when the plaintiff applies for recognition);
- duly *evidenced* (reciprocity needs to be evidenced either by a certificate issued by the consulate of the state of origin, or by a report of two practicing lawyers or professors of the state of origin of the judgment).

There are two general issues regarding reciprocity that for U.S. judgments we should clarify before proceeding to the next recognition regime.

The first issue relates to the state where the judgment was rendered. Under the federal system of the United States, recognition of foreign judgments is a matter of state law. Therefore, the Spanish court should look at the foreign judgment recognition legislation of the specific state where the judgment was rendered and its corresponding case law. So, for example, if the judgment for which recognition is being sought in Spain was rendered in Texas, the Spanish court should look at Texas legislation and case law. Evidence that Spanish judgments are or would be recognized and enforced in any other state of the nation (*e.g.*, New York) should be irrelevant as to the establishment of reciprocity between Texas and Spain.

The second issue relates to the nature of the evidence needed to prove reciprocity. A possible reading of the CPL is that reciprocity is established as long as the legislation and case law of the foreign jurisdiction would permit the hypothetical recognition of a Spanish judgment. That is, under that reading there is no need to present evidence that an actual Spanish judgment was recognized and enforced by the foreign state in order to establish reciprocity. So, for example, if it can be shown that the legislation would allow the recognition and enforcement of the Spanish judgment and there is case law where judgments from countries similar to Spain (*e.g.*, France) are recognized and enforced, then reciprocity could be established. However, this is not how the Spanish Supreme Court has read the reciprocity requirements in the CPL. Under Spanish case law, in order to establish reciprocity the party requesting the recognition of the foreign judgment must provide specific cases where a Spanish judgment (and not a judgment from some other foreign jurisdiction) was recognized and enforced by the foreign state.

These two general issues are illustrated in Supreme Court Decision RJ 1998\3559 of 7 April 1998. In that case, in order to establish reciprocity, the party requesting the recognition of a judgment rendered in Minnesota presented a brief stating the statutory and case law of the State of Minnesota regarding the recognition and execution of foreign judgments. The court acknowledged that the legislation and case law described in the brief corresponded to the state of origin of the judgment (*i.e.*, the state of Minnesota). However, since none of the cited cases dealt with the recognition and execution of a Spanish judgment in Minnesota, the court held that reciprocity had not been established and proceeded to apply the conditional regime of Article 954, which is described below. Nevertheless, that case seems to be an exception among *exequatur* cases. In most cases, the court does not scrutinize the Article 952 requirements. Rather, they jump to the Article 954 conditions after finding that there is no evidence of negative reciprocity (described in Article 953). Even if a party were to prove reciprocity, the Court would determine whether the Article 954 conditions are met. Given the difficulty of proving reciprocity and given that even after proving that Article 952 has been satisfied the Supreme Court will look at Article 954, lawyers might find it reasonable and cost and time efficient to forego the reciprocity of Article 952 and go straight to Article 954.

C. Recognition under the Conditional Regime (Art. 954 CPL)

Article 954 establishes an autonomous or conditional regime. If none of the aforementioned situations applies to the case, the judgment will be enforceable in Spain if the following circumstances are met:

> 1st The judgment was rendered as a consequence of an exercise of a personal cause of action.
>
> 2nd The judgment was not rendered by default (i.e., without an appearance of the defendant).
>
> 3rd The obligation to be enforced through the judgment is lawful in Spain.
>
> 4th The judgment meets all the necessary requirements in the country where it was rendered to be considered valid, and those that the Spanish laws require for it to be valid in Spain.[4]

If there is no international treaty with the country where the judgment was rendered and if the reciprocity regime is not applicable (*e.g.*, can neither be proved nor disproved), the foreign judgment will be recognized in Spain if it meets the conditions established in Article 954.

D. Is There a Hierarchical Relationship Between the Reciprocity Regime and the Conditional Regime?

The main problem presented by the recognition regimes in practice is the relationship among them, and how to decide which regime should be applied when facing a foreign judgment for which recognition and enforcement is being sought. In principle, it appears that the law establishes a hierarchical relationship among the regimes, so that we first look at the applicable international treaty; if there is no such treaty we would turn to the reciprocity regime; and if that regime does not apply, we would then turn to the test set forth in Article 954. However, this does not seem to be the case in practice.

The wording of articles 952 and 953 of the CPL would seem to establish that there is a hierarchical system. Accordingly if evidence is given of the existence of reciprocity, the Spanish Supreme Court would grant recognition without analyzing whether the foreign judgment meets the requirements established in the conditional regime. Nevertheless, according to the reading of those articles by the Spanish Supreme Court, even if there is reciprocity (*i.e.*, even if the courts of the state of origin recognize and enforce Spanish judgments), it will determine whether the conditions stated in the "conditional regime" are *also* met, prior to considering if the foreign judgment can be recognized and enforced. This approach could appear contrary to the wording of the CPL, but if we look at the requirements that are established in addition to reciprocity, we could conclude that *they are minimum and fundamental conditions* (*e.g.*, due process, not to offend public policy, etc.) that cannot be disregarded and that should be reviewed for any judgment to be enforceable in Spain.

We can summarize the interaction between the reciprocity and conditional regimes as follows.

- If evidence is given of negative reciprocity, the Spanish court will dismiss the recognition and enforcement procedure.
- If evidence is given of the existence of reciprocity, but the foreign judgment does not comply with the requirements set forth in the "conditional regime," it is likely that the Spanish court will dismiss the recognition and enforcement procedure.
- If no evidence is given either about the existence or the lack of reciprocity, the Supreme Court will

analyze whether the foreign judgment fulfills the requirements stated in the "conditional regime."

In other words, evidence of negative reciprocity will allow the Court to deny the "*exequatur*," while evidence of the existence of reciprocity may not have conclusive consequences in favor of the party who seeks the enforcement of the foreign judgment.

IV. Foreign Judicial Judgments Capable of Recognition

Traditionally, there have been three main requirements for the recognition of a foreign judicial resolution in Spain:

- Recognition must refer to judgments and not other types of judicial decisions or orders.
- Judgments must be final and conclusive.
- Judgments must refer to private law as opposed to administrative or public law.

The Supreme Court used to deny the recognition of foreign decisions if they were not labeled or referred to as a "final and conclusive judgment," as literally established by the wording of the CPL. However, that trend has been abandoned by recent case law, which has extended the possibility of recognition to every foreign judicial decision, provided it is in fact final and conclusive, regardless of how the judgment is referred to or "named."

There are two relevant comments on the "final and conclusive" requirement:

- The finality (*i.e.*, the nature of being final and conclusive) must be interpreted in the sense of *res judicata*, that is, of the impossibility of it being subject to further appeal or review. The finality is determined under the legal criteria of the state where the judgment was rendered.
- The finality requirement is not required under certain international treaties.

Finally, the foreign judgment must deal with private law matters (*e.g.*, civil, commercial, or labor matters). This does not mean that a foreign judgment dealing with public law matters could not have effects in Spain other than mere evidentiary effects, but these effects would come about under the recognition process for judgments dealing with private law matters. (For example, a criminal judgment may contain decisions on the civil liability of the guilty party, which are private matters capable of being recognized and enforced.) Regarding this issue, what is relevant is the cause of action on which the judgment is based, not the jurisdictional body that rendered it.

V. Requirements for Recognition

The recognition of a foreign judgment in Spain is not unconditional. It is subject to a series of requirements or assumptions that are technically referred to as "requirements for recognition." The conditions that a foreign judgment must meet to be recognized in Spain vary according to the recognition regime that is applicable.

- If recognition is requested under the conventional regime, the conditions will be established by the treaty that is applicable.
- Under the reciprocity regime, the recognition in Spain of a foreign judgment will be subject to the same conditions that the country where the judgment was rendered would require for the recognition of an analogous Spanish judgment. However, as we have seen, Spanish case law does not consider this sufficient and requires that the conditions established in Article 954 be met as well.
- If the autonomous regime is applicable, the requirements will be those established by Article 954.

In spite of the diversity of regimes, there is a series of *common minimum conditions* that would apply to any of the regimes. These coincide with the requirements set forth in Article 954, as they are interpreted by case law. These requirements are as follows.

A. Formal Compliance

This entails the verification of the validity of the judgment under the procedural rules of the country where it was rendered, as well as under the Spanish rules. In the autonomous regime, it is a requirement established in Article 954.4. In practice, it entails the fulfilling of Articles 600 and 601 of the CPL which requires that the foreign judgment be *apostilled and translated*. In the case of the conventional regime, every treaty requires in one way or another the accreditation of the validity of the foreign judgment.

B. Procedural Compliance (Due Process)

This entails the verification that in the proceeding followed in the foreign country from which the judgment derives, the parties' right to defense has been respected. This requirement has been developed by the Supreme Court's case law as follows.

Until 1985, a judgment in order to be recognized for enforcement could not have been rendered in default (*i.e.*, without an appearance of the defendant), regardless of the cause for the defendant's absence. However, after 1985, and as a result of a decision of the Constitutional Court, this was narrowed into a requirement that the defendant has been duly summoned in time and manner. In other words, the Supreme Court distinguishes between those defendants who had no opportunity to appear before the foreign court (in which case *exequatur* should not be granted) and those others who did not appear as a matter of strategy or convenience.[5] Accordingly, the Supreme Court will study the circumstances surrounding the defendant's failure to appear in order to ascertain whether it is an intentional failure or whether it is due to a procedural or formal defect in relation to the service of process on the defendant.

Recent case law gives a broader view to the due process condition, requiring that the right to defense and to protection of judicial rights have been adequately ("*satisfactoriamente*") complied with.

Short of performing a general and exhaustive control of the process, Spanish courts do verify the impartiality of the rendering court, the sufficiency of grounds for the decision, the existence of a minimum degree of proof, and whether the parties had the opportunity and time to defend and protect their rights.

C. Contradiction between the Foreign Judgment and a Final or Pending Spanish Judgment

This entails the non-existence of a final judgment not compatible with the foreign judgment or of a pending process in Spain with the same parties, object, and cause of action. This requirement is not among those established in Article 954 for the autonomous regime, but has been adopted by Spanish case law.[6]

D. Review of the Jurisdiction of the Court of Origin ("forum conveniense")

Unless otherwise provided for in a treaty ratified by Spain, the Supreme Court has always reviewed the jurisdiction of the court of origin where the judgment was rendered in order to verify that such jurisdiction has not been exercised (i) in a case over which Spanish courts have exclusive jurisdiction or (ii) in an exorbitant manner. The examination of the jurisdiction of the court of origin is not expressly established in the CPL, but it is another requirement that has been created by case law, as a matter of defending public policy.

When will it be considered that the state of origin did not have jurisdiction to render a decision on the matter and, consequently, the Spanish Supreme Court will deny the "*exequatur*"?

As a general rule, no foreign resolutions will be recognized if they contain a judgment on a matter upon which Spanish courts consider that they have exclusive jurisdiction. Articles 22 and 25 of the Spanish Law regarding the Fundamental Bases of the Spanish Judicial System (*Ley Orgánica del Procedimiento Judicial*) establish the cases in which Spanish courts have exclusive jurisdiction. For example, Spanish courts have exclusive jurisdiction in proceedings which have as their object rights *in rem* over real property located in Spain, regardless of the domicile of the defendants.

Foreign judgments based on "exorbitant jurisdiction" will also not be recognized. Judgments based on exorbitant jurisdiction are those dealing with matters that have no reasonable connection with the state where the judgment was rendered. In practice, this reasonable connection is measured by applying the Spanish Rules of International Judicial Competence (*Competencia Judicial Internacional*) to the jurisdiction of the state where the judgment was rendered. This analysis of the sufficiency of the connection between the state rendering the judgment and the elements of the litigation (*e.g.*, the parties, their activities and conduct, the effect of those activities and conduct, with the goods or rights that are in dispute) ensures a sound administration of justice and a balanced distribution of the burdens of the procedure.[7] The degree of the minimum connection is scrutinized by determining whether the foreign court applied jurisdictional rules and criteria similar to the ones existing in Spain for determining its jurisdiction. It will be considered that the foreign court has jurisdiction if it has applied jurisdiction rules similar to those applicable in Spain (for instance, if it is a procedure relating to in rem rights over real property located in the state of origin of the resolution). If the foreign court has not applied similar jurisdictional rules to those provided under Spanish law, the Spanish court will verify whether there is a reasonable connection between the foreign court and the parties to the litigation or if it is appropriate for the procedure to be carried out in the state of origin (for instance, because the witnesses and the evidence are located in that state).

In its examination of the grounds of jurisdiction, the court reviewing the application will not be bound by the findings of fact on which the court of the state of origin based its jurisdiction.

E. Not Contrary to Spanish Public Policy

The recognition of a foreign judgment is a procedure of formal review, which excludes the review of the substance of the foreign judgment. Nevertheless, there is an exception for the review of the substance of a judgment to ascertain that it does not contradict Spanish public policy. This examination implies that foreign judgments whose substance clearly offends or is contrary to Spanish public policy will not be recognized.

Regarding public policy, the following circumstances should be taken into account.

- The examination of the compliance with public order is governed by Article 954.3 of the CPL.

- In order for public policy to be considered offended, it is not enough for the judgment to be contrary to a Spanish mandatory or imperative law. To offend public policy a judgment must be contrary to the fundamental principles of social and legal organization which are the basis for national law, such as constitutional principles and human rights.

- Principles of public policy are not immutable. They can change with time. In this regard, it must be stated that the public policy that must be taken into account in order to examine a foreign judgment is the public policy existing at the time the recognition is sought. For example, until 1981 marriage in Spain could not be dissolved and divorce was contrary to public policy. Nevertheless, in 1982 recognition was sought for a foreign judgment of divorce granted in 1942 and the Supreme Court granted the recognition of such foreign judgment.

If only certain aspects contained in a judgment are contrary to public policy, the Spanish court may grant partial recognition to the foreign judgment, by denying recognition to those aspects which offend public policy and recognizing and enforcing the remaining part of the judgment.

VI. Procedure for Recognition: *Exequatur* Before the Supreme Court

A. Generally

The general system for recognition of a foreign judgment is to seek an *exequatur* order from the Supreme Court. This is the applicable procedure for the conventional, reciprocity and autonomous regimes (if the applicable treaty has no special procedural rules).

The *exequatur* is the declaration that a foreign judgment can produce effects in Spain (other than merely constituting evidence of its existence and holdings). Consequently, *exequatur* should not be confused with the enforcement of a judgment. The *exequatur* is a previous and necessary condition for the enforcement of a foreign judgment in Spain, and the enforcement of the judgment itself is carried out by a different jurisdictional body. Thus the Supreme Court grants or denies the *exequatur*, while the Court of First Instance enforces the judgment.

B. Procedure

The procedure for *exequatur* is established by Articles 955 to 958 of the CPL.

- The recognition must be applied for by a party with legitimate standing. Such parties are those that took part in the foreign proceedings or their successors. The presence of an attorney and representation by a court representative ("*procurador*") are required.

- The application must be accompanied by the foreign resolution for which recognition is being petitioned, duly apostilled and translated.

- One of the most controversial issues regarding an *exequatur* action is the possibility of obtaining preliminary or precautionary orders. The Supreme Court has traditionally denied these petitions without providing detailed explanations.[8] These denials of precautionary orders may be the result of the impossibility of their adoption (*i.e.*, because it can be considered that such orders cannot be adopted prior to the recognition of the judgment) or of lack of jurisdiction (because such remedies can only be adopted by the Court of First Instance, which enforces the foreign judgment, and not by the Supreme Court, which merely grants its recognition).

- Once the petition for recognition has been submitted, the respondent is given thirty days to appear before the court. If the party has not appeared before the thirty-day period elapses, the proceedings will continue (which doesn't necessarily mean that the judgment will be recognized). If the party appears, it will have a period of nine days to enter its pleadings. Given that the *exequatur* is a procedure for official recognition, and not of substantive review, the only argument that the "defendant" will be allowed to present is the lack of one of the requirements or conditions for recognition.

- Next, notice is given to the Public Prosecutor, and then the Supreme Court renders its decision, which is only appealable to the Constitutional Court in the event that granting the recognition would pose a threat to a fundamental right. There is also the possibility of reapplying for an *exequatur* if the cause for the denial can be corrected.

- Once recognized, the foreign judgment has been "nationalized" and gains the force of a Spanish judgment. For its enforcement, a certificate of the Supreme Court decision will be sent to the Court of Appeals of the defendant's place of residence and the latter court will give an order to the corresponding Court of First Instance for its enforcement.

