



# INTERNATIONAL LAW QUARTERLY

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## ADR in a Global Marketplace – Its Challenges and Issues

by Albert J. Orosa

The "promise" of international arbitration is to provide divergent parties from incongruent backgrounds with a reliable alternative forum to multi-national litigation in resolving their transnational business disputes. Commercial arbitration can be considered one of the oldest professions in the world, as it has existed since the dawn of commerce. Then as now, arbitration was seen as a process whereby parties could seek justice and obtain a fair and equitable outcome to their disagreements. Arbitration is a private, empowering and participatory process, which has proven itself to be a timesaver, cost effective, dependable and almost universally enforceable. In most parts of the world, arbitration is now becoming

the generally accepted method of resolving international business disputes.

Facing a seamless world without trade barriers where business is conducted at the speed of a light over a fiber optic cable, business leaders and their counsel must deal with the complexities of operating within a global market and dealing with the inevitable business disputes that will arise. To this end, alternative dispute resolution (ADR) should be a threshold consideration for multinational organizations and, indeed, for all attorneys involved in international transactions. Through the use of carefully drafted clauses in cross-border contracts, ADR offers predictability; freedom to choose the applicable procedural

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**2<sup>nd</sup> Place Winner of "Writing for Reality" Contest**

## Protection for Indigenous Knowledge: An International Law Analysis

by Miriam Latorre Quinn

### I. Delimitation of the Problem

A "Medicine Man"<sup>1</sup> working for the research foundation, Aston Laboratories, lost the cure for cancer. Dr. Robert Campbell, a brilliant research doctor stationed deep in the rainforests of Brazil was on an assignment that could change the world of medicine forever. He is looking for a type of plant mutation that local medicine men, or witch

doctors, use to cure cancer. A young scientist, Dr. Rae Crane, is sent by Aston to help with the research. She then learns of this magnificent cure and tries to help revive the research, through which they find the exact molecule structure of the serum they have been looking for. After a series of events through which they observe indigenous life, culture, and knowledge, the

See "Indigenous Knowledge," page 16

# The FTAA

## *Second in a Three-Part Series*

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### **Draft Chapter on Agriculture**

by **Maura M. Bolivar**

The FTAA Negotiating Group on Agriculture (NGAG) is responsible for negotiation of Agreement text regarding tariff measures for agricultural products, export subsidies and other trade-distorting practices affecting agricultural products in the hemisphere, and sanitary and phytosanitary (SPS) <sup>1</sup> measures. The negotiations on agriculture have sought to solve problems that have developed in the implementation of the WTO Agreement on Agriculture and reduce protection and subsidies in the agricultural sector.

#### **Market Access**

As tariffs are not unique to agriculture, the NGAG objectives expressly incorporate those of the FTAA Market Access Negotiating Group, so that the approach to tariffs developed will be applicable to agricultural and non-agricultural products. Items such as the base rate (starting point from which tariffs are reduced), timetable and pace of tariff elimination, product classification and trade data reference periods will be consistent with rules of origin, customs procedures, safeguards and technical barriers to trade.

#### **Tariffs and Export Subsidies**

The Draft Chapter on Agriculture adopts provisions of existing trade agreements. Section Two (Tariffs and Non-Tariff Measures) incorporates GATT 1994 Article II (national treatment) and its interpretive notes, and will respect tariff elimination programs in bilateral or subregional agreements that exceed FTAA rates (Art. 4), and provides for automatic incorporation of improved trade rules and disciplines resulting from future negotiations the WTO Agreement on Agriculture (Art. 6, 9). Section Three calls for elimination of agricultural export subsidies and utilizes the definition of export subsidies in the WTO

Agreement on Agriculture. The dynamic linkage of the FTAA Chapter on Agriculture to other major trade agreements will lock-in reforms already made and ideally incorporate negotiated corrections to weaknesses in the agreements.