VII. Systems of Recognition Under the New CPL

A new CPL has been enacted in Spain and became effective as of 8 January 2001 ("New CPL"). Pursuant to the repeal provision of Paragraph 1.3 of the New CPL, when the new law became effective, Articles 951 through 958 of the current CPL regarding the recognition and execution of foreign judgments in Spain were not repealed and continued to be applicable until the law on international judicial cooperation on civil matters is ratified and is in force. Therefore, when the New CPL became effective, as long as the aforementioned law on international judicial cooperation is not in force, the content of this report on the subject of the recognition and execution of foreign judgments in Spain will remain valid.

VIII. Case Study

A. Fact Situation: Recognition Order ("Exequatur") Required

The plaintiffs in the case study had been employees of the Paradiso Island subsidiaries of three corporations: American Conglomerate Bank (ACB); Banque Fiduciare de France (BFF); and the London Trust Company (LTC). Their employment contracts had been executed by the parent companies. Now that the plaintiffs have become Texas residents, they have initiated proceedings against their former employers claiming pension benefits, termination allowances and unpaid vacation days under their labor contracts. The proceedings were brought before a Texas court, which rendered a decision in favor of the plaintiffs. Plaintiffs now intend to enforce the Texas court judgment in Spain in order to attach assets of the defendants located in Spain.

Prior to such enforcement, the Texas court judgment must be recognized by the Spanish Supreme Court, pursuant to an *exequatur* proceeding.

B. Conclusions

The plaintiffs with judgments against LTC and BFF should not seek a recognition order ("*Exequature*") from the Spanish Supreme Court for the following reasons:

- It is possible that the Spanish Supreme Court will find that both in the case of BFF (which did not enter an appearance) and LTC (which entered a special appearance to contest jurisdiction) the Texas court exercised "exorbitant jurisdiction" in that there was not a "reasonable and minimum connection" between the state and the matter on which the judgment has been rendered.

- With respect to BFF it is also possible (although not necessarily likely) that the Spanish Supreme court will determine that BFF's default was not intentional and self-serving but that service by mail return receipt requested did not offer appropriate guarantees of notice actually being received by the defendant.

The plaintiffs with judgments against ACB should seek a recognition order from the Spanish Supreme Court, since it is likely that this recognition will be granted. However, it is unlikely that any preliminary or precautionary attachment order will be granted until the recognition ("*exequatur*") order has been granted.

C. Discussion

1. Applicable Recognition System: Lack of Treaty; Need for Evidence of Existence or Lack of Reciprocity

There is no treaty between Spain and the United States on recognition and enforcement of judgments. Whether a Spanish judgment will be enforced in the United States is ultimately determined by the law of the local jurisdiction where enforcement is sought. Consequently, the existence or lack of reciprocity must be analyzed under Texas statute and case law, the state where the judgment was rendered. If either (i) existence of reciprocity is evidenced or (ii) insufficient evidence is given to establish the existence or the lack of reciprocity, the Supreme Court will analyze whether the foreign judgment fulfills the conditions stated in the "autonomous regime."

a. Should the Plaintiffs Give Evidence of the Existence of Reciprocity?

Giving evidence of the existence of reciprocity may not be conclusive in favor of the party seeking the enforcement of the foreign judgment: even if evidence is given that Texas courts recognize and enforce Spanish judgments, a Spanish court will determine whether the conditions stated in the "conditional regime" are also met. To illustrate this point, it is noteworthy to cite the Resolution of the Spanish Supreme Court dated 7 April 1998 (R. Ar. 3559).[9]

b. May ACB, BFF and LTC Oppose the Recognition by Alleging Lack of Reciprocity?

Certainly, ACB, BFF and LTC may try to oppose the recognition of the judgment by basing their defense on the lack of reciprocity between Texas and Spain. For this purpose, they would have to present evidence of the fact that, notwithstanding the provisions of Texas law, at the time of the petition for recognition Texas courts (not other U.S. courts), in practice, do not recognize or enforce Spanish judgments (not other foreign judgments) of the same nature and dealing with the same type of matter as the judgment subject to the process of recognition.[10] If evidence is given of the lack of reciprocity, the Spanish court may dismiss the recognition and enforcement procedure. Nevertheless, it is unlikely that the Spanish Supreme Court will find lack of reciprocity. In this regard, it is worth noting the Order dated 13 October 1998 on a judgment rendered by a Texas court, where the Spanish Supreme Court noted:

> As there is no treaty entered into by USA and Spain on recognition and enforcement of judgments, the general regime contained in article 954 of the Spanish procedural law shall apply, as no evidence has been given regarding the lack of reciprocity (article 952 of the CPL).[11]

Various cases have held that there is insufficient evidence regarding lack of reciprocity between U.S. states and Spain.[12]

2. Does the Judgment Qualify for Recognition?

It is clear that the resolution rendered by the Texas court (i) is a judgment and (ii) deals with matters of private law (since it is a claim for labor compensation and benefits). Thus it complies with two of the requirements already stated. A certification of the Texas court or a report of two practicing Texas lawyers would be required, stating that under Texas law the judgment is final and conclusive.

3. Does the Texas Judgment Comply with the "Minimum Conditions" Stated under the Autonomous Regime?

a. Formal Requirements

Formal requirements will be fulfilled provided the judgment is (i) translated into Spanish (in principle, a certified translation will not be required) and (ii) apostilled as provided in the Hague Convention of 5 October 1961.

b. Procedural Requirements

(i) Was the Judgment Rendered in Default (i.e., Without an Appearance of the Defendants)?

ACB appeared before the Texas court and presented a defense based on expropriation and statue of limitations. Thus it may be stated that it accepted the jurisdiction of the Texas court and that the judgment was not rendered in default (*i.e.*, without an appearance of ACB).

LTC made a special appearance before the Texas court to contest jurisdiction, since it did not do business in Texas. Consequently, LTC had the opportunity to prepare its defense and to make arguments as to the substance of the litigation. Therefore, the Texas court judgment may not be characterized as being granted in default so as to hinder its recognition. This conclusion is supported by the Order of the Spanish Supreme Court dated 7 April 1998 (R: Ar. 3559).[13]

BFF did not appear before the Texas court because BFF officials never received the complaint: a mail room person at its Paris headquarters signed for it and discarded it. BFF may allege before the Spanish Supreme Court that the foreign judgment was rendered in default (*i.e.*, without an appearance of BFF) and thus, that the Texas court judgment should not be recognized in Spain. To respond to such allegation, the plaintiffs should give evidence that the absence of BFF in the course of the proceedings was a *default of convenience*[14] (*i.e.*, the defendant was aware of the existence of the litigation, but consciously or by negligence did not appear before the court). For these purposes, (i) it should be ascertained if BFF was summoned in a timely and proper manner and (ii) the plaintiffs should give evidence of the effective receipt of the summons by BFF.

In principle, the Spanish Supreme Court would not strictly apply requirements established under Spanish law for a summons to be deemed timely and proper in form, but would apply the requirements established by Texas law, provided that (i) evidence is given by the plaintiffs in regard to the existence of those requirements under Texas law, (ii) such service of the process is not contrary to Spanish public policy, and (iii) evidence is given that the summons was received personally by the defendant (or its legal representative) and thus permitted the defendant to prepare its defense.

Nevertheless, it should be taken into account that article 268 of the CPL provides for the validity of the summons delivered to an employee of the defendant (or a neighbor or a person of the family of the defendant) provided (i) *the person who received the summons is clearly identified in the certification of the service of the process* and (ii) it can be rationally presumed that the person who received the summons would comply with his/her obligation to deliver the summons to the defendants.[15] It is likely that, in the case at hand, the certification of the service of the process did not specify the person who actually received the summons in the name of BFF. That may hinder the recognition of the Texas judgment under Spanish law.

Spanish case law is not very clear on where the line between "forced default" and "default by convenience" lies in cases like this. In Decision RI 1998\6846 of 8 September 1998, the Supreme Court stated that the jurisdictional institutions must try to achieve the personal summons and citation of the individual when possible, exhausting all the ordinary channels of communication that provide greater guarantee and security of their reception by the addressee. In that particular case, the court held that a party that had been summoned through publication of notice could not be considered to have been summoned or cited in a manner that would allow him/her to know there was a proceeding pending against him/her.

(ii) Other Requirements

The grounds of the decision should be contained in the judgment (*i.e.*, why, according to Texas law, the allegations of the defendants may be dismissed). We assume that the pertinent parts of the opinion of the court provided to us in the scenario are not the complete opinion and that this requirement has been met. Given how the Spanish Constitutional Court has interpreted the requirement of Article 954.3 of the CPL, the substance of the Texas court opinion will be important in determining whether recognition will be granted by the Spanish Supreme Court. Although in the *exequatur* proceedings the Spanish court cannot inquire into the substance of the judgment, it can examine whether in the rendering of the foreign judgment the guarantees contained in the Spanish Constitution, specifically in Article 24, were respected.[16]

c. Non-existence of a Final Judgment or a Pending Process in Spain with the Same Parties, Object and Cause of Action

It is not likely that there exists a proceeding pending in Spain on this issue between the plaintiffs and ACB, BFF and LTC

d. Review of the Jurisdiction of the Court of Origin ("forum conveniens")

(i) Exclusive Jurisdiction?

According to what Article 25[17] of the Spanish Law Regarding the Fundamental Bases of the Spanish Judicial System (*Ley Orgánica del Procedimiento Judicial*), it cannot be deemed that the matter at hand is under the exclusive jurisdiction of Spanish courts.

(ii) Is There a "Reasonable and Minimum Connection" with the Texas Court?

As has already been stated, ACB accepted the jurisdiction of the Texas court. Therefore, the requirement of minimum connection has been complied with in regard to this party to the litigation.[18]

Regarding LTC (which contested the Texas court's jurisdiction) and BFF (which did not appear before Texas court), the following should be noted.

- The Texas court did not apply similar jurisdictional rules to those provided under Spanish law. Consequently, the Spanish court will verify whether there is a *"reasonable and minimum connection"* between the Texas court and either the parties to the litigation or the matter upon which the judgment has been rendered.[19]
- The finding of fact on which the Texas court based its jurisdiction over LTC and BFF was that the Texas statute provides jurisdiction "against any person who has injured a Texas resident." Nevertheless, at the time at which the termination of the labor contracts occurred, the plaintiffs were not Texas residents. It is likely that the parties to the labor contracts upon which termination pension benefits and termination allowances are claimed did not submit to the jurisdiction of the Texas courts. Moreover, no connection exists between the Texas court and the defendants BFF and LTC, who do not do business in the state of Texas.
- It appears that the Spanish Supreme Court may determine that the Texas court judgment was based on "exorbitant jurisdiction" with regard to LTC and BFF. Consequently, it may partially dismiss the recognition of the judgment as to LTC and BFF.

e. Not Contrary to Spanish Public Policy

Apart from the fact that the judgment may have been based on exorbitant jurisdiction, no reasons have been found to consider that the judgment may offend Spanish public policy.

5. Final Conclusion

As a conclusion to the foregoing, the following should be emphasized:

- There is a risk that the Spanish Supreme Court will hold that the Texas judgment was rendered in default (*i.e.*, without an appearance of BFF), and that such default was not clearly demonstrated or evidenced to be solely attributable to an intentional and self-serving failure of BFF to enter an appearance. Should this be the case, a partial recognition may be granted, and the judgment may be recognized in regard only to ACB and LTC.
- In addition, there is a risk that the Spanish Supreme Court will find that the Texas decision

was based on exorbitant jurisdiction over LTC and BFF. Should this be the case, a partial recognition may be granted, and the judgment may be recognized in regard only to ACB.

- Since some grounds can be found to support the recognition of the Texas judgment by the Spanish Supreme Court, it may be advisable to initiate the proceedings.

Endnotes

1. Art. 951 LEC: *"Las sentencias firmes pronunciadas en países extranjeros tendrán en España la fuerza que establezcan los Tratados respectivos."*
2. 952 LEC: *"Si no hubiere tratados especiales con la nación en que se hayan pronunciado, [las sentencias firmes] tendrán la misma fuerza que en ella se diere a las ejecutorias dictadas en España."*
3. 953 LEC: *"Si la ejecutoria procede de una nación en que por jurisprudencia no se dé cumplimiento a las dictadas por tribunales españoles, no tendrá fuerza en España."*
4. 954 LEC: '*Si no estuviere en ninguno de los casos de que hablan los tres artículos que anteceden, las ejecutorias tendrán fuerza en España, si reúnen las circunstancias siguientes:*

    1. Que la ejecutoria haya sido dictada a consecuencia del ejercicio de un acción personal

    2. Que no haya sido dictada en rebeldía

    3. Que la obligación para cuyo cumplimiento se haya procedido sea lícita en España

    4. Que la carta ejecutoria reúna los requisitos necesarios en la nación en que se haya dictado para ser considerada como auténtica, y los que las leyes españolas requieren para que se haga fe en España."

5. The Spanish Supreme Court distinguishes among: *default by conviction*, when the defendant does not appear before the court because he considers the latter has no jurisdiction over the matter; *forced default*, when the defendant cannot be charged with the cause of the default of appearance, because the defendant did not properly receive the service of the process or insufficient time was afforded to the defendant to prepare his defense; and *default of convenience*, when the defendant received the service of the process and acknowledged the existence of the litigation, but consciously or by negligence did not appear before the court. *See, e.g.*, Resolutions of the Supreme Court dated 2 February (R. Ar. 788); 26 January 1999 (R. Ar. 194); 23 June 1998 (R. Ar. 6080); and Resolution of the Constitutional Court 43/1986, of 15 April 1986.
6. It should be pointed out that the Spanish Supreme Court has rendered certain decisions, such as Resolution of 24 April 1935, denying the recognition of a foreign judgment on the basis of the fact that there was a process pending in Spain on the same matter, object and cause of action, *even though the process had been initiated in the state of origin of the foreign resolution prior to its initiation in Spain.*

    In this regard Resolutions of the Supreme Court dated 1 December 1998 (R. Ar. 10537) and 19 January 1999 (R. Ar. 186) set forth:

    > It is a condition for the *exequatur* that there is not a process pending in Spain that may derive into a judgment contradictory to the foreign judgment, disregarding the fact that the litigation carried out or pending in Spain may have been initiated in Spain after the initiation of the foreign process."

    Nevertheless, this position has been criticized by scholars.

7. According to legal scholars, the reason for this control over jurisdiction is to prevent "forum shopping," i.e., that a plaintiff sues in a foreign state in order to avoid the applicable law of the forum and then takes advantage of the facilities of the system for recognition of foreign judgments by initiating a proceeding for the recognition of the foreign judgment in the forum.
8. Nevertheless, there are some exceptions to this trend. For example, on 11 April 1961 the Supreme Court rendered a Resolution by which a prejudgment remedy was granted to record in the Spanish Registry a foreign judgment which provided for the attachment of certain properties of the defendant.
9. Resolution of the Spanish Supreme Court dated 7 April 1998 (R. Ar. 3559), titled *Northrup King Corporation v. Compañía Productora de Semillas Aleodoneras*. The former was represented by legal counsel; the latter failed to enter an appropriate appearance. The court of origin of the judgment was a court of the State of Minnesota. Northrup King Corporation tried to give evidence of the existence of reciprocity between Minnesota and Spain by submitting a report of two practicing lawyers in Minnesota. The Public Prosecutor supported the allegations of the plaintiff by informing the Spanish court that some evidence had been given supporting the existence of reciprocity. Nevertheless, the Spanish court held *inter alia*: (i) that foreign judgments recognized by the courts of Minnesota stated in the Report were not Spanish judgments and so the reciprocity was not bilateral; and (ii) that in any event the existence of reciprocity would not exonerate the plaintiff from the fulfilment of other requirements (referring to requirements stated in the conditional regime). In addition, the Spanish court placed additional burdens on the petitioner to give evidence of facts that it would have not had to prove if it had resorted directly to the conditional regime. The recognition was ultimately granted, since evidence was also given of the compliance with the requirements stated in the conditional regime.
10. Please bear in mind that the lack of reciprocity must be also specific, bilateral, applicable in practice, at the present time and duly evidenced.
11. Resolution of the Supreme Court dated 13 October 1998: The foreign judgment was related to the divorce of two Spaniards that were married in Texas. It should be pointed out that the Spanish Supreme Court also set forth that there had not been "forum shopping" and that the Texas court had jurisdiction on the matter because one of the spouses was domiciled in U.S. (we assume in Texas) at the time of the initiation of the litigation before the U.S. court and the other spouse had appeared before such court and thus accepted its jurisdiction.
12. Resolutions of the Spanish Supreme Court dated 20 September 1999 (R. Ar. 5237); 24 November 1998 (R. Ar. 9487); 13 October 1998 (R. Ar. 7671); 13 October 1998 (R. Ar. 7672); 27 October 1998 (R. Ar. 9009); 9 June 1998 (R. Ar. 5322); and 24 December 1996 (R. Ar. 8394).
13. In regard to default of appearance by conviction, the following judgments of the Spanish Supreme Court should be taken into account.