#### **Domestic Support**

One area of recognized weakness in the WTO Agreement on Agriculture is directly addressed in Section Four (Other Measures and Practices That Distort Trade [And Production] in Agricultural Products). It is well recognized that the goals of the WTO Agreement on Agriculture have not been achieved in the area of domestic support.<sup>2</sup>

The WTO Agreement on Agriculture called for reductions by 20% in the Total Aggregate Measurement of Support ("AMS") from 1995-2000.<sup>3</sup> However, the calculation of Total AMS was skewed and WTO members could count direct payments to farmers, including support for production limits for purposes of base AMS (from which the 20% reduction commitment is measured) but to exclude such payments from the calculation of current AMS (used to determine annual compliance). As a result, no real reductions in domestic support occurred. In addition, the WTO Agreement exempts domestic support provided through publicly funded government programs from a country's reduction commitment if certain criteria are met.<sup>4</sup> Article 13.2 of the FTAA Draft Chapter on Agriculture contains language whereby these domestic support programs would be either reduced or eliminated.

#### **Health and Safety Measures**

Section Five of the FTAA Draft Chapter on Agriculture is designed to address agricultural health and safety measures. This section will adopt the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). The SPS Agreement requires governments to use scientific

cally based and non-protectionist SPS measures. Incorporation of the SPS Agreement in the Draft Chapter on Agriculture will continue development of regulations that have the potential to eliminate many questionable sanitary barriers to international trade in agricultural products.

#### **Florida's Agricultural Interests**

The implications of FTAA negotiations are significant for Florida, as our state is one of the most diverse agricultural states in the nation, producing nearly 250 products and commodities for commercial sale. However, the specific interests of Florida's agricultural sector were not addressed by the broad language in the Draft Chapter on Agriculture. The state's agricultural sector sought inclusion in the Draft Agreement of language regarding monetary policy (due to NAFTA related trade losses related to Mexico's currency devaluation) and a section addressing the need for equivalence in environmental, labor and safety standards between trading partners to allow Florida to compete with FTAA countries where standards are more lax. A linkage between trade and the environment was sought by a variety of different countries and interest groups, but the NGAG did not include this due to its controversial nature. Time will tell whether Florida's agricultural sector can gain from elimination of protectionist policies under the FTAA, given the comparative advantage enjoyed by less developed economies in this sector.

*Maura Bolivar is an associate with the law firm of Broad & Cassel in Tallahassee, Florida, practicing commercial litigation and appellate law. Ms. Bolivar is a 1999 graduate of Florida State University College of Law, where she was Editor in Chief of the Journal of Transnational Law & Policy and a member of the Jessup Moot Court team.*

#### **Endnotes:**

<sup>1</sup> Sanitary measures concern human and

animal health. Phytosanitary measures apply to plants.

<sup>2</sup> Domestic support consists of agricultural policies that may affect a farmer's decision to produce, sustain prices of agricultural products, increase farmer income or improve market conditions.

<sup>3</sup> Total AMS is essentially the measure of all domestic subsidies for all agricultural commodities.

<sup>4</sup> Examples of such permitted policies are (a) general services to the agricultural or rural community involving research, pest and disease control; (b) inspection services; (c) disaster relief payments and (d) public stockholding for food security purposes.

## **Government Procurement** by **Francisco A. Corrales**

The Government Procurement chapter attempts to fundamentally change the way that the governments of all 34 FTAA countries buy their goods and services. At 31 pages, with 42 articles of text, plus annexes, its objective is to open government procurement markets to suppliers from FTAA countries by streamlining and standardizing the entry, registration, bidding and award procedures. It also seeks to inject transparency and set procedural criteria into the procurement process, and result in a system where governments base their purchases on objective market forces.

The main area of contention is the chapter's scope of coverage. While the parties agree to extend the principle of National Treatment to suppliers from other FTAA countries, and refrain from discriminatory treatment, the tug-of-war between trade liberalization and national sovereignty is evident (as in every other chapter). To what extent should a government have to open its procurement market? How many reservations, and in what sectors should a party be allowed to exclude from the chapter's coverage? And should the provisions of this chapter extend to cover procurement from state and local governments, or just federal?

Generally, it appears that areas associated with defense, national security and public order will be excepted from coverage. Additionally, those areas covered by a controlling subregional agreement, such as the NAFTA or Mercosur will probably be excluded. It is also proposed that the

government procurement provisions should not hinder the privatization process, which would then presumably remove coverage of the entity's purchases from this chapter to the Market Access chapter. And an area that will be hotly contested will be domestic programs, such as procurements relating to set-asides and other preferential award mechanisms.

Chapter coverage concerning foreign bidders centers around the qualifications that will be needed in order for them to do business with another FTAA government. The chapter contains a wide assortment of proposals on what kinds of information that a company must provide, and how detailed it should be. Another area deals with the rules of origin of a foreign bidder: What percentage of FTAA content should be required in order to sell a good or service under these provisions? And what percentage of a company's ownership must come from FTAA parties in order to qualify? Some say 50%. Others suggest using the criteria found in the Market Access and Investment chapters.

To foster development of the procurement sector, the parties agree to adopt a common set of technical standards on which their procurement requirements will be based (though it probably won't mean that the Americans will be going metric). The parties will also publish their laws, regulations and procedures that govern the procurement process in their country, and establish contact points for information on how to do business

with their government. They are also attempting to standardize the review and appeal procedures for contracts awarded, the jurisdiction of which will no doubt remain exclusively within the procuring party's domestic judicial and administrative processes.

Finally, the parties contemplate creating the Government Procurement Committee, which will oversee the implementation of this chapter, and act as a centralized administrative organ for the publication and dissemination of information and statistics.

*Francisco A. Corrales is an attorney practicing law in Fort Lauderdale, Florida. He is the current Chairman of the Free Trade Area of the Americas Committee.*

## **Summary of FTAA Chapter on Antidumping, Countervailing Duties, and Subsidies**

**Stephen J. Powell, Director of Int'l Trade Programs, UF Levin College of Law**

Under World Trade Organization (WTO) rules, a country may assess added taxes on imports found to be dumped (priced lower for export than for the domestic market, or priced below cost) or subsidized (recipients

*continued, next page*

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Articles between 10 and 20 pages involving the various disciplines affecting international trade and commerce may be submitted on computer disk with accompanying hard copy, or on typewritten, double-spaced 8 1/2" x 11" paper (with the use of endnotes, rather than footnotes.) Please contact Francesca R. Di Staulo for submissions to the Quarterly and for any questions you may have concerning the Quarterly.

## FTAA

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of a targeted benefit from government), if these imports cause injury to the domestic industry producing like products. National laws enabling these “trade remedies” to protect domestic industries from unfairly-traded goods – the extra duties charged at the border offset the market advantage given by the dumping or subsidies – must track closely provisions of the WTO’s Anti-Dumping (AD) Agreement and its Agreement on Subsidies and Countervailing Measures (SCM).

When the WTO was created in 1995, its detailed rules governing every aspect of a trade remedy investigation, together with its tough new dispute settlement system, for the first time imposed real limits on the broad discretion that had characterized national investigations since Canada’s invention of AD laws a century ago. As examples in the AD Agreement of the level of detail that emerged from eight years of negotiations, three separate conditions must be met before below-cost sales may be excluded from the dumping comparison and three alternative measures of profit are prescribed if actual producer profit is unavailable in constructing a price. An entire Annex is devoted to steps investigators must take to coax information even from recalcitrant exporters, so that dumping calculations will be accurate. The SCM Agreement is similarly detailed.

As to the binding dispute settlement system, in the dozen trade remedy cases decided by WTO panels, no challenged country has escaped without significant findings of violation of the AD or SCM Agreements. There is every reason to expect this pattern to continue in light of the meticulous inspection challenged investigations receive from dispute panels and the WTO’s Appellate Body.

Nonetheless, many FTAA countries demand that the chapter on anti-dumping and anti-subsidy (called countervailing duty or CVD) remove even more discretion from investigating authorities. Since the WTO’s lowering of tariffs and other trade barriers, trade remedy investigations around the world have ex-

panded greatly. 64 countries have enacted trade remedy laws and they carried out over 240 investigations last year. In this Hemisphere, Mexico, Brazil, and Argentina have joined the United States and Canada as major players in the trade remedy arena, so the FTAA stakes are high.

The FTAA Negotiating Group on Subsidies, Antidumping, and Countervailing Duties (NGADCV) was charged by Trade Ministers with two objectives. With respect to AD, the Group was to improve where possible the rules and procedures that apply to trade remedy laws in order not to create unjustified barriers to trade in the Hemisphere. As to subsidies, the Group is to examine ways to deepen, if appropriate, existing WTO disciplines and enhance SCM compliance.