    1. Resolution of the Spanish Supreme Court dated 7 April 1998 (R. Ar. 3559), titled *Northrup King Corporation v. Compañía Productora de Semillas Algodoneras*: the defendant did appear before the Minnesota court but only to contest jurisdiction, since he deemed that the court had no jurisdiction on the matter. The Minnesota court dismissed his defense in regard to the lack of jurisdiction and considered the defendant in default of appearance. The Spanish Supreme Court, in ruling as to the recogni-

tion of the Minnesota court judgment, stated that the defendant was in default of appearance by conviction. Nevertheless, the Spanish Supreme Court ruled that once the U.S. court dismissed the allegation of the defendant regarding the lack of jurisdiction of Minnesota court, the defendant had the opportunity to prepare his defense and to contest as to the substance of the litigation, but did not present it. Consequently, the default of appearance of the defendant did not hinder the recognition of the Minnesota court judgment.

2. Resolution of the Constitutional Court 1986/43 of 15 April 1986, titled *Zabala Hermanos. S.A. v. Kassnar Imports*: The court of Michigan condemned a Spanish company (the defendant), referred to as Zabala Hermanos, S.A., to pay a certain amount to an American company referred to as Kassnar Imports. The judgment was rendered in default (*i.e.*, without an appearance by the defendant). In the course of the proceedings of recognition before the Spanish Supreme Court, the defendant alleged that he had not appeared before the court of Michigan because he considered that the court did not have jurisdiction on the matter and thus, he had intentionally refused to enter an appearance based on his conviction that the court lacked jurisdiction. The Supreme Court held that the Michigan court had jurisdiction on the matter, dismissed the aforesaid allegation of the defendant, stating that he had defaulted, and recognized the Michigan court judgment.

14. Among others, Resolutions of the Supreme Court dated 2 February (R. Ar. 788); 26 January (R. Ar. 194); 23 June 1998 (R. Ar. 6080); and Resolution of the Constitutional Court 43/1986, of 15 April 1986.

15. Judgment of the Spanish Constitutional Court 22/1997 of 20 February 1997; and Judgment of the Spanish Constitutional Court 41/1987 of 6 April 1997.

16. *See, e.g.*, STC 54/1989, 23 February 1989. Protection of the judicial rights of the defendants must be ascertained and will be reviewed by the Spanish court even if the defendants are not Spaniards. According to Article 24 of the Spanish Constitution, "Everybody has the right to obtain the protection of the Courts in exercising his/her rights and legitimate interests, in such a manner as to ensure that a lack of proper defense never occurs."

17. Exclusive jurisdiction on labor matters is set forth in Article 25 of the Spanish Law Regarding the Fundamental Bases of the Spanish Judicial System *(Ley Orgánica del Procedimiento Judicial)*, which provides as follows:

> In the public order, the Spanish Courts will have jurisdiction on: 1st In matters of rights and obligations derived from a labor contract, when the services had been rendered in Spain or when the contract had been executed in Spanish territory, when the defendant has its place of residence in Spanish territory or an agency, branch, delegation or any other representation in Spain, when the employee and employer are of Spanish nationality, regardless of the place where the services where rendered, or where the contract was executed; and furthermore in the case of a contract of shipment, if the contract was preceded by an offer received in Spain by the Spanish employee.
>
> 2nd In matters of the review of the legality of collective labor agreements executed in Spain and of claims derived of collective labor disputes which take place in Spanish territory.
>
> 3rd In matters of Social Security claims before Spanish entities or that have residence, agency, delegation, or any other representation in Spain.

18. The Resolution of the Supreme Court dated 13 October 1998. *See* note 11 *supra*.

19. The Resolution of the Spanish Supreme Court dated 7 April 1998 (R. Ar. 3559): The Spanish decision that there was "minimum connection" with the forum on which the Minnesota court could properly base its decision regarding its jurisdiction, and that the jurisdiction not exorbitant, because the Minnesota court decision guaranteed the connection between the matter and the parties to the litigation, and allowed the defendant to have access to the proceedings in terms of equality and being able to exercise his right to a defense, without any possibility of fraud in the rules that attribute jurisdiction to the court and according to the rules under which the substance of the case was to be judged.

Latin America and the Right of Privacy in the Internet

By Alejandro Ciero

I. Introduction

The Internet can be thought of as a decentralized network of computers operating worldwide. Accordingly, information management, security, content regulation, and privacy have been the subject of discussion in the global community.

In Latin America, the countries leading the way in the development of the Internet and electronic commerce are Brazil, Mexico, Argentina and Chile. This article is a limited analysis of the current regulations in these countries regarding the right to privacy on the Internet.

II. Relevant Statistics[1]

A. Latin America and the Internet

Latin America has 500 million inhabitants, of which 100 million have the economic power to use the Internet. At this point, there is a four percent computer penetration into the total population and one and one half percent Internet user penetration in that total population. This level of penetration reflects the fairly low gross national product per capita of US$3,976. Right now, there are thirteen telephones for every one hundred people, and ninety-three percent of all users are connected via dial-up—although there is a high cost of connection.

The growth of Internet in Latin America is in its beginning phases. Relatively few individuals are "connected" and commercial transactions online do not represent a large volume of business.

B. Mexico, Brazil, Argentina, and Chile

Turning to the four Latin American countries we are focusing on, these four countries have a total of 313 million inhabitants, 75 million of which have the economic power to use the Internet. The computer user penetration is at five percent,[2] slightly higher than in Latin America as a whole, and there is a one and two thirds percent Internet user penetration. This reflects the slighly higher GDP per capita of US$5,116.[3] Currently there are sixteen telephones per one hundred inhabitants.[4]

III. The Right to Privacy

The right to privacy allows every person to protect personal data that may be considered sensitive, such as religious habits, sexual, political, health, ideas, etc. The right to privacy in the Internet is a concern today due to the constant advance of information technology and the phenomenon of the Internet, making it easier to ascertain individual tendencies constituting "sensitive data" through the classification and interconnection of systems of non-sensitive personal data.

Brazil, Mexico, Argentina and Chile currently have no specific legislation or regulations regarding protection of the right to privacy on the Internet. This reflects the fact that neither Internet access nor electronic commerce has yet acquired the economic importance that it enjoys in other countries.

In general, Latin American governments have been slowly strengthening the democratic processes in their countries. However, these countries still have high levels of poverty, indebtedness and corruption. Any discussions regarding the right to privacy must take into account the dual Latin American polemics of the public right to information and the need for government transparency on the one hand, and the personal right to privacy and the right of the individual to defend that privacy on the other hand.

The reality of the globalization forces, of which the Internet is a part, ensures that the right to privacy will exist in some form in Latin America. Because of the instantaneous virtual coexistence of the Internet in every country, the scope of the right to privacy debate in Latin America will be set by the Internet right to privacy policies of the more developed countries.

The question of the right to privacy in the Internet will be addressed more directly as e-commerce and Internet access in Latin America grow to the levels found in more developed countries.

Accordingly, we outline below the current applicable regulatory framework upon which future legislation must be constructed regarding Internet material and the right to privacy in Mexico, Brazil, Chile, and Argentina.

IV. Mexican, Brazilian, Chilean and Argentine Legal Background and Potential Future Legislation Regarding the Right to Privacy in the Internet

A. Mexico[5]

1. Generally

The right to privacy is a constitutional guarantee in Mexico,[6] interpreted so that no person's privacy may be violated, and, by extension, no private communications between persons may be violated.

In 1999, portions of the Penal Code regarding the protection of data in information systems were amended. Further, in April 2000, the Mexican legislature voted to amend the Civil Code, Commercial Code, the Federal Consumer Protection Code, and the Procedures Code to include new provisions meant to take into account the developments in electronic commerce. Legal protection for electronic transactions was established, the use of the digital signatures was recognized, and information produced by electronic channels was accepted as a valid form of evidence.

These amendments are based upon the UNICTRAL-established principles regarding the regulation of electronic commerce. These basic principles address:

- The need to record commercial transactions;
- The recognition of data messages as a form of evidence;
- The obligation of Internet providers to:
  - — Explain to consumers their rights as consumers prior to completion of a commercial transaction, including their right to return any goods purchased.
  - — Not disclose information of the consumer obtained in any transaction.
  - — Respect the right of the consumers to decline receipt of nonsolicited advertisements.
- The encouragement of the development of ethical conduct codes by providers of goods and services on the Internet as a way of further strengthening the current regulations.

Although some aspects of the right to privacy (for example, protection of confidentiality) were contemplated in the most recent legislation, there is currently discussion as to whether creating specific legislation to address the right to privacy in the Internet is necessary.

2. Conclusions

- The right to privacy is a constitutional guarantee.
- Mexico has specific legislation for e-commerce.
- Basic guidelines for protection of consumer rights have been established.
- Mexican regulations encourage the creation of an ethical code by providers of goods and services.
- The necessity of specific legislation concerning the right to privacy in the Internet is being discussed.

In light of the rate at which e-commerce between Mexico and the EU is being developed, it is hoped that any future legislation that may be passed will be consistent with that of the applicable EU regulations.

B. Brazil

1. Generally

Law 7232/84 contains the Brazilian national policy on information gathering, stating that information gathering and database structuring is to be regulated by specific regulations. In 1990, the Consumer Protection Code set forth consumer rights regarding the access to databases for the purpose of correcting erroneous information about them.

Further, the 1988 constitution established the action of *hábeas data* in the following cases:

- To ensure that any person may request and obtain information concerning him or her held by any governmental entity or any entity having a public character.
- To correct erroneous data in a confidential manner, and if this is not possible, by judicial or administrative procedure.

Law 9507/97 regulates the action of *hábeas data*. It establishes procedural mechanisms so individuals may request, among other things, the correction of erroneous personal data contained in public databases. However, the issue of whether this regulatory scheme encompasses Internet content and right to the privacy in Internet remains unclear.

2. Conclusions

- The right to privacy is a constitutional guarantee.
- Actions to defend one's privacy may be made by way of a *hábeas data* claim.
- It is debatable whether the regulatory scheme contains the right of privacy in the Internet.

C. Chile[7]

1. Generally

While no legislation specifically addresses the right to privacy in the Internet, both the right to privacy, the right to information and freedom of speech are constitutionally guaranteed in Chile in its *Constitucion Politica de la Republica*. The constitution includes a *recurso de proteccion*, which is a formal court proceeding which may be invoked by an individual who believes his rights of privacy and free speech have been violated.

Regarding publicity, the right to information and to free speech is qualified by the Law regarding Abuse of Publicity. The law prohibits the distribution of false, slanderous, or injurious statements against individuals, and protects against the distribution of information about the personal life of an individual which would discredit or damage that individual. The Internet is considered a communication medium governed by this law, and therefore its content must be in compliance with it.

Further, Chile passed its Law Protecting Personal Data on 28 August 1999. This law regulates the collection of personal data for public registers and databases. Since this regulation covers any operation or procedure which collects, communicates, or uses personal data, the law may be interpreted to encompass the Internet.

This law establishes the following principles:

- Personal data may only be collected either (i) in a manner authorized by the law or (ii) when the individual concerned consents to the release of such personal data.
- Authorization from an individual is not required to collect (i) personal data accessible from public sources, (ii) personal data of economic, financial, banking or business character corresponding to credit problems of the individual concerned, and (iii) personal data necessary to make direct sales of goods and services
- Personal data must be eliminated or destroyed when (i) the original collection thereof lacked legal basis or (ii) such data is no longer correct.
- Personal data may only be used for the purposes for which they were originally collected.
- Personal data must be corrected if they are found to be erroneous.

2. Conclusions

- The right to the privacy is a constitutional guarantee.
- Chile has a general but no specific legal framework protecting personal data.

There is discussion of the need for regulations dealing with privacy concerns in the Internet when content does not originate from within the country.

D. Argentina[8]

1. Generally

Since 1997, the Argentine government has handed down a series of decrees and resolutions[9] setting the general guidelines regarding material on the Internet. In doing so, the government has recognized the Internet's importance in its application as a developmental tool in diverse activities, and has stated that freedom of expression should be protected in the Internet. Individuals are to be given free access and Internet content is free from censorship; and the government has emphasized to the business sector that it will not regulate Internet content.

2. The "Right to Privacy" and the *Hábeas Data*

Legislative and constitutional protection to privacy has been brought about by Argentina's increased recognition of human rights.[10] The 1994 constitutional reform guaranteed the right to the privacy to the people and established *hábeas data* as the specific action in defense thereof.

On 2 November 2000, the Congress passed Law 25,326 regarding this subject.

a. Legal Evolution

In 1968, the National Census and Statistics Institute was created. The law that created this government entity also established the concept of privacy in the handling and processing of information used for public surveys and statistics. The overarching principle of this 1968 law is that any data collected should not be individualized to particular persons or organizations to whom they refer. In 1990, Law 23,798 was enacted. This law declares a national interest in the fight against AIDS, and establishes that any policy dealing with AIDS must contemplate and respect the privacy of that person.

b. Main Principles of the Law 25,326

Law 25,326 provides a clear definition of "Personal Data": "Any data, which specifically refers or may be linked to a specific person or a group of individuals." The law includes a clear definition of Sensitive Information: "Information regarding ethnic origin, health status, sexual preference, union affiliation (if any), or political, religious, philosophical or moral convictions." The law states that personal data may be collected only upon the express consent from the individual concerned. Moreover, any personal data or sensitive information must be destroyed once such information becomes unnecessary. The law also includes rights of correction, updating, and suppression, as the case may be.

Among other features of Law 25,326 are the following:

- The private sector will be responsible for its own databases and may set its own codes of conduct for the data contained therein in order to safeguard and to improve the operational conditions of such databases.
- No authorization will be required for personal data regarding economic solvency or obtained from sources accessible to the public.
- There is a prohibition against the transfer of any type of personal data with any country or inter-

national organization that does not provide suitable levels of protection for such information.

3. Conclusions

- Argentina has unrestricted freedom regarding the Internet, giving emphasis to access and the free expression of ideas and content.
- Various legislation regarding the right of privacy (and in particular Law 25,326 regarding *hábeas data*) set forth principles which may be applicable to future regulations specific to the Internet.
- The right against the manipulation or alteration of information is guaranteed by the constitution.

It is expected that any future legislation regarding privacy that may be passed will be consistent with that of the applicable EU regulations.

V. Overall Conclusions

In Latin America, the development of the electronic commerce is still in its early stages, and the number of users of Internet is small but significant.

To date, Brazil, Mexico, Argentina and Chile have encouraged Internet activity and they have provided regulations which limit or restrict content, access, or the traffic of information. Thus Brazil, Mexico, Argentina and Chile all agree that there is a need to protect the right of privacy for Internet users, and in these four countries there are ongoing discussions regarding the necessity for new regulations to protect the right of privacy.

Should the number of Internet users grow, electronic commerce will likely receive increased scrutiny regarding the necessity for specific regulations to protect the right to privacy. Indeed, it is probable that there will be much discussion in the near future about the reach and content of regulations regarding the right to privacy.

Endnotes

1. Goldman Sachs Investment Research, 21 January 2000.
2. Computer user penetration rate into the population:

-Mexico	4.9%
-Brazil	3.6%
-Argentina	6.5%
-Chile	4.3%

3. GDP/per capita:

-Mexico	US$4,826
-Brazil	US$3,105
-Argentina	US$7,947
-Chile	US$4,587

4. Telephones per 100 inhabitants:

-Mexico	11
-Brazil	10.7
-Argentina	24.3
-Chile	18.3

5. With the collaboration from Jean Michel Enriquez Dahlhaus and Dina Moreno de la Rocha of the firm of Creel, Gracia Cuellar and Müggenburg of Mexico.
6. *Constitucion Politica de Mexico* Art. 16.
7. With the collaboration from Jose Maria Eyzaguirre B. of the Claro y Cia law firm.
8. Jorge Reinaldo Vanossi, "*Hábeas Data*": *It neither can nor may go against the liberty of the media*, 159 El Derecho 949 *et seq*. (1994).