The United States gives a minimalist reading to this charge as supporting – at most – consideration of procedural improvements to increase the opportunity exporters now have to ensure fair and transparent investigations throughout the Hemisphere. To date, the United States has tabled only a controversial and tellingly brief paragraph that excludes a separate chapter on trade remedies in favor of confirmation that the FTAA will not affect the way Parties apply their AD/CVD laws to FTAA trade.

The sweeping wish lists of other FTAA countries fall into four camps. Chile’s even more concise proposal, consistently with its separate trade agreement with Canada, “renounces” use of AD laws for trade within the FTAA, at least after trade within the region is “fundamentally free.” The remaining proposals for the most part track the Articles of the AD Agreement that address the same subject – Article 3, for example, is about the determination of injury – and show how the WTO Agreement would be revised for use within the FTAA.

Many countries fall into the second group, which argues for substantive revision of WTO methodology to “improve upon” the results of the Uruguay Round. For instance, dumping margins below 5% of the export price (instead of the present 2%) would be disregarded. Another idea would exclude profit when constructing an exporter’s home market price.

One proposal in this camp stands out because of its severe impact on AD relief: Antitrust principles would become part of the dumping equation by a rule that account be taken of the effect on the “market of the importing Party” of imposing duties. This twist takes to an extreme early recognition by Trade Ministers of a possible nexus between AD/CVD and competition policy, which led Ministers to ask the NGADCV and the Negotiating Group on Competition Policy to study any linkage.

A strong third camp agrees that changes in the way dumping margins are calculated must be reserved for the WTO, but that procedural improvements are acceptable. One submission requires parties who submit information to supply all other parties with a public version. Another requires authorities to tell parties about a hearing at least 15 days in advance. Transparency and due process proposals from the United States could ultimately join those of this group.

The final group argues for changes keyed to the size of the exporter or the country of export. A small company under one proposal need only recover its variable costs to escape a finding of below-cost pricing, rather than the WTO’s requirement also to recover fixed costs. Higher *de minimis* levels would apply to imports from “smaller economies.” These suggestions echo the controversy over how trade remedies apply to developing countries that lingers in the WTO as well.

In sum, the heavily-bracketed text of the NGADCV offers several competing ways to meet its objectives. Most would weaken relief provided by US trade remedy laws, a result the Bush Administration repeatedly has promised the Congress will not occur.

**Stephen J. Powell** is Director of International Trade Programs at the University of Florida’s Fredric G. Levin College of Law, where he develops seminars on practical trade topics for business executives and their attorneys, plans academic courses on international trade law for future lawyers, conducts research on trade and business laws to aid company export strategies, and provides technical assistance to developing coun-

tries on implementing their World Trade Organization obligations. Prior to his appointment in January 2000, Mr. Powell was for 17 years Chief Counsel for Import Administration in the U. S. Department of Commerce, the agency responsible for the two most important laws providing relief against unfairly traded imports, the antidumping and countervailing duty laws. Steve has also served as Assistant General Counsel for Enforcement and Litigation with the National Oceanic and Atmospheric Administration and as NOAA's Western Regional Counsel in Seattle. He began his legal career as a Captain with the U.S. Air Force Judge Advocate General. He has negotiated a number of treaties and executive agreements to discipline government subsidization and unfair private pricing practices, including the North American Free Trade Agreement with Canada and Mexico. He also served as lead U.S. negotiator in Free Trade Area of the Americas talks on subsidies and dumping and has traveled extensively in furtherance of U.S. interests in the elimination of unfair trading practices and the opening of foreign markets.

\* \* \*

## **Dispute Settlement** by **Francisco A. Corrales**

At 36 pages, with 56 articles of text plus annexes, the Dispute Settlement chapter seeks to provide a mechanism for FTAA parties to address the measures of other FTAA parties that are inconsistent with FTAA obligations, or measures that may nullify and impair a party's benefits from the FTAA. This is to be done in a manner consistent with the parties' obligations under the World Trade Organization, using good faith to arrive at a mutually satisfactory result.

A key fact to remember about this chapter is that it only covers state to state disputes between FTAA signatory parties. An example of a state to state dispute is the United States' refusal to open its border to Mexican trucking interests, in violation of its NAFTA obligations. There is no material in this chapter that covers the resolution of disputes between a private party and a state, though it does

not preclude other FTAA chapters from creating private rights of action. Given the political makeup of the FTAA participants, it seems likely that if any private right of action is created, a private party will have to exhaust all local remedies in that country beforehand.