> Why have most of the countries of the Latin Americas, particularly Argentina, been concerned about this issue? One might say that, given its character, this is something more typical of the Old Continent rather than ours. However, it is not so. What happens is that the manner in which these dangers and defenses thereto manifest themselves vary and differ because they exist in vastly distant and different realities.
>
> The difference that one finds when reviewing the legislative digests and compilations in the field of human rights protection in Europe or some parts of the Americas such as USA or Canada and the cases that occur in our derided Latin America is self evident. Europeans have very sophisticated protection standards because their damages are minimal and arise from current extravagances that have developed around legal scholars' opinions and the protection of the human being. We could say that in Europe there are situations of smaller magnitude, while in Latin America there are incidents of gigantic magnitude, where the violations to human rights appear in a powerfully qualitative and quantitative dimension.

9. Resolution 2132/97 (Secretariat of Communications) dated 11 July 1997 states, among other things:

> Section 42 of the National Constitution establishes that it is a duty of the authorities to see to the protection of the rights of users and consumers, the defense of competition against any form of market distortion, the control of the natural and legal monopolies, [and] the quality and efficiency of utilities in order to secure the general welfare. . . . [It is clear] that the increasing development of the Internet is causing the geographical, economical and temporal barriers to collapse. Accordingly, the Internet arrives in the world of telecommunications bringing new challenges for the regulation and regarding technologies availability, access and interconnection. . . . [I]n this context, the main purpose of this Secretariat is to protect the end user against all practices, policies or situations that could directly or indirectly damage, hinder or discourage the use of the Internet and the various applications that result from it especially in the field of education and health. . . . [A]s it was stated in Resolution S.C.174/96 "the National Government is firm in supporting the free competition in data access, a qualified means to sustain pluralism and the freedom of the press." . . . [A]ccordingly it is understood that one of the main characteristics that defines the Internet is its interconnectivity, so that any type of manipulation infringes the individual liberties germane to democracy. In this respect the United States Supreme Court decreed, last June, in a judgment "Reno, Attorney General of the United States et al. vs American Civil Liberties Unions et al." that ". . . no law should be enacted that will diminish the liberty of expression. . . ." Furthermore, it sus-

tained that". . . the Internet can be seen as a worldwide conversation with no barriers." That is why the Government may not, through any means, interrupt such conversation. Since it is the most participatory of mass discourses ever developed, the Internet deserves the strongest protection against governmental interference. . . .

The National Executive Power Decree 1279/97, dated 25 November 1997, declares that the Internet services are among the constitutional guarantees that protect the freedom of expression.

Resolution 1235/98, dated 22 May 1998 (Secretariat of Communications), establishes that, in order to protect the freedom of contents in the Internet, Internet providers must include in the invoices to be issued for their services a warning to the consumers stating that the National State does not control or regulate the activity of or the information available through the Internet and recommending that parents exercise reasonable control on the contents obtained by their children.

10. The Supreme Court of Justice defined the term "Privacy," granting to it constitutional scope and protection under the guarantees and personal rights protected under sections 18 and 19 of the Argentine Constitution (which include, among others, inviolability of the defense in court, inviolability of the domicile, mail and private papers), and established that the guarantee of privacy means that no one may be subject to arbitrary or abusive interference in his private life, family, residence or mail, nor be subject to unlawful attack to his honor and reputation and that all persons have the right to be protected by law against such interference or attack. In this sense it has been construed that the constitutional guarantee concerning the inviolability of the domicile must be oriented to protect people rather than places. The criterion followed is similar to that expressed by the U.S. Supreme Court in *Katz v. United States*, 389 U.S. 347, 351 (1997). *See* Alberto J. Egües, *"Right To Privacy" and commercial "Habeas Data,"* La Ley 26 June 2000.

Furthermore, the 1994 constitutional amendment included the *hábeas data* action as a qualified instrument to protect the rights—in absence of more qualified judicial means—that a person has to know data referring to him/her and the purpose of their safekeeping in public or private registries or data bases for the purpose of providing information, and in the event of falsehood or discrimination, to demand their elimination, correction, confidentiality or updating. This amendment was very much criticized by local legal scholars because it fails to describe the right protected by the action (on the contrary, it describes specific conduct whose regulation corresponds to the general legislation but not to the National Constitution). All this was the source of multiple interpretations as to what was the real subjective right or constitutional guarantee protected under the habeas data action. Finally, it has been construed that the constitutional right capable of being protected through an habeas data action is the right to privacy, which is deemed as included in the guarantees of sections 18 and 19 described above, *i.e.*, the inviolability of the domicile, the mail and the private papers.

The scope of the constitutional protection of privacy and the exercise of the habeas data action is made concrete by the right to prevent

> banks or data registries from compiling information that involves personal aspects directly related to private life and that cannot be made available to the public or be used against a person by public organisms or private entities. The protected information is mainly focused on politics, religion, union participation, labor or teaching environment, etc.

Rossetti, H.R. v. Dun y Bradstreet S.R.L., *La Ley*, 1995 E, 294 (Nat'l. Ct. App., Room H, 19 May 1995).

As a precedent to the aforesaid, the Argentine Civil Code established principles or guidelines to support a compensative right that would remedy the damages caused by an infringement of the privacy right (among others) in the Argentine Civil Code. Section 1071 bis states:

> Anyone who arbitrarily interferes with another person's life, by publishing portraits, disclosing correspondence, annoying others in their customs or feelings or otherwise disturbing their private life, even if the fact is not deemed a crime, will be forced to stop such activities, if not already ceased, and to pay an indemnity to be fixed equitably by the Judge, according to the circumstances; in addition, the Judge, at the request of the damaged party, may order the judgment to be published in a journal or newspaper of the location, should this be considered a proper means to provide satisfactory indemnification.

It should be clarified that the defense of the right to privacy contained in the *hábeas data* action should not be construed as an attack on general data filing or information itself, and it is not intended to abolish any kind of registration system. Rather, it is oriented to safeguard the accuracy, good faith and updating of the information, the protection of the intimacy, the security of "material data" and to avoid their use for harmful purposes. Actually, this is a tool intended to defend people against possible harm.

Until now the evolution of the treatment of privacy and *hábeas data* action has been the subject of considerable discussion and controversy. On 23 October 1996 the National Congress voted for a bill for Habeas Data Law 24,747 in order to regulate this issue, but this bill was fully vetoed by the National Executive Power under Decree 1616/96.

With collaboration from Roberto H. Crouzel, Ramón I. Moyano and Fortunato Lucido.

Rules of Origin in the WTO and the EU

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I. Introduction

Rules of origin are a complex set of dynamic and interrelated criteria and principles according to which a country of origin is assigned to a traded product. The determination of origin allows an importing country to apply specific trade preferences or restrictions to the imported good. As the degree of differentiation among similar goods from different countries or trading groups increases, rules of origin become more important and controversial, since the benefit of being determined to be from a certain country or trading group vis-a-vis others may be significant. This is why a common definition of origin is important.

Rules of origin can be divided into two categories: preferential and non-preferential. The former are applied in preferential trade relations between two or more countries (free trade agreements or unilateral systems of preferences). The non-preferential rules of origin will be applied in the rest of the cases.

The *non-preferential* rules of origin have been included in the agenda of the World Trade Organization (WTO) in order to be harmonized. Nevertheless, the signatories are still free to adopt *preferential* rules of origin, which are far from being harmonized.[1]

The first part of the present paper will briefly analyze the rules of origin within the framework of the WTO and the current efforts of harmonization at that level. The second part will examine the application of the rules of origin by the European Community. Finally, a brief approach to the rules of origin in the Free Trade Agreement concluded between Mexico and the European Union[2] will be made.

II. Rules of Origin in the WTO

A. First Efforts to Find a Common Definition of Origin

The General Agreement of Tariffs and Trade[3] (GATT) did not include any specific regulation on origin. The Contracting Parties were free to determine their own rules of origin. Another international institution, the Customs Cooperation Council,[4] encouraged the conclusion of an International Convention on the Simplification and Harmonization of Customs Procedures, known as the Kyoto Convention.[5] The European Union (EU) became party to the Convention in 1975,[6] and accepted Annex D.1 concerning rules of origin in 1977.[7] The Kyoto Convention applied to all rules of origin, both preferential and non-preferential, but did not provide a uniform international origin system: its function was limited to clarifying certain concepts and recommending certain practices and standards.[8] Only the conclusion of the Uruguay Round would bring a binding agreement on rules of origin.

B. The Agreement on Rules of Origin

If the question of origin has been a controversial one, recent evolution in the production patterns has made the problem of rules of origin more acute. Nowadays it is very usual that components from several countries are used for the fabrication of one product, making origin determination more complex. Furthermore, the form taken by certain rules of origin has sometimes turned them into barriers themselves, since they are formulated to provide certain products with specific origin and therefore specific treatment. This evolution resulted in a series of international discussions at a political level and the inclusion of the origin problem in the Uruguay Round agenda, within the framework of the Negotiating Group of Non-Tariff Measures, and led to the Agreement on Rules of Origin, part of the WTO Agreement that put an end to the Uruguay Round.[9]

The Agreement on Rules of Origin[10] (the "Origin Agreement") is a framework agreement, which includes the main principles applicable to all rules of origin (transparency, predictability, impartiality, etc.) and the basis for the harmonization of the non-preferential rules of origin. Such rules are not to be used as instruments to pursue trade objectives and should not themselves create restrictive, distorting, or disruptive effects on international trade.[11]

C. The Scope of the Negotiations

The scope that the negotiations on rules of origin should take had been the object of discussion from the beginning of the negotiations. While some countries, such as the United States, proposed a harmonization extended to all rules of origin, other parties to the negotiations, such as the EU, preferred to restrict the discussions to the non-preferential provisions, excluding all origin rules contained in free trade agreements. The restrictive approach prevailed and the Origin Agreement expressly excludes the preferential rules of origin.[12] However, Annex II of the Origin Agreement contains the Common Declaration with Regard to Preferential Rules of Origin (the "Common Declaration") according to which the general principles and requirements applicable to non-preferential rules will also apply to preferential rules. Such will be the case for obligations of publication and non-retroactivity, for instance. The Common Declaration does not intend to harmonize preferential rules of origin, but simply extends some of the guarantees established for the non-preferential rules to preferential rules.

A controversial point that might limit the effect of harmonization is the situation of the United States and Canada, which apply different non-preferential rules of origin for different purposes. Such differences would have been difficult to maintain in a system that aims at totally harmonizing rules of origin. EU legislation on rules of origin offered a different approach, since it applies, in principle, to all purposes. Finally, the Origin Agreement adopted the "one single rule for all purposes" following the European system. Nevertheless, countries such as the United States and Canada obtained an additional delay to accommodate their system.

D. Two-Step Approach for the Harmonization

The Origin Agreement establishes two distinctive periods in the harmonization process, a transitional period, and a final period.

The *transitional period* should have lasted three years, measured from the entry into force of the Origin Agreement,[13] and the negotiations should have been completed by July 1998. However, this deadline could not be met. A new deadline, November 1999, was agreed upon, but was not respected either. Since the parties cannot be relied upon to respect a new deadline, a new date has not been fixed,[14] and the end of the transitional period remains uncertain. During the transitional period some of the formal guarantees and principles related to the adoption and application of rules of origin, provided for in the agreement, will already apply:

- Rules of origin must be *clear*, that is objective, understandable and predictable.
- Laws, regulations, and judicial and administrative rulings of general application are to be *published*.
- If the rules were to suffer modifications, or new rules are introduced, they should *not* be applied *retroactively*.
- *Negative* rules of origin (containing negative definitions) shall be avoided, since they are often addressed to particular purposes and situations.
- Any person with a justifiable cause can request from the national administration an *assessment* of the origin accorded to a product.
- Any administrative action taken in relation to the determination of origin shall be *revisable* promptly by judicial, arbitral, or administrative tribunals or procedures, independent of the authority issuing the determination.

In the *final period* the principles already introduced during the transitional period will basically continue to be applied and two more principles will be introduced.

- The *equal* application of rules to all purposes.
- The application of the *wholly obtained* and *substantial transformation* criteria.

These later standards are explained in Part II.E below.

E. Criteria for Harmonization

After the transitional period the Origin Agreement provides for a harmonization system of the non-preferential rules of origin.

In establishing the origin of a product, a distinction can be made between products obtained in only one country and products obtained in several countries. When only one country intervenes in the production of the good, origin will be conferred where the good has been *wholly obtained*. When several countries are involved in the production of the product, origin will be conferred in the country where the *last substantial transformation* has been carried out.

The Origin Agreement provides that, within the framework of the harmonization program, some definitions are to be developed: goods that are to be considered as being *wholly obtained* in one country,[15] operations that do not confer origin to a product (*minimal operations*)[16] and several criteria to define *substantial transformation*.[17] To consider that a substantial transformation of a product has been carried out, the Origin Agreement gives preference to the *Change in Tariff Classification* criterion. Only when this criterion is inadequate or insufficient to determine if a substantial transformation has taken place will other criteria apply, in a supplementary or exclusive manner. The alternative criteria are *Specific Operations* and *Value Added*. Also, is must be noted that the Origin Agreement refers to the last substantial transformation: among several significant operations, the last, and not the most significant, should confer origin.

1. Change in Tariff Classification

Under a rule based on the *Change in Tariff Classification*, an article completed in one country from materials originating in another will be deemed to originate in the country of completion if the processing there is sufficient to change the tariff classification of the imported materials to a specific degree.[18] This method is based on the Harmonized Commodity Description and Coding System ("Harmonized System") which classifies articles at a two-digit chapter level, a four-digit heading level, a six-digit subheading level, or an eight-digit statistical level. Origin will be conferred if the final product is classified in a tariff category that differs in a specified way from the classification of the imported input.

This criterion presents the advantage of being objective and precise. However, to the extent that the tariff classification has been elaborated for purposes other than origin determination, its adequacy for origin purposes has often been questioned.[19] In effect, this criterion can be quite rigid in certain cases, but supplementing this criterion with other criteria can compensate for the inconvenience.

2. Value Added

The *Value Added* criterion determines the origin of a product on the basis of the value that has been added by the manufacturing or transformation processes undergone in a country or by the materials or components used in manufacturing or producing the goods. When this added value equals or exceeds a specific percentage, origin is conferred. This criterion can be employed as a separate rule of origin or in conjunction with another rule. Because processing and assembly operations often do not result in meaningful tariff changes when parts and components are assembled into a final product, the *Value Added* criterion is often used to supplement the *Change in Tariff Classification* criterion.

Calculation of value added frequently depends upon resolution of complex or controversial accounting issues, which adds cost and considerable uncertainty. This limits the valuation harmonization. Moreover, under the *Value Added* criterion, rules of origin may change in unpredictable ways because of fluctuations in exchange rates or in material costs. Nevertheless, since this criterion has a secondary role, conflicts are reduced.

3. Specific Operations

The determination of an operation or a list of operations that confer origin is also used as a supplementary criterion to define when a substantial transformation has taken place. The operations taken into account are those that confer on a good its basic characteristics and are obviously different for each good.

This criterion offers the advantage of being clear and precise and enables the use of parameters adapted to each good. However, the establishment of different criteria for each product can become burdensome. Furthermore, the differences between the various models of each product and the technological evolution to which certain products are subject may complicate the task.

F. The Present Situation of the Harmonization Work Program

A Committee on Rules of Origin (CRO) in the WTO and a Technical Committee on Rules of Origin (TCRO) in the World Customs Organization (WCO) are conducting the work on the rules of origin harmonization. The CRO[20] is composed of representatives from each contracting party; it meets "as often as necessary" and at least once a year, and it consults and directs the TCRO. The TCRO[21] is charged with the technical work related to origin rules.

In May 1999, at the conclusion of its seventeenth formal session, the TCRO approved the final results of its harmonization work for submission to its WTO counterpart, the CRO. The CRO is now expected to review and approve the status of the harmonization work program,[22] which will bring to an end the transitional period.[23] This means that the TCRO has concluded its harmonization work, although the CRO can still consult the TCRO in order to clarify technical concepts.