The jurisdictional scope of the Dispute Settlement chapter addresses controversial issues such as how to deal with subregional agreements (like the NAFTA). It appears that the FTAA Dispute Settlement provisions would govern issues between the parties found only in the FTAA, while the Dispute Settlement provisions of the subregional agreement would govern all other situations. Another issue is the relationship between the Dispute Settlement provisions and the domestic laws of a party to the FTAA. Currently, there is a split of opinion between those parties advocating national sovereignty and those parties who feel that in order to create a viable trading bloc, the FTAA provisions should supersede domestic legislation. How this issue is resolved will, to a large extent,

shape the overall scope of the chapter (i.e. the number of exceptions created) and the FTAA as a whole.

Procedurally, an FTAA dispute between the parties would be resolved in the following manner:

1. A party to the FTAA discovers material injury, the threat thereof, or the nullification and impairment of its FTAA benefits due to another party's measure(s).
2. The aggrieved party requests, then enters into informal negotiations with the other party, presumably on a bilateral basis (and outside of the FTAA).
3. The aggrieved party would then bring the dispute into the FTAA's coverage through a formal request for consultations.
4. Thereafter, the parties would enter a conciliation period, where other parties/organizations may lend their good offices to help reach a mutually acceptable resolution.
5. This is followed by the creation of a Neutral Panel, which would hear

*continued, next page*

## ***Upcoming Section Events***

### **Practice and Procedure Before the U.S. Court of International Trade**

*January 10, 2002 - 8:00 a.m - 12:00 noon*

*Florida Bar Midyear Meeting - Hyatt Regency Miami*

### **International Law Certification Review**

*January 10, 2002 - 1:00 p.m. - 5:00 p.m.*

*Midyear Meeting - Hyatt Regency Miami*

### **France - Florida Forum**

*January 19-23, 2002*

*Paris*

### **23rd Annual Immigration Law Update**

*February 14-15, 2002*

*Hyatt Regency Miami*

### **4th Annual Canadian Forum**

*March 2002*

*Cruise - South Florida to Bahamas*

### **Legal Aspects of Doing Business in Latin America**

*April 11-12, 2002*

*Miami*

## FTAA

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arguments from both sides and release an initial report, which the parties would use to try to settle the dispute. If that proves unsuccessful, a final report would be issued. Questions exist as to if and when the reports should be made public, balancing the need for confidentiality with the desire for transparency.

6. The parties would have the right to appeal the decision, or request that the decision be interpreted or clarified.
7. Finally, the time would come for the parties to implement the decision. The losing party would have to remove the measure(s) that are FTAA inconsistent, or that nullify and impair the prevailing party's FTAA benefits, or face sanctions. Sanctions could cover anything from suspension of FTAA benefits, reciprocal trade restraints, or even monetary damages.

*Francisco A. Corrales is an attorney practicing law in Fort Lauderdale, Florida. He is the current Chairman of the Free Trade Area of the Americas Committee.*

## Free Trade Area of the Americas; Services

by Thomas L. Raleigh III, Esq.

Over thirty pages of substantially bracketed text<sup>1</sup> comprise the "Services" chapter of the FTAA released in July, 2001.<sup>2</sup> Among other matters, for example, there is no consensus yet on what services are to be covered.

For purposes of this brief summary, the U.S. position on "services" will be summarized and a more in-depth look at legal services, from the perspective of the parallel debate within the General Agreement on Trade in Services ("GATS"),<sup>3</sup> will be examined. This paper will conclude with recommendations for the future.

The U.S. position<sup>4</sup> on services<sup>5</sup> was developed from comments received from Federal executive agencies, Congress and certain private sector

advisory committees and comments solicited via *Federal Register* announcements.<sup>6</sup> Future discussion will include the following subjects:<sup>7</sup> definition of affected services; government services and other specific exceptions; "most favored nation" ("MFN") and "national" treatment (like treatment among all parties); opportunity to comment ("transparency"); denial of benefits; market access. Additional issues for consideration are: domestic/national regulation; professional licensing standards/criteria; exceptions.