The harmonization work program has focused its work on the concepts of *wholly obtained* goods, *minimal operations* and *substantial transformation* through *Change in Tariff Classification* and supplementary criteria.

- A large number of definitions of the goods that are to be considered as being *wholly obtained* in one country have been harmonized. No major problems were encountered to adopt rules for animals and their products, plants, minerals, waste and scrap. Nevertheless, the CRO has been unable to agree on a definition for fishery products.

- As to *minimal operations*, and according to the Origin Agreement,[24] the TCRO has agreed that the following processes do not by themselves, or in combination with each other, confer origin of a good:

  — Ensuring the preservation of goods in good condition for the purposes of transport and or storage.

  — Facilitating shipment or transportation.

  — Packaging or preserving goods for sale.

These rules will only be finally adopted by the CRO at the end of the negotiation, in order not to prejudice the outcome of any specific rule still under negotiation.

- Since the *Change in Tariff Classification* has been chosen as the principal criterion to determine when a substantial transformation has taken place, the TCRO has determined the origin for the entire tariff headings and subheadings of the Harmonized System. However, problems remain, because more than half of the Harmonized System has been referred for further negotiations to the CRO.

Goods can be divided into two groups. First, goods for which there is an agreement: this involves only a few products, such as milk products, honey, animal origin products, refined petroleum products, natural gas, camel leader, fur, wood articles, several kinds of paper, artificial flowers, iron and steel products, some weapons, works of art.[25] For all these products, the criterion of *Change in Tariff Classification* is applicable. For the rest of the products the negotiations are ongoing: in the negotiations the EU is opposed to the position of most other parties, because it does not accept the *Change in Tariff Classification* criterion for some products. It proposes to have recourse to the *Value Added criterion* for the most significant products in order to avoid the circumvention of the trade defense laws by the transfer of the assembly of the good.

During the different summits of the CRO and TCRO, many rules have been adopted in the agricultural, minerals, chemical and pharmaceutical areas. Nevertheless, for a large number of product categories, the CRO has not been able to adopt any rule. The major stumbling blocks are the following:[26]

- *Processed agricultural products*: The key problem for processed agricultural products has been the very divergent appreciations of the degree of industrial transformation required for the last substantial transformation, regardless of the new uses and properties of the product. Some difficult sectors are meat, wine and coffee.
- *Textiles and clothing*: The rules adopted refer to raw fibers; waste; weaving, knitting or crocheting fabrics; knitting or crocheting articles of apparel and clothes accessories; producing felt, nonwoven carpets and hand-woven tapestries and worn articles.
- *Machines, electronics and transport equipment*: The CRO has adopted only a very few rules in this sector. Agreement could not be reached either on the basic key issues of assembly from parts and production of parts from blanks, or on the assembly of parts into multi-component parts or assembly from unfinished machines.
- *Watches, clocks and movements*: The CRO has not been able to adopt any rule of origin, because positions in several countries differ substantially in the assembly process.

Finally, it must be noted that the question of the *proof of origin* has not been dealt with at all, and this lack of regulation may cause problems in the application of the rules of origin.

At the end of the negotiations all the rules adopted by the CRO will be integrated in an Annex of the Origin Agreement. This will entail that the transitional period will be finished and that all the rules of origin will be applicable.

To summarize, origin can be conferred on a product either on the basis of a *Change in Tariff Classification* or on the basis of a substantial transformation of the product. When a *Change in Tariff Classification* cannot be used to confer origin, the fundamental difficulty is to determine what is a substantial transformation. Interests of the countries are very important and disagreement over some technical details are slowing the negotiations down. The failure of Seattle and the American election have also slowed down the harmonization program. For the moment the transitional period is ongoing and it is uncertain when it will come to an end. Progress in the harmonization within the WTO has been achieved, even if there is still a long way to go until there is total harmonization. However, the advantages of the harmonization are reserved for the countries party to the WTO. No universal origin system will be established, although the largest part of the international trade community is expected to be bound by the new provisions.

III. The EU Approach

Probably the most important feature of EU legislation on rules of origin is that it has particularly widespread applicability, so that a close and attentive look at the most updated EU legislation and the case law of the European Court of Justice (ECJ) on the matter becomes essential in order to know which rules will apply to a specific international transaction originating or finishing in the EU.

This fact is further evidenced by the myriad of commercial agreements concluded by the EU with individual countries or groups of countries, and the customs regimes unilaterally granted by the EU to most developing countries.

The object of the rules of origin within the EU is to determine the origin of goods coming from third countries, that is, countries outside the EU. Since the very early times of the European Economic Community, intra-Community exchanges have not been governed by rules of origin, but rather by the principle of "free circulation," which implies that once a product has complied with the customs obligations in one Member State; it will circulate freely throughout the EU. This fact, unfamiliar to other regional integration processes, is indicative of the commitment to economic and political integration pursued by the EU.

When analyzing the regime on origin within the EU, attention will be paid to the main substantive rules (*e.g.*, concepts of *wholly obtained* product, *substantial transformation*, etc.). Procedural rules (form of origin certificates, administrative issues, etc.) will be left outside the scope of this brief article.

Lastly, account will be taken of recent harmonization efforts at the EU level and the effect of global harmonization upon EU legislation on rules of origin, particularly in light of the works of the TCRO and CRO. It is noteworthy in this sense that current efforts within the EU are pointed at harmonizing preferential rules, expressly excluded from the harmonization process at the WTO level.

A. Non-Preferential Origin Rules

The EU applies non-preferential rules of origin to imports of goods from countries which have not signed any preferential agreement with the EU or to which the EU has not granted a unilateral customs regime. They principally affect goods originating in the U.S., Canada, Japan, Australia, Korea, Taiwan, Hong-Kong, Singapore, India or China.

The non-preferential regime also applies to goods imported from countries with which the EU has signed a preferential agreement or to which the EU has granted a unilateral special regime, but where the application of preferential treatment has not been expressly requested.

The Community Custom Code[27] (CC) and its implementing regulation[28] (IR) lay down the non-preferential rules of origin,[29] which have mainly played a role within the EU as criteria for the application of trade protection measures, such as quantitative restrictions (*e.g.*, within the framework of the Common Agriculture Policy or textiles), veterinary controls, and especially antidumping measures.

The CC incorporated Regulation 802/68[30] (known as the "Base Regulation") on the common definition of the concept of the origin of goods and the IR incorporated all implementing regulations adopted thus far by the Commission.

As within the framework of the WTO, in establishing the origin of a product, the EU makes a distinction between products obtained in one country and products obtained in several countries. If the treatment of *wholly obtained* goods is basically the same under both regimes, the approach towards goods *whose production involves more than one country* differs considerably.

1. Goods Wholly Obtained in a Country

The CC establishes that the goods originating in one country shall be those *wholly obtained* or produced in that country and gives a list of products that, due to their simplicity, obviously originate from the country in which they are obtained.[31] Examples of goods *wholly obtained* in a country are mineral products, vegetables, live animals or products of hunting and fishing, but also goods that are produced exclusively from those goods.

However, some of the concepts used to define *wholly obtained* products are far from being clear and need further clarification, and problems have arisen as to what should be understood as "vessels," "territorial sea," "factory ships," etc.

2. Goods Produced in More than One County

Contrary to the preferential rules, which in most cases are very detailed and concise, the "common" rules are elementary, and leave wide scope for different interpretation and, sometimes, confusion.

This is especially true in respect to Article 24 of the CC, which deals with the case of goods whose production involved more than one country. In those cases, the good will be regarded as originating in the country where it underwent its "last, substantial, economically justified processing or working in an undertaking equipped for that purpose and resulting in the manufacture of a new product or representing an important stage of manufacture."

Due to the vagueness of those four cumulative criteria, the ECJ has had to interpret them in several occasions. Thus, the ECJ has established, *inter alia*, that the "*last processing*" will only be "*substantial*"—and therefore confer the status of originating product—when "the product resulting therefrom *has its own properties and a composition of its own*, which it did not posses before that process or operation."[32]

Unlike in the Origin Agreement, which gives preference to the *Change in Tariff Classification* criterion, in the EU no preference has been given to this criterion when developing the basic "*substantial transformation*" principle. In an early case the ECJ even discouraged the idea that, where the technical criteria set forth in Article 24 did not suffice, the *Change in Tariff Classification* criterion could be used subsidiarily for determining the existence of a substantial transformation.[33]

As to the *Value Added* criterion, the ECJ considered that it could be used as a complement for those purposes, although it could never replace, but rather only develop, the basic criteria set forth in Article 24.[34]

On the other hand, when "it is established," or "the facts as ascertained justify the presumption," that the sole object of the processing was to *circumvent* the application to the product of the rules of origin, the product will not be deemed to originate in the country where the processing was carried out.[35] According to the ECJ, this will be the case when the decision of the operator to do the processing in another country (for example by transferring the assembly from the country in which the parts were manufactured to another country in which use is made of existing factories) coincides in time with the entry into force of the relevant legislation.[36]

Exceptionally, and for textiles and certain other products, the IR allows for the use of the *Change in Tariff Classification* and *Specific Operations* criteria and sets up clear and concise explanations as to what constitutes *substantial transformation* for every particular product concerned in the light of such criteria.

- *Textiles*. Article 36 of the IR considers that a complete process for textiles will take place when "working or processing as a result of which the products obtained receive a classification under a heading of the combined nomenclature other than those covering the various non-originating materials used." However, there are several exceptions to the use of the general rule of *Change in Tariff Classification*, which are embodied in Annex X of the IR.
- *Other products*. Annex XI of the IR specifies, for a short and heterogeneous list of products,[37] different criteria to determine what should be deemed as substantial process for each of them. In some cases (such as for photocopy machines) it sets forth negative criteria, that is, what operations do not constitute substantial transformation.

3. Minimal Operations[38]

EU common rules of origin, with the exception of textiles and the products listed in Annex XI of the IR,[39] do not provide a list of processing operations that are considered as insufficient to confer the status of originating products.

B. Preferential Regime

Preferential rules of origin lay down the requirements for products to be considered as originating products for the application of preferential trade agreements between the EU and third countries, group of countries or territories or preferential regimes unilaterally granted by the EU. The rules governing goods imported from countries to which the EU has granted a unilateral customs regime are embodied in Articles 66 to 122 of the IR.[40] The preferential rules of origin under the different preferential trade schemes are contained in protocols to those agreements, and, therefore, are extremely widespread.

The European Commission is currently driving a harmonization process that purports to unify the preferential rules of origin applied to third countries. Some Commission papers even refer to a "model proposed for the harmonization process of preferential rules of origin applicable to third countries."[41] This "model," not yet embodied in any document, is the fruit of the evolution and practice of precedent rules, and the EU will try to "impose" it on agreements to be adopted in the future, or on the review of existing ones.[42]

In general terms, the same rules apply as to what constitutes a *wholly obtained* product, albeit some differences appear according to the aim of the specific rule, especially as to fishery products.[43] Concerning *substantial transformation*, the *Change in Tariff Classification* criterion is the rule, although for certain cases the *Specific Operations* or *Value Added* criteria are envisaged.

The EU has signed a variety of bilateral and multilateral preferential trade agreements in which tariff preferences are conditional on origin requirements. There are, *inter alia*, agreements linking the EU with central and eastern European countries,[44] a customs union with Turkey,[45] an ACP-EU Partnership agreement with the countries of the African, Caribbean and Pacific Rim,[46] association agreements with the Mediterranean countries,[47] a comprehensive trade agreement with Mexico,[48] a co-operation agreement with South Africa,[49] and a free trade agreement with Switzerland. Iceland, Liechtenstein, and Norway also enjoy preferential treatment as a result of the European Economic Area agreements.[50]

The EU also grants unilateral preferential treatment to the Western Balkan Countries[51] and the Association of the overseas countries and territories.[52] In addition, the Generalized System of Preferences (GSP) is a scheme implemented in 1995 by the EU on the basis of Regulations covering periods of three to four years, the latest dating from 1 July 1999, which grant limited tariff reductions without quantitative restrictions to almost all developing countries.[53]

1. Goods Wholly Obtained in a Country

Every preferential agreement has a list of *wholly obtained* products which is basically the same, and is normally complemented with definitions of the concepts contained therein.[54]

2. Goods Produced in More than One Country

The rules of origin corresponding to every preferential regime define, in respect of each product, what constitutes *substantial transformation*, either by setting a general rule and some exceptions for certain products, or by indicating for every product what is to be deemed as *substantial transformation*.

The most recent rules applied by the EU establish as the general rule that a product completed in one country from materials originating in another will be deemed to originate in the country of completion if the processing there is sufficient to change the tariff classification of the imported materials to a specified degree. This *Change in Tariff Classification* criterion can be found, *inter alia*, in the EU-Tunisia agreement.[55] The exceptions to this general rule are then embodied in an annex to the respective agreements, indicating, for every product, what is to be deemed *substantial transformation*.

Nonetheless, in the case of GSP, and by virtue of a recent amendment to the IR,[56] the general concept of *substantial transformation* as *Change in Tariff Heading* has disappeared, and an Annex[57] specifies, product by product, what is the processing required.

3. Minimal Operations

A list of processing operations considered as insufficient to confer the status of originating products is also present in all preferential regimes.[58] Their role is twofold: on the one hand, they prevent the situation where a very slight processing on a product might confer the status of originating products; on the other hand, it eases the work of both economic operators and customs authorities by allowing them to conclude that the product has not the origin claimed when an insufficient processing, as defined in the rules, is identified.

4. Cumulation

Cumulation of origin allows the use of foreign materials originating in countries that are part of a free trade area, so that the product processed under the use of foreign materials is estimated as being of the country's origin where processing took place.[59] This concept plays an important role in granting preferential custom status to products which are neither *wholly obtained* in one area nor contain foreign material; which have undergone sufficient processing.

Cumulation rules in preferential regimes vary according to the degree of integration pursued. It is therefore not surprising that the Europe Agreements, concluded with central and eastern European countries, some of which are formal current candidates to join the EU, include both bilateral and diagonal cumulation,[60] thus allowing for integration of the economies concerned.

However, the GSP does not even contain either bilateral cumulation nor cumulation between the beneficiary countries.[61]

C. EU Legislation in the Light of the Origin Agreement

1. Non-Preferential Regime

The criteria established by the TCRO for defining *wholly obtained* products are basically similar to those set forth by the CC. Therefore, there should not lie any difficulty in this sense, apart from some discrepancies as to the exact definitions of fishery products.

Concerning goods whose production involved more than one country, the criteria set forth by Article 24 of the CC leave wide scope for interpretation, and have been developed in the application of various criteria (change of tariff position, value added and specific transformations), for a limited series of goods. This provision may result in contradictions with the requirements of the Origin Agreement[62] that the rules should be clearly defined. It is submitted that the EU should review its position in the light of the WTO requirements and the results of the harmonization procedure.[63]

Regarding the products mentioned in Annex XI of the IR, the rules imposing negative criteria[64] will also have to be amended and replaced by positive criteria.

It is submitted that, once the transitional period ends, the EU will have to revise its position and expand the application of the *Change in Tariff Classification* criterion to interpret the loose concept of *substantial transformation*.

2. Preferential Regime

The Origin Agreement specifically provides that it does not attempt to harmonize the preferential rules of origin.[65] It only states in the Common Declaration that those rules should be positive and "clearly defined."

In any case, the *Change in Tariff Classification* criteria commonly used by the EU in the preferential agreements seems clear enough to comply with the Origin Agreement requirement of "precise and clear" rules. The complementary criteria applied, such as the *Specific Operations or Value Added* criteria, established as the rule in the Europe Agreements, also seem in line with the position taken in the Origin agreement.

IV. EU-Mexico Free Trade Agreement

The Free Trade Agreement (FTA) between the EU and Mexico officially entered into force on 1 July 2000. According to its negotiators, the EU-Mexico FTA is the most ambitious so far negotiated by the EU. This global agreement, which is based on democratic principles, marks a new phase in the EU relations with Mexico. In terms of coverage, it will provide EU operators with more rapid preferential treatment and will place them in a much better position to compete on the Mexican market.

The structure and general provisions of the rules of origin in the FTA[66] are practically identical to those laid down in the protocols on the rules of origin contained in the European Agreements: the rules of origin agreed upon with Mexico are "inspired by the model proposed for the harmonization process of preferential rules of origin applicable to third countries."[67] The general structure and provisions of the EU standard protocols have been maintained for the Annex concerning the definition of originating products and the methods for administrative co-operation.