It is difficult to predict what the final text of an agreement on services will eventually look like. The parties must first determine a negotiation approach to the subject. For example, the United States believes that all services sectors should be liberalized *except* where a particular FTAA country reserves a particular sector or measure to address domestic sensitivities.<sup>8</sup>

The extent to which a final agreement will bind country parties must also be decided. The U.S. asserts that it should be binding upon all governments (central/regional/local) and upon non-governmental bodies to whom powers have been delegated by governments, subject to exceptions that may apply to local governments.<sup>9</sup> The U.S. excludes from coverage non-commercial government services, immigration policy, employment market access, government procurement of services and air transport services.<sup>10</sup> The U.S. will not promote privatization of certain social services, such as education and health care.<sup>11</sup> Other industry-specific services likely will be the subject of specialized provisions, such as financial services and telecom.

The U.S. argues that MFN and national treatment should apply to all service sectors and service suppliers, with certain limited exceptions to be allowed.<sup>12</sup> In addition to MFN and national provisions, the U.S. asserts that the services chapter should include guarantees of "market access."<sup>13</sup> The U.S. favors "transparency" such that, for example, for services requiring a license, countries should make publicly available the criteria to obtain such a license and all terms of granting and revoking the same.<sup>14</sup>

The U.S. opposes extending FTAA

benefits to "shell companies" or to companies that are owned by investors from non-FTAA countries with whom the U.S. has no diplomatic relations or which are subject to U.S. economic sanctions.<sup>15</sup>

Legal services proposals have been submitted to the WTO Council for Trade in Services by United States<sup>16</sup> and Australia.<sup>17</sup> The U.S. recognizes that "law firms have become increasingly involved in advising clients on international transactions covering a variety of business matters... [and that] lawyers and law firms pave the way for international trade and investment."<sup>18</sup> The U.S. recognizes that lawyers often have difficulty becoming licensed in other countries due to the need to know that country's national legal system and, sometimes, licensing is limited to citizens of that country. The U.S. proposes that a reference paper be drafted to describe the problems encountered by law firms servicing clients internationally with a view towards liberalizing opportunities for market access (including citizenship and residency requirements for licensing, scope of practice, association of foreign partner law firms with local firms, movement of personnel, etc.).<sup>19</sup>

Australia proposes a "limited licensing" approach that would excuse the foreign lawyer from satisfying the burdensome admission requirements of full licensure in the host country jurisdiction and allow a foreign lawyer to provide counsel on home country law (not host country law), international law and, where qualified, third country law in partnership or other voluntary commercial association with other foreign legal practitioners or host-country legal practitioners.<sup>20</sup> Australia asserts that this concept is consistent with foreign lawyer regulation principles recommended by the IBA.<sup>21</sup> (It is also comparable to Florida's Foreign Legal Consultancy Regulation.<sup>22</sup>) Australia observes that such a limited licensing scheme provides benefits to the host country and host country lawyers (promoting international commercial arbitration and complimentary home country support services) without intruding on home country domestic legal services (family law, estate planning, personal injury, etc.).<sup>23</sup>

## Conclusion

Here are some recommendations for future action as the debate on the "services" chapter unfolds:

1. Florida should establish a point of contact with the U.S. Negotiating Group on Services ("NGS") for the FTAA. This could be a joint effort between Florida FTAA, Inc. (a public-private initiative recently established by the Florida Secretary of State) and the Florida Bar International Law Section. This contact should provide formal comment to the NGS and monitor other U.S. public comment received on FTAA services.
2. Florida should identify key services of importance to its economy, determine any services deserving of special "local" treatment and support the creation of appropriate exceptions for such specified Florida services.
3. Florida should monitor the preparation of the U.S. reference paper for the WTO on the subject of legal services and its application to the FTAA. Florida's Foreign Legal Consultancy Rule (unique in the U.S.) may be affected by the "limited licensing" WTO proposal made by Australia.