The FTA contains permanent rules of origin, subject to the specific provisions concerning the date of entry into force of certain rules, and temporary rules of origin, which apply, for the products concerned, from the entry into force of the Agreement until the indicated deadline. These rules apply either for both parties or to one of the parties. In addition, supplementary rules may be applied within the framework of quotas for Community exports to Mexico. This has been the case with textiles and footwear, in order to obtain a continued market access under preferential tariff treatment.[68]

In most of the cases in which origin rules have been adapted, the lack of raw materials or components in Mexico has been taken into account.

Finally, it should be noted that the movement certificates EUR.1 issued by the customs authorities of the EU, which are used in other preferential agreements in which the EU is a party, must be accepted by the customs authorities of Mexico.

Endnotes

1. Proliferation of free trade agreements does not help in harmonizing rules of origin at a global level, since they may try to use rules of origin as "hidden" trade mechanisms.
2. Free Trade Agreement between the United Mexican States and the European Community signed on 24 November 1999, entered into force on 1 July 2000.
3. The agreement was applied by virtue of the Protocol of Provisional Application of 1947, 55 United Nations Treaty Series 308.
4. Created by the Brussels Convention, signed on 15 December 1950.
5. The convention was signed at Kyoto on 18 May 1973 and entered into fore on 25 September 1974.
6. Council Decision 75/1999 concluding an international convention en the simplification and harmonization of customs procedures and accepting the Annex thereto concerning customs warehouses OJ (1975) L 100/1.
7. Council Decision 77/41 accepting on behalf of the Community several Annexes to the international convention on the simplification and harmonization of customs procedures, OJ (1997) L 166/1.
8. The convention also instigated the publication of a compendium that gathered information on the different national rules of origin, under the coordination of the Customs Cooperation Council. The compendium, although not very detailed, together with the Kyoto Convention itself, constituted a useful basis for the harmonization process of the WTO that resulted from the Uruguay Round. In effect, certain provisions of the Kyoto Convention, such as the criteria applied to define *wholly obtained* articles, or the operations that are not to confer origin, constituted the basis of the Agreement on Rules of Origin of the WTO.
9. The Agreement was signed in Marrakesh on 15 April 1994.
10. The Agreement on Rules of Origin ("Origin Agreement"), conditional for WTO Membership, was signed in Marrakesh on 15 April 1994 by all Members of the WTO and entered into force on 20 July 1995.
11. See Article 2(b) and (c) of the Origin Agreement.
12. 12 Article 1.2 of the Origin Agreement.
13. See note 10 *supra*.
14. According to official sources from World Customs Organization, the new deadline of 31 July 2000 included in the WTO Draft Ministerial Text of 19 October 1999 (at www.rwnside.org.sg/title/2nddraft-cn) was not finally agreed to.
15. *See* Article 9.2(b)(i) of the Origin Agreement.
16. *Id.*
17. *See* Articles 9.2(b)(ii), (iii) of the Origin Agreement.
18. *See* Palmeter*, Rules of Origin in Regional Trade Agreements*, in P. Demaret, J-F. Bellis, G. García-Jiménez, eds., *Regionalism and Multilateralism after the Uruguay Round* 343 (EIP Brussels 1997).
19. This is precisely the reason why the European Court of Justice has rejected the application of this criterion in certain cases. *See* Part III.A.2 *infra*.
20. *See* Article 9.3 of the Origin Agreement.
21. *See* Article 9.2 of the Origin Agreement.
22. *Harmonized Rules of Origin*, WTO/TCRO, can be found at http://www.wcoomd.org/origin/harmonized /rules/of/origin.htm.
23. *See* Part II.D *supra*.
24. *See* Article 9.2(c) of the Origin Agreement.
25. F. Dehouse and P. Vincent, *Les règles d'origine de la Communauté europeénne* 174 (Bruylant, Brussels 1999).
26. *See* Nell, *WTO Negotiations on the Harmonization of Rules of Origin: A First Critical Appraisal*, 33 J. World Trade No. 3 at 45 (1999).
27. Council Regulation 2913/92, OJ (1992) L 302.
28. Commission Regulation 2454/93, OJ (1993) L 253.
29. The IR, as amended by Commission Regulation 12/97, OJ (1997) L 9/1, also contains the rules applicable to preferential tariff measures adopted unilaterally by the EU in respect of certain countries, group of countries or territories (Articles 66 to 122).
30. Council Regulation 802/68, OJ (1968) L 148/1.
31. Article 23 of the CC.
32. *See* Case 49/76, *Caséine*, (1977) ECR 41, para. 6.
33. "It would not seem sufficient to seek criteria defining the origin of goods in the tariff classification of the processed products, for the common custom tariff has been conceived to fulfil special purposes and not in relation to the determination of the origin of the product." *Id*, para. 5.
34. *See* Case 93/83, *Zentrag*, (1984) ECR 1095.
35. Article 25 of the CC.
36. *See* Case C-26/88, *Brother Int.*, (1989) ECR I-4253. Nevertheless, this will lead to a reversal of the burden of proof to the manufacturer, who will have to prove that there were "reasonable grounds, other than avoiding the consequences of the provisions in question, for carrying out the assembly operations in the country from which the goods were exported." *Id*., para. 28.
37. Among others, wine, meat, leather clothes, shoes, televisions, photocopy machines or chairs.
38. Referred in the EU legal texts as "insufficient transformation."
39. Article 38 of the IR establishes that operations to ensure the preservation of goods in good condition during transport and storage, or simple operations of removal of dust, sifting or screening, sorting, to name but a few, "shall in any event be considered as insufficient working."
40. As amended by Commission Regulation 12/97, OJ (1997) L 9/1.
41. *See, e.g.*, the Commission Communication accompanying the final text of the draft decisions by the EU-Mexico Joint Council, COM (2000) 9, of 18 Jan. 2000.
42. According to EU Commission sources, the current "model" to be followed for the European and Mediterranean agreements is

contained in the EU-Slovenia Agreement, OJ (1999) L 51. The EU Commission is currently working on a set of interpretative guidelines for the application of rules of origin.

43. For example, the ACP-EU Agreement requires at least fifty percent of the crew of a vessel to be nationals of States party to the Agreement. This percentage is seventy-five percent in the EU-Turkey agreement.

44. The latest Europe Agreements, concluded with Estonia, Latvia and Lithuania, entered into force on 1 February 1998. The agreement between the EU and Slovenia entered into force on 1 February 2000.

45. Since the EU and Turkey are linked by a customs union, rules of origin do not apply. However, certain products, in particular agricultural products, are excluded from the customs union.

46. The provisions of the new commercial arrangements signed in Suva with the African, Caribbean and Pacific rim countries took effect as of 1 March 2000, although they are currently under examination in the WTO Council for Trade in Goods. Therefore, the non-reciprocal trade arrangements currently applied under the Fourth Lomé Convention have been maintained.

47. The agreements with Tunisia (1 March 1998) and Morocco (1 March 2000) have already entered into force. Also, Cyprus and Malta have concluded preferential trade agreements with the EU.

48. The Free Trade Agreement between the United Mexican States and the European Community will be dealt with in the next part of this article.

49. Concluded on 24 March 1999, it took effect as of 1 January 2000.

50. The list of bilateral or multilateral agreements concluded by the EU is very broad, including agreements with territories such as Andorra or the Faeroe Islands.

51. The EU grants trade preferences on an autonomous basis to Albania, Croatia, Bosnia and Herzegovina, and on the basis of a Cooperation Agreement to the FYRCM. The Federal Republic of Yugoslavia is excluded from this regime.

52. Council Decision 91/482 on the association of the overseas countries and territories with the European Economic Community, OJ (1991) L 263/1. It applies to territories for which the French Republic, the United Kingdom and the Kingdom of the Netherlands have a special responsibility derived from their political links, and, in part, to Greenland.

53. For the list of beneficiary countries of the GSP, see Annex III of Council Regulation 3281/94, OJ (1994) L 348/1, amended by Council Regulation 2623/97, OJ (1997) L 354, which excluded South Korea, Hong-Kong and Singapore from the list.

54. *See, e.g.*, Article 68 of the IR, as amended by Commission Regulation (EC) 12/97 for the list of *wholly obtained* products in relation to the GSP agreements.

55. OJ (1998) L 97.

56. Commission Regulation 46/99 OJ (1999) L 10.

57. In particular, Annex XV.

58. *See, e.g.*, Article 70 of the IR in respect to the GSP.

59. See Prieß, *Modification of Rules of Origin in the Europe Agreement*, International Trade Law 66 (1999).

60. While bilateral cumulation is limited to processes within one free trade area, diagonal cumulation grants preferential status to a product assembled in one free trade area but sold in another.

61. Exceptionally, the IR (Article 72(3)) allows for regional cumulation in the Association of South-East Asian Nations (Asian), the Central American Common Market and the Andean Community.

62. *See* Article 2.

63. Note that the requirements of clear, objective and positive rules laid down in the Origin Agreement already apply during the transitional period.

64. For example, for photocopy machines.

65. *See* Annex II.

66. For a detailed analysis of the rules of origin in the EU-Mexico Agreement, see Bond and Moreno, *Treatment of Preferential and Custom Duties Mark a Major Advance for Mexico and Europe*, in Mexican Forecast 5 (15 March 2000).

67. Communication from the Commission to the Council and the European Parliament, accompanying the final text of the draft decisions by the EU-Mexico Joint Council.

68. Communication to Traders: Implementation of the rules of origin under the; EU-Mexico Agreement, OJ (2000) C 187/03.

The Upward Spiral: A U.S. Outlook on International Anti-Bribery Efforts in the New Millennium

By Neil V. Getnick and Richard J. Dircks

I. Introduction

At the dawn of this new millennium, we are positioned as a world community to combat bribery in international business transactions. With the passage of overlapping international laws enacted by various nations, the U.S. is no longer alone in this approach. The convergence of these international efforts has the potential of creating an upward spiral in business conduct and governmental integrity. Building on their experience and expertise, U.S. counsel can contribute greatly to helping companies meet this challenge.

The development and promotion of transnational legal efforts directed at eradicating bribery in international business transactions is a relatively recent phenomenon. Thirty years ago, there was no such anti-bribery legislation anywhere in the world. It was not until 1977, with the passage of the Foreign Corrupt Practices Act, that the U.S. launched the first offensive against international bribery. Today, multilateral international anti-corruption efforts are underway throughout the world through such varied organizations as the United Nations, the Global Coalition for Africa, the Asia Pacific Economic Cooperation, the World Trade Organization, and the Council of Europe.

In this paper, we look briefly at the three international anti-bribery initiatives currently in force involving the U.S.: the U.S. Foreign Corrupt Practices Act; the Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; and the Organization of American States Convention Against Corruption. We then look at the practical effects of these initiatives on international business and at the unique position held by U.S. counsel to act as both guide and architect assisting companies to cope with new anti-bribery laws.

II. U.S. Anti-Bribery Efforts

A. Foreign Corrupt Practices Act: Leading by Example

In 1977, with the passage of the Foreign Corrupt Practices Act (FCPA),[1] the U.S. took a revolutionary stand against the bribery of foreign officials in the context of international business transactions. After some startling discoveries by the federal government concerning the extent to which U.S. businesses utilized bribery as a means for obtaining business overseas, Congress passed the FCPA in an effort to restore citizen confidence in the integrity of U.S. business practices.[2]

In essence, the FCPA prevents U.S. individuals and business entities from paying, or offering to pay, money or in kind benefits to foreign public officials in exchange for obtaining or maintaining business. In terms of content, the statute has two main thrusts: (i) anti-bribery provisions; and (ii) accounting standards designed to work in conjunction with the anti-bribery provisions. This paper will address only the anti-bribery provisions.

1. Elements

There are five elements of an offense under the FCPA anti-bribery provisions.[3]

a. Jurisdiction: Who May Be Liable

The FCPA potentially applies to any individual, firm, officer, director, employee, or agent of a firm and any stockholder acting on behalf of a firm. The statute refers to "issuers," "domestic concerns" and "persons other than issuers or domestic concerns."

- *Issuer:* A corporation that has issued securities that have been registered in the U.S. or that is required to file periodic reports with the SEC.[4]
- *Domestic Concern:* Any individual who is a citizen, national, or resident of the U.S. Any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship that has its principal place of business in the U.S., or that is organized under the laws of a state of the U.S. or a territory, possession, or commonwealth of the U.S.[5]
- *Other:* A "person, other than an issuer or domestic concern" means any natural person other than a national of the U.S. or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the law of a foreign nation or political subdivision thereof.[6]

Liability for FCPA violations may be imposed on issuers and domestic concerns under either one of two means of obtaining jurisdiction. Under "territorial jurisdiction," issuers and domestic concerns may be liable for acts taken within the territory of the U.S. in furtherance of a corrupt payment to a foreign official using the

U.S. mails or any means or instrument of interstate commerce.[7] Under "nationality jurisdiction," issuers and domestic concerns may be liable for any act in furtherance of a corrupt payment taken outside the U.S.[8]

Liability for FCPA violations may be imposed on persons other than issuers and domestic concerns under territorial jurisdiction. That is, a foreign company or person may be liable if it causes an act in furtherance of a corrupt payment to take place within the territory of the U.S. It should be noted that these persons may be liable under the FCPA irrespective of any utilization of means or instrumentalities of interstate commerce.[9]

b. Corrupt Intent

To be liable under the FCPA, the person making or authorizing the payment must corruptly intend to cause the foreign official to misuse his official position for particular ends.[10] The FCPA prohibits corrupt payments intended: to influence any act or decision of a foreign official in his official capacity; to induce a foreign official to do or omit to do any act in violation of his lawful duty; to secure an improper advantage; or to induce a foreign official to use his influence with a foreign government or instrumentality thereof to affect any act or decision of that entity.[11]

c. Payment

The FCPA prohibits paying, offering to pay, promising to pay, or authorizing to pay or offer, money or anything of value.[12]

d. Recipient

The FCPA prohibits corrupt payments to a foreign official, a foreign political party, a foreign political party official, and any candidate for foreign political office. The term "foreign official" is defined in the statute as follows:

> The term "foreign official" means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government of department, agency, or instrumentality, or for or on behalf of any such public international organization.[13]
>
> The statute provides a very broad definition, making the provisions potentially applicable to any public official, regardless or rank or official duty.

e. Business Purpose Test

The FCPA prohibits corrupt payments made for the purpose of obtaining or retaining business for or with, or directing business to, any person.[14]

2. Exceptions and Affirmative Defenses to the FCPA

Not every payment made to a foreign official falls within the scope of the FCPA. The FCPA does not apply to "facilitating" or "expediting" payments the purpose of which is to expedite or secure the performance of a routine governmental action by a foreign official, political party, or party official.[15] Routine governmental actions include: (1) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country; (2) processing governmental papers, such as visas and work orders; (3) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country; (4) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities for deterioration; or (5) actions of a similar nature.[16]

It is an affirmative defense to the FCPA that (i) the payment, gift, offer, or promise of anything of value that was made was lawful under the written laws and regulations of the recipient's country; or (ii) the payment, gift, offer, or promise of anything of value that was made was a reasonable and bona fide expenditure incurred on behalf of the recipient and directly related to the promotion, demonstration, or explanation of products or services or the execution or performance of a contract with a foreign government or agency thereof.[17]

3. Enforcement and Potential Sanctions[18]

The Department of Justice is responsible for all criminal enforcement of the anti-bribery provisions,[19] and for civil enforcement against domestic concerns.[20] The Securities and Exchange Commission has the authority for the investigation and civil prosecution of both the accounting and anti-bribery provisions of the FCPA with regard to issuers.[21] There is no private cause of action under the FCPA.[22]

Criminal: Corporations and other business entities that violate the FCPA face a fine of up to $2,000,000.[23] Officers, directors, stockholders, employees and agents face a fine of up to $100,000 and imprisonment of not more than five years, or both. [24]

Civil: A civil action may be brought against any firm as well as any officer, director, employee, or agent of a firm, or a stockholder acting on behalf of a firm, for a civil penalty of not more than $10,000.[25] Additionally, the FCPA provides for injunctive relief when it appears that the anti-bribery provisions are being, or are about to be, violated.[26]

B. OECD: Anti-Bribery Convention

1. Overview

The passage of the FCPA put American businesses at a significant competitive disadvantage in the international arena. While competitors from other countries were openly, and often handsomely, paying foreign officials in exchange for influence and business opportunities, American companies were prohibited by the provisions of the FCPA from making similar payments.[27] Over the course of the past decade, the United States has worked diligently to involve and incorporate other members of the international community in its stand against corruption and bribery. During this period of time, Transparency International, a nongovernmental organization, emerged as a further catalyst to the adoption of international anti-bribery laws and practices. These efforts, combined with increasing participation by and support from other nation states, brought the issue of corruption generally, and bribery specifically, to the fore of the international business dialogue, resulting in the passage and implementation of the Organization for Economic Cooperation and Development's (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Convention").[28]

The OECD Convention is a supply-side agreement. That is, it obligates the parties to criminalize bribery of foreign public officials in the conduct of international business. It is directed at those who offer, promise, or pay a bribe. The OECD Convention seeks to effect changes in the conduct of companies in exporting nations. It provides the member countries with the freedom and autonomy to craft the implementation of the OECD principles, so long as the terms of the convention are met.

The OECD Convention was signed on 17 December 1997 and came into force on 15 February 1999.[29] It has been signed by all twenty-nine OECD members and Argentina, Brazil, Bulgaria, Chile, and the Slovak Republic. As of 8 September 2000, twenty-six countries had deposited an instrument of ratification with the OECD, with all but three having adopted implementing legislation.[30]

As noted, the framework of the OECD Convention provides for the implementation of the Convention by each member country. Given the nature of the OECD Convention, a significant concern of all members is that other members are acting in accordance with the terms of the Convention. Monitoring and compliance in this regard is undertaken by the Working Group on Bribery, an OECD entity composed of all OECD Convention signatories. The Working Group on Bribery is charged with reviewing implementing legislation and monitoring the means and efficacy with which that legislation is carried out. The cooperative nature of the Working Group provides an international follow-up mechanism that considerably strengthens the OECD Convention overall and makes it a formidable force in opposition to international corruption.

2. OECD Convention Implementation in the U.S.

In order to implement the OECD in the United States, Congress amended the FCPA through the International Antibribery and Fair Competition Act of 1998 (IAFCA).[31] The terms of the OECD Convention required the following expansions of the FCPA:

- The definition of bribery was expanded to include "any improper advantage."
- The definition of "foreign public official" was expanded to include officials of "public international organizations."
- Nationality jurisdiction was included in addition to territorial jurisdiction.
- Potentially liability was expanded to include persons other than domestic concerns and issuers, *i.e.*, foreign companies and nationals acting within the U.S.
- The FCPA penalty disparity between U.S. nationals and foreign nationals was eliminated.[32]

Section 6 of the IAFCA directs the Secretary of Commerce to submit a report each year for six years following the enactment of the IAFCA to the Senate and the House of Representatives assessing progress on the implementation of the OECD Convention and addressing other related matters. As of July 2000, two such reports had been submitted to Congress.

C. Organization of American States: Inter-American Convention against Corruption

1. Overview

On 29 March 1996, the Organization of American States (OAS) adopted the Inter-American Convention Against Corruption (IAC). On that day, the IAC was opened for signature by OAS member states. The IAC entered into force on 3 March 1997, thirty days after the deposit of the second instrument of ratification. As of September 2000, twenty OAS member states had ratified the IAC.[33]

The stated purposes of the IAC are: (1) to promote and strengthen the development by each of the States Parties of the mechanisms needed to prevent, detect, punish and eradicate corruption; and (2) to promote, facilitate and regulate cooperation among the States Parties to ensure the effectiveness of measures and actions to prevent, detect, punish, and eradicate corruption in the performance of public functions and acts of corruption specifically related to such performance.[34] The IAC specifically identifies acts of corruption, including transnational bribery, that signatories must criminalize within their own countries. With respect to bribery, the IAC is both a supply-side and demand-side agreement insofar as it requires signatories to criminalize solicitation and acceptance of bribes by a government official.[35]

The ratification and implementation of the IAC by OAS member countries is a further important step toward the development and acceptance of an international anti-bribery standard. The IAC underscores the value and necessity of cooperation between nations in this regard.[36]

2. IAC Ratification and Implementation in the U.S.

Although signed by the U.S. in June 1996, the IAC was not approved by the U.S. Senate until 27 July 2000. It was recently ratified by President Clinton in September 2000. Pursuant to the terms of the IAC, it will enter into force for the U.S. on the thirtieth day following the deposit of the U.S.'s instrument of ratification with the OAS General Secretariat.[37]

In approving the IAC for ratification, the U.S. Senate specifically noted its understanding that "[T]he kinds of official corruption which are intended under the Convention to be criminalized would in fact be criminal offenses under U.S. law. . . . [T]he United States does not intend to enact new legislation to implement Article VII of the Convention."[38] Therefore, implementation of the IAC in the U.S. will not require any change in government law or law enforcement.

III. Goals of U.S. Anti-Corruption Policy

In May 2000, the U.S. federal government, through the Department of State, and in consultation and cooperation with the Department of Commerce, the Department of Justice, the Department of the Treasury, the Office of Government Ethics, and the Agency for International Development, issued a brochure in which it listed the "Key Goals of U.S. International Anticorruption Policy."[39] These goals may provide a contextual framework from which to analyze all contemporary U.S. anti-corruption efforts and legislation. They are as follows:

- Promote full ratification, implementation, and enforcement of the OECD Bribery Convention by all signatories.
- Promote ratification by the U.S. of the Inter-American Convention Against Corruption and full ratification, implementation, and enforcement by all hemispheric partners.
- Nurture stability in democratic institutions and strengthen the rule of law in transitional economies.
- Promote global and regional anti-corruption norms and initiatives that deter and punish corruption.
- Ensure transparency in government procurement procedures to enhance openness, disclosure and predictability.
- Develop ethical and administrative codes of conduct that can promote the highest levels of professionalism and integrity in government.
- Engage the business community to join the U.S. and other governments in promoting corporate governance, transparency, and integrity in business operations.
- Foster an active civil society that is involved in participatory governance and upholds democratic principles.[40]

IV. Corporate Compliance Programs: Effective Governance From Within

A. Generally

The ultimate effect and value of international anti-corruption efforts will be determined by the implementing legislation of the various nation states, the enforcement of that legislation, and the monitoring ability of the international community to ensure compliance with both the letter and the spirit of the agreement.

As each nation passes its form of international anti-bribery legislation, every business within that nation will be required to comply with that legislation. The successful transition from former business practices to bribery-free business practices will require significant efforts directed at systemic reform. The eradication of bribery as a means of doing business will require new corporate perspectives, as well as practical changes.

It is incumbent upon each company to take the responsibility for assuring that it is in compliance with all applicable laws. To do this, a company should establish a corporate compliance program focused on the international bribery law or laws to which that company is subject. A successful corporate compliance program (CP) will educate the company employees as to what the new law says and under what situations it applies. The CP should also guide the employees with regard to what is expected from each of them under the new law. Finally, the CP should provide company management with immediate access to relevant information concerning corporate operations under the new law. This access to information will best position the company to discover and deal with problematic situations. While each CP is a unique mechanism, developed and crafted to fit a specific company under a certain statutory framework, every CP should have certain hallmark characteristics. Among those characteristics are the following:

- **Written Corporate Policy and Procedures**: Each company's CP should be written in a clear and concise manner so that it is easily understood by all employees.

- **Executive/Management Involvement**: On one level, all CPs must be "top-down" directives. Management must understand and convey the importance of corporate compliance to the employees. The CP is destined to fail in an environment where it is not respected at the highest levels of the organization.

- **Employee Involvement**: At the same time, successful CPs are often best served from the "bottom up." All employees must have ready access to the CP and training and education as to its significance. Further, organizations should encourage employee contributions and suggestions during the development and maintenance of the CP. More often than not, the employee in the field has an informative and relevant perspective. Continuous input from employees is essential in allowing the CP to grow and adapt to changing business practices.

- **Dedicated Resources**: The company must be willing to dedicate sufficient resources, in terms of time, money, and personnel to develop and implement a viable CP.

- **Controls**: The CP must incorporate means by which the company can prevent future violations of the law. Such controls might include employee certifications or employee spending caps.

- **Monitoring**: The written corporate policies and procedures will be worthless unless there is strict monitoring to ensure adherence to both.

The development of a successful CP is a creative task; one that must be company-specific and tailored to specific needs and desires. There is no formula to follow when developing a CP. This is especially true when developing a CP for compliance with a new law or treaty.

B. U.S. Counsel: Unique Expertise

As foreign businesses look to develop CPs in response to new multilateral anti-bribery legislation such as the OECD Convention or the IAC, those businesses should look to capitalize on the unique expertise of U.S. counsel in this area. For the past twenty-three years, attorneys in the U.S. have been crafting CPs in response to the FCPA. The dual focus of these CPs has been on adherence to the law and maximization of profits. Thus, although there is no CP formula, U.S. counsel are seasoned in this area and are familiar with the pitfalls associated with anti-bribery compliance. Furthermore, U.S. counsel have successfully guided American companies through the specifics of FCPA compliance while assisting those companies to grow and compete on an international level. This expertise should be utilized by newly regulated foreign companies to develop CPs that allow for profitable operations within the bounds of the law.

V. Conclusion

The U.S. led the way in fighting bribery in international business transactions with the passage of the Foreign Corrupt Practices Act in 1977. The relatively recent adoption of the OECD Anti-Bribery Convention and OAS Inter-American Convention Against Corruption provides worldwide recognition and support for this effort. This common international view and approach can create an upward spiral in business conduct and governmental integrity. United States counsel can play a particularly important role in helping to achieve these goals by applying the experience gained and lessons learned in guiding U.S. companies to operate profitably within the bounds of anti-bribery laws.

Endnotes

1. Codified as 15 U.S.C. §§ 78a, 78m, 78dd-1, 78dd-2, 78dd-3, 78ff.
2. *See* U.S. Dep't of Justice and U.S. Dep't of Commerce, *Foreign Corrupt Practices Act: Antibribery Provisions*, http://www.usdoi.gov/criminal/fraud/fcpa/doidocb.htm (last modified 29 December 1999) (As a result of SEC investigations in the mid-1970s, over four hundred U.S. companies admitted making questionable or illegal payments in excess of $300 million to foreign government officials, politicians, and political parties.); George *et al.*, *On the Threshold of the Adoption of Global Antibribery Legislation: A Critical Analysis of Current Domestic and International Efforts Toward the Reduction of Business Corruption*, 32 Vand. J. Transnat'1 L. 1, 5 (1999).
3. *See* Dep't of State, *Fighting Global Corruption: Business Risk Management*, Dep't of State Publication 10731, Appendix A (May 2000).
4. 15 U.S.C. § 78dd-1(a).
5. 15 U.S.C. § 78dd-2(h)(1).
6. 15 U.S.C. § 78dd-3(f)(1).
7. I5 U.S.C. §§ 78dd-1(a), 78dd-2(a).
8. 15 U.S.C. §§ 78dd-1(g), 78dd-2(i).

9. 15 U.S.C. § 78dd-3(a).

10. According to the legislative history of the FCPA, a payment or gift is offered or given "corruptly" if it is "intended to induce the recipient to misuse his official position in order to wrongfully direct business to the payor or his client, or to obtain preferential legislation or a favorable regulation." S. Rep. No. 95-114 at 10 (1977).

11. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

12. *Id.*

13. 15 U.S.C. §§ 78dd-1(f)(1)(a), 78dd-2(h)(2)(a), 78dd-3(f)(2)(a).

14. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

15. 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b).

16. 15 U.S.C. §§ 78dd-1(f)(3)(a), 78dd-2(h)(4)(a), 78dd-3(f)(4)(a).

17. 15 U.S.C. §§ 78dd-1(c), 78dd-2(c), 78dd-3(c).

18. The potential sanctions listed in this portion of the paper are those specifically provided for under the FCPA statute. The practitioner must be certain to review all applicable federal agency rules, regulations and guidelines regarding agency-specific sanctions in addition to those in the FCPA statute. *See, e.g.*, Dep't of State, *Fighting Global Corruption: Business Risk Management*, Dep't of State Publication 10731, at 25-7 (May 2000) (discussing additional fines, debarment, and suspension under rules promulgated by the Securities and Exchange Commission, the Office of Management and Budget, the Commodity Futures Trading Commission, and the Overseas Private Investment Corp.).

19. 15 U.S.C. § 78dd-1.

20. 15 U.S.C. § 78dd-2(d).

21. 15 U.S.C. §§ 78dd-2(d), 78dd-1, 78ff(c).

22. However, in certain instances, conduct that violates the anti-bribery provisions of the FCPA may give rise to liability under the federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 (RICO), which does include a private cause of action.

23. 15 U.S.C. §§ 78dd-2(g)(1)(A), 78dd-3(e)(1)(A), 78ff(c)(1)(A).

24. 15 U.S.C. §§ 78dd-2(g)(2)(A), 78dd-3(e)(2)(A), 78ff(c)(1)(A).

25. 15 U.S.C. §§ 78dd-2(g)(1)(B),(2)(B); 78dd-3(e)(1)(B), (2)(B); 78ff(c)(1)(B), (2)(B).

26. 15 U.S.C. §§ 78dd-2(d), 78dd-3(d).

27. *See* Bencivenga, *Antibribery Pact*, N.Y.L.J., 15 January 1998, at 5 ("Since the Foreign Corrupt Practices Act was enacted in 1977, U.S. companies have been the only ones barred from bribing foreign officials. Meanwhile, in France and Germany, companies may deduct such payoffs on their tax returns.").

28. The OECD describes itself as "an organization that, most importantly, provides governments a setting in which to discuss, develop and perfect economic and social policy." OECD, *About OECD—What is OECD*, wysiwyg://4/http://www.oecd.org/about/general/ index.htm (updated 19 Sept. 2000). Currently, OECD comprises twenty-nine member countries that work together on the development of public policy issues that impact both the national governance of the member countries and the international community. The member states of the OECD are Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States.

29. The agreement between the signatories to the OECD Convention stated that it would enter into force on the sixtieth day following the date upon which five of the ten countries with the largest shares of OECD exports had deposited their instruments of acceptance, approval, or ratification with the Secretary-General of the OECD. Canada became the fifth qualified country when it deposited its instrument of ratification on 17 December 1998.

30. Of the following countries that have ratified the OECD Convention, those marked with an asterisk have yet to pass implementing legislation: Iceland (17 August 1998), Japan (13 October 1998), Germany (10 November 1998), Hungary (4 December 1998), United States (8 December 1998), Finland (10 December 1998), United Kingdom (14 December 1998), Canada (17 1998), Norway (14 December 1998), Bulgaria (22 December 1998), Korea (4 January 1999), Greece (5 February 1999), Austria (20 May 1999), Mexico (27 May 1999), Sweden (8 June 1999), Belgium (27 July 1999), Slovak Republic (24 September 1999), Australia (18 October 1999), Spain (14 January 2000), Czech Republic (21 January 2000), Switzerland (31 May 2000), Turkey* (26 July 2000), France (31 July 2000), Brazil* (24 August 2000), Denmark (5 September 2000), Poland* (8 September 2000).

31. The previous discussion of the FCPA, see in Part II.A. above, concerns the FCPA as it exists currently, including the 1998 amendments.

32. *See* Dep't of Commerce, *Addressing the Challenges of International Bribery and Fair Competition: July 2000*, (Second Annual Report to Congress on the OECD Antibribery Convention), at 11-12; George *et al.*, note 2 *supra*, 32 Vand. J. Transnat'l L. 1, 11-12.

33. The following OAS member states have ratified the IAC: Argentina, Bahamas, Bolivia, Canada, Chile, Columbia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Honduras, Mexico, Panama, Paraguay, Peru, Trinidad and Tobago, the United States, Uruguay, and Venezuela.

34. Inter-American Convention Against Corruption, Article II, available at http://www.oas.org/EN/PROG/JURIDICO/english/Treaties/b-58.html.

35. Inter-American Convention Against Corruption, Articles VI-VIII, available at http://www.oas.org/EN/PROG/JURIDICO/english/Treaties/b-58.html.

36. For example, the IAC speaks specifically to such international cooperation issues as extradition, seizure, and bank secrecy.

37. Inter-American Convention Against Corruption, Article XXV, available at http://www.oas.ore/EN/PROG/JURIDICO/english/Treaties/b-58.html.

38. Senate Resolution Advising and Consenting to the Treaty on Inter-American Convention Against Corruption, 27 July 2000, downloaded from www.usdoj.gov/criminal/fraud/fcpa/oas.htm.

39. *See* Dep't of State, *Fighting Global Corruption: Business Risk Management*, Dep't of State Publication 10731 (May 2000).

40. *Id*. at 12.

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The Treaty Trader (E-1) and Treaty Investor (E-2) Temporary Working Visa Classifications

By Kenneth A. Schultz

I. Introduction

The Immigration and Nationality Act, at § 101(a)(15)(E), provides the international business community with especially beneficial temporary working statuses for purposes of trading with or investing in the United States. The classifications, known as E-1 for treaty traders and E-2 for treaty investors, are available to qualifying nationals of countries with which the United States has a Treaty of Friendship Commerce and Navigation, a bilateral investment treaty, or a diplomatic agreement such as the North American Free Trade Agreement with Canada and Mexico. The United States has such treaties and agreements with numerous countries, which have been entered into over the course of almost two hundred years. For example, the U.S. treaty with the United Kingdom dates back to 1815, while the treaty with Albania is as recent as 1998. Our treaty with Spain entered into force on 14 April 1903.

The purpose of the E classification is to facilitate international economic and commercial interaction by providing immigration benefits to persons engaged in substantial trade between the treaty countries or to persons engaged in making substantial investments in the United States. The two E classifications are provided for by statute. In practice, however, they are as much creatures of policy as law. Most of the relevant policy is set forth in volume 9 of the State Department's Foreign Affairs Manual (FAM) in notes relating to regulations at 22 C.F.R § 41.51.[1] Eligibility in most instances is determined by a U.S. consular officer whose decision, involving a significant degree of judgment and discretion, is not subject to judicial review.

Despite the difficulties or vagaries often encountered in qualifying for an E visa, its reward can well be worth the effort because of one unique characteristic: Unlike the other temporary working visa classifications customarily used by the international business community, there is no overall time limitation on the E visa. The visa itself is usually issued for five years. However, it can be renewed indefinitely as long as the U.S. consul is persuaded the treaty alien intends to leave the United States when the qualifying trade or investments ends.

Qualifying for treaty trader or treaty investor status ordinarily requires the applicant to submit a considerable amount of documentation to a U.S. consul addressing a well settled list of issues. Typically, the smaller the business, the greater the amount of documentation that will be required. A small business cannot rely on the credibility usually enjoyed by a large company with which the consul is likely to be familiar from his or her own personal knowledge.

For the E-1 treaty trader visa, the applicant must establish that:

- The enterprise has the nationality of a treaty country and the applicant is a national of that country.
- The enterprise's activities constitute trade.
- The trade is substantial.
- The trade is principally between the United States and the country of the alien's nationality.
- The applicant is destined for an executive or supervisory position or possesses skills essential to the enterprise's operations in the United States.
- The applicant intends to depart the United States when the E-1 status terminates.

For the E-2 treaty investor visa, the applicant must establish that:

- The enterprise has the nationality of a treaty country and the applicant is a national of that country.
- The applicant has invested or is actively in the process of investing a substantial amount of capital in the enterprise.
- The enterprise is a real and operating commercial enterprise.
- The investment is more than a marginal one solely for earning a living.
- The applicant is in a position to develop and direct the enterprise.
- The applicant, if an employee, is destined for an executive or supervisory position or possesses skills essential to the enterprise's operations in the United States.
- The applicant intends to depart the United States when the E-2 status terminates.

II. Qualification Requirements for Treaty Trader

A. Nationality of the U.S. Enterprise

The nationality of an enterprise is determined by the nationality of the owners of at least fifty percent of the business, without regard to the enterprise's place of incorporation or legal establishment. This necessitates tracing ownership back to the individuals owning the business. For example, if a U.S. enterprise is owned by a Spanish corporation indirectly through a Netherlands Antilles corporation, the determining factor will be the nationality of the stockholders of the ultimate Spanish parent company. Although seemingly straightforward, several points concerning nationality are worth noting.

- When a corporation is sold exclusively on a stock exchange in the country of incorporation, there is a presumption that the nationality of the corporation is the same as the location of the exchange.
- Owners who are nationals of the treaty country and have lawful permanent residence in the United States (the "green card") do not qualify as nationals of the treaty country for purposes of the fifty-percent rule.
- Establishing nationality is problematic if layered relationships have been created to avoid disclosure of the identity of owners and impossible unless the owners can be identified.

B. Nationality of Applicant

The nationality of the applicant must be the same as the enterprise. This criterion for eligibility rarely presents an issue. However, even this provision can have some twists. For example, the treaty entered into with the United Kingdom limits benefits to citizens of the United Kingdom who are "inhabitants" of British territory in Europe. This covers the United Kingdom, Channel Islands and Gibraltar. The term "inhabitant" is defined as "one who resides actually and permanently in a given place, and has his domicile there." Therefore, British citizens domiciled in Bermuda or elsewhere outside of the United Kingdom, Channel Islands or Gibraltar are not eligible for E classification. On the other hand, some treaties are more inclusive. The treaty with France, which entered into force in 1960, applies to Martinique, Guadeloupe, French Guyana and Reunion, as well as France. The treaty with Spain is applicable to all territories.

C. Activities Constituting Trade

It had long been held that "trade" required an actual exchange of goods or money in order to constitute qualifying trade, although the Foreign Affairs Manual embellished this by stating that "trade" was interpreted to also include international banking, insurance, transportation, tourism, communications and news gathering activities.

Many business persons and immigration lawyers advocated for years that "trade" should include "trade in services" in addition to "goods." The first breakthrough came during the negotiations on the U.S. - Canada Free Trade Agreement, which became effective on 1 January 1989. The terms of that agreement provided that Canadian citizens could qualify for treaty trader status on the basis of substantial trade in services as well as goods. However, the agreement did not provide much insight into how "trade in services" would be quantified. The State Department also informally agreed to recognize "trade in services" for all eligible treaty traders, not just Canadians.

In March 1989, the Immigration Service formally defined the term "trade" by regulation to include services. Regulations at 8 C.F.R. § 214.2(e)(9) now define trade as follows:

> Items of trade include but are not limited to goods, services, international banking, insurance, movies, transportation, communications, data processing, advertising, accounting, design and engineering, management consulting, tourism, technology and its transfer, and some news-gathering activities. For purposes of this paragraph, goods are tangible commodities or merchandise having extrinsic value. Further, as used in this paragraph, services are legitimate economic activities which provide other than tangible goods.

Neither the State Department nor the Immigration Service has provided much guidance on qualifying for an E-1 visa on the basis of trade in services and the major stumbling blocks appear to involve a showing that there is some significant exchange between the United States and the treaty country and that the exchange is substantial. It is not enough, for example, for a consultant to simply render services in the United States and repatriate the remuneration to the treaty country. On the other hand, if the consultant's services also involve significant work product done in the treaty country which is transferred to the United States, the necessary component of exchange between the two countries could be met.

D. Substantial Trade

It is easier to address the meaning of the word "substantial" when referring to trade in goods, but there are still no bright line tests. Relevant factors include the volume of trade as well as the value. The FAM states:

> The word "substantial" is intended to describe the flow of the goods or services which are being exchanged between the treaty countries. That is, the trade must be a continuous flow which should involve numerous transactions over time. Consular officers should focus primarily on the volume of trade conducted, but consider the monetary value of the transaction as well.

The FAM goes on to say that the term "substantial" is not intended to discourage particular types of trade or necessarily exclude employees of small companies. Moreover, numerous transactions, although each may be small, *might* establish qualifying trade. The FAM suggests that trading operations of modest proportion *might* be considered substantial if the income generated is enough to support the treaty trader and family. Nonetheless, it is unlikely that many applications are approved premised on trade that is only sufficient to provide the applicant with a living wage.

E. Trade Principally Between U.S. and Treaty Country

Assuming the trade qualifies as substantial, it is also essential to show that the trade engaged in by the U.S. enterprise is principally between the United States and the treaty country. Simply put, this means that over fifty percent the U.S. enterprise's total purchases must be from the treaty country or over fifty percent of the U.S. enterprise's sales must be to the treaty country.

Problems can arise in situations where the goods originate or pass through a country other than the treaty country and the United States. For example, in an application by a Spanish national, if a Spanish company manufactures goods at one of its plants in Germany and then ships the goods from Germany to the United States, it would not constitute qualifying trade between Spain and the United States, even though the Spanish company held title to the goods. If, however, the goods were first shipped to Spain and then on to the United States, it would be qualifying trade.

F. Executive or Supervisory Position or Essential Skills

In order to qualify for E-1 classification, the trader must also be destined to a position which is executive, supervisory or have special qualifications making his or her services essential to the operation of the U.S. enterprise. The terms "executive," "supervisor" and "special (essential) skills" are defined by regulation, and common sense guidance is also offered by the FAM. These three categories are akin to the executive, managerial and specialized knowledge positions more comprehensively defined by regulation in connection with the L-1 (intracompany transferee) classification. The FAM directs the consul to consider the title of the position and its place in the organizational structure, the applicant's duties, and authority as well as salary and the applicant's qualifications to hold the position. The consul must also be satisfied that the executive and supervisory functions will be the applicant's principal responsibility. If routine staff work is involved, it can only be on an incidental basis.

A more difficult task is in store for employees seeking to qualify on the basis of "essential skills" or services. The regulations and the FAM make it clear that E status is limited to specialists essential to the U.S. operations, not ordinary skilled workers. The consul should assess such things as the degree of proven expertise in the area of specialization, uniqueness of skills, length of experience with the firm, and salary.

Ordinarily, consuls consider persons qualifying for E status on the basis of special qualifications as being relatively short-term employees. However, long-term essentiality may be established with respect to continuous activities such as product improvement, quality control, or the provision of services not generally available in the United States.

In situations requiring highly trained technicians needed to train or supervise U.S. technicians, an E-1 is available if the employing firm can establish that qualified U.S. technicians are not available. In this instance, there is a presumption the U.S. entity will expeditiously train U.S. workers. Regarding the issue of the availability of U.S. workers, the consul should consider the conditions of the American labor market and use common sense if requiring the applicant to provide information on the subject.

III. Qualification Requirements for Treaty Investors

The E-2 classification is for treaty investors and the requirements that the U.S. enterprise and the applicant have the nationality of a treaty country are met in the same way as with the E-1 classification. The same is true for the types of positions the treaty investor can hold, that is, executive, supervisory or special (essential) skills. The temporariness factor is also identical. The only requirement is that the investor intend to leave the United States upon completion of the temporary assignment, however far down the road that may be. The remaining requirements for the E-2 classification are as follows.

A. Substantial Investment

In order to establish eligibility for E-2 classification, there must be a substantial investment in a real and operating commercial enterprise, or the investor must be in the process of making such an investment in the United States.

The obvious question is how much is "substantial," but, as with "trade," there are no bright line tests. The State Department's position is that an investment in a new business is substantial if it is an amount normally considered necessary to establish such a business. On a practical level, this creates a problem for any number of prospective investors because the investment must be made before the U.S. consul will determine if the amount qualifies as substantial.

This is generally not an issue when publicly traded corporations are involved, but more modest investors face a real predicament when the fate of the investment turns on the ability of the investor to work in the United States in E-2 status. The investor is also unable to draw complete comfort from the fact that the statute says he or she need only be actively in the process of investing to qualify, because consuls do not issue E-2 visas without substantial funds or assets being at risk, that is, subject to loss. Can this requirement be met if an investor has contracted to purchase an existing business, and has made full payment (either to the seller or an escrow agent), but the contract provides for the return of the purchase price should the purchaser fail to obtain an E-2 visa? The FAM at Note 7 indicates that this arrangement would satisfy the concept of "in the process of investing." The investment would be considered real and irrevocable, even though conditioned on the issuance of the visa. However, a mere intent to invest or possession of uncommitted funds in a bank account will not suffice.

In determining whether an investment is substantial, there are also other issues requiring analysis. The first is referred to as the "proportionality" test. The consul must consider whether the amount invested is substantial in relation to the total value of the enterprise or an amount normally considered necessary to establish a viable enterprise of the type contemplated. The test works along the lines of an inverted sliding scale: the lower the cost of the business, the higher the percentage of the investment is required. The FAM at Note 9.3 provides the following examples:

(1) A newly created business, e.g., a consulting firm, might need a $50,000 investment to be set up and to become fully operational. As this cost figure is relatively low, a higher percentage of investment is anticipated. An investment approaching 90-100 percent would easily meet the test.

(2) A business costing $100,000 might require an investment of 75-100 percent to meet the test.

(3) A small business costing $500,000 would demand generally upwards of a 60 percent investment, with a $375,000 investment clearly meeting the test.

(4) In the case of a million dollar business, a lesser percentage might be needed, but 50-60 percent investment would qualify.

(5) A business requiring $10 million to purchase or establish would require a much lower percentage. A $3 million investment might suffice in view of the sheer magnitude of the dollar amount invested.

(6) An investment of $10 million in a $100 million business would qualify based on the sheer magnitude of the investment itself.

Another issue is known as the "marginality" test. It is premised on the concept that the alien will not be allowed to invest in a marginal enterprise solely for the purpose of earning a living. Even if the investment is substantial, but will only provide enough income for the applicant, it will be considered marginal. However, marginality problems can be avoided if the investment will expand job opportunities locally, or the applicant has substantial income from other sources and doesn't rely on the investment for his or her livelihood. The FAM at Note 10 provides consuls with the following guidelines:

> The alien must not be investing in a marginal enterprise solely for the purpose of earning a living. An applicant is not entitled to E-2 classification if the investment, even if substantial, will return only enough income to provide a living for the applicant and family. There are various ways to help in determining whether an investment is marginal, in the sense of only providing a livelihood for the applicant.
>
> (1) First, look to the alien's income or financial situation. If the applicant has another source of income or other financial means to support him or herself and the family, then the business is not deemed to be established for the sole purpose of earning a living. Furthermore, if the income derived from the business exceeds what is necessary to support self and family, then this, too, meets the test.

(2) If the first test is not met, and it becomes necessary to consider other factors, one can look to the economic impact of the business. An applicant may show, for instance, that the investment will expand job opportunities locally and/or that the income or return from such a business will have a positive significant impact on the local economy. Such a business would likewise not be considered to be marginal.

(3) Officers should remember that businesses in the start-up years or during a period following the change of ownership/management often do not generate a great amount, if any, of profit. The officer will have to exercise judgment when confronted with such a case.

B. Development and Direction

The statute specifically requires that the investor must be coming to the United States solely to develop and direct the enterprise. This is interpreted to mean that the investor must have a controlling interest in the enterprise, although control, given the right set of facts, can be achieved with less than a majority interest. Of course, this issue can be avoided if the applicant will be qualifying as an employee of the U.S. enterprise and serving in an executive or supervisory capacity or as a person with essential skills. These three categories of employment are the same as discussed above with respect to the E-1 classification.

IV. Miscellaneous Procedural Matters

An accompanying spouse and minor unmarried children are given the same visa as the principal alien irrespective of nationality.[2] Each time an entry is made on an E visa, the applicant will be admitted to the United States for two years, regardless of the fact that the visa may expire in less than two years. While in the United States E aliens can also apply for extensions of status in increments of up to two years.

The E-1 and E-2 visa classifications have the major attribute that a treaty trader or investor can properly maintain status in the United States for as long as the qualifying trade or investment continues. It is possible to spend an entire career working in the United States in E status, something that cannot be accomplished in any other temporary working status. The trader or investor must only maintain an intention to depart the United States upon the expiration or termination of the E-1 or E-2 status.

Endnotes

1. The applicable regulations of the Immigration Service are at 8 C.F.R. § 214.2(e).
2. Family members are not affirmatively authorized to work; however, the Immigration Service will not seek to deport them even if they do.

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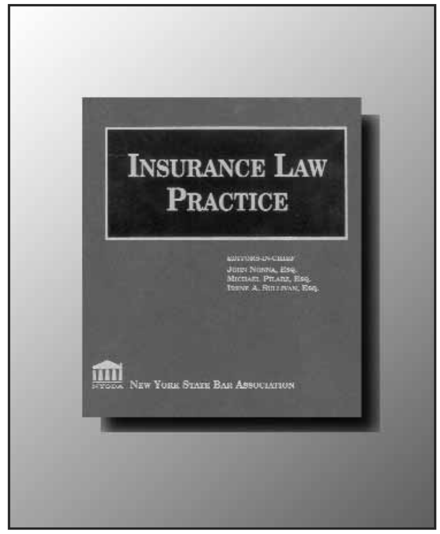

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