## Endnotes:

1. Square brackets indicate the existence of different points of view on the text. Each initial draft chapter was developed based on consolidated texts proposed by individual country (or country groups) to each of the nine FTAA Negotiating Groups.
2. Rev. I July 3, 2001. For full text, see the Official FTAA website: [www.flaa\\_alca.org](http://www.flaa_alca.org).
3. Proposals for the following services can be found at [www.wto.org/english/tratop\\_e/serv\\_e/s\\_propnewnegs\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/s_propnewnegs_e.htm): accounting; advertising and related services; architectural; computer and related services; construction and related engineering services; distribution services; education services; energy services; oil and gas services; environmental services; express delivery services; financial services; legal services; logistics and related services; movement of natural persons; postal and courier services; professional services; sporting services; telecommunication services; tourism services; transport services; air transport services; maritime transport services and services auxiliary to all modes of transport. Negotiations for liberalization of trade in services among member governments of the World Trade Organization began in January 2000 pursuant to the GATS, which entered into force in 1995. The GATS

applies to all internationally traded services except public sector services and air traffic services. The four "modes of supply" in which a service can be traded, according to, GATS, are as follows:

- cross border supply (services supplied from one country to another);
  - consumption abroad (consumers in one country using the service in another country);
  - commercial presence (a company from one country establishes a branch or subsidiary in another country to provide services);
  - movement of natural persons (persons travel from one country to provide services in another country).
4. The U.S. Negotiating Group on Services is led by Ms. Ann Main, Director, Trade in Services Negotiations, Office of the United States Trade Representative, 600 17th Street, NW, Washington, D.C. 20508, Telephone: (202) 395-4510; Fax: (202) 395-2891; Email: [Amain@ustr.gov](mailto:Amain@ustr.gov).
  5. The full public summary of the U.S. position can be found at: [www.ustr.gov/regions/whemisphere/services.html](http://www.ustr.gov/regions/whemisphere/services.html).
  6. For a list of requests for public comment in the Federal Register, see *Federal Register*, July 12, 2001, Volume 66, Number 134, Pages 36614-36615. The most recent comment period was closed on August 22, 2001 and non-confidential submissions are available for public review in the USTR reading room (Room Three) in the annex of the Office of the U.S. Trade Representative, 1724 F Street, N.W., Fifth Floor, Washington, D.C. 20508 (Ms. Brenda Web; telephone 202-395-6186). To date, approximately 100 comments have been received on the FTAA generally and another 37 comments have been received concerning e-commerce specifically.
  7. Articles 1-8.
  8. See endnote 5.
  9. Ibid.
  10. Ibid.
  11. Ibid.
  12. Ibid.
  13. Ibid.
  14. Ibid.
  15. Ibid.
  16. Communication from the United States, WTO, S/CSS/W/28, 18 December 2000 (00-5557).
  17. Communication from Australia, WTO, S/CSS/W/67/Suppl. I/Rev 1, 10 July 2001 (01-3435); S/CSS/W/67/Suppl.1, 9 July 2001 (01-3397) and S/CSS/W/67, 28 March 2001 (01-1530). See endnote 3.

18. See endnote 16.

19. Ibid.

20. See endnote 17 (Suppl.1). Apparently, Victoria, New South Wales, Northern Territory and Australian Capital Territory have already implemented legislation which ensures these rights.

21. Australia would prohibit appearances in local courts or advice on host country law and would require public disclosure of foreign practitioner status. The International Bar Association created certain principles in its "Resolution on the General Principles For the Establishment of Regulation of Foreign Lawyers" adopted by the Council of the IBA in Vienna on 6 June 1998. Under these principles, the foreign lawyer must: be licensed and in good standing with the home country, satisfy minimum practice requirements; be of good character; submit to the host country Code of Ethics; carry liability insurance; consent to local service of legal process.

22. Rules Regulating The Florida Bar, Chapter 16.

23. See endnote 17.



**Thomas L. Raleigh III** is a shareholder with Akerman, Senterfitt & Eidson, P.A. in Orlando. He is Chairman of the firm's International Practice Group and is a past Chair of the Florida Bar International Law Section.

Mr. Raleigh concentrates his practice in International Corporate Transactions and business immigration law. He is the author of "Legal Aspects of Doing Business in Florida" Published in *Doing Business in North America and Canada, Volume 6/7 (Kluwer Law and Taxation Publishers, Antwerp, Holland)* and is a contributing author of *International Professional Practice (Chancery Law Publishing Ltd., London, England)*

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# Florida-France Forum Scheduled for Paris in January 2002

The France-Florida Forum, scheduled to take place in mid-January, 2002, promises to be one of the most exciting events organized by The Florida Bar. The Forum, set to take place in Paris for 5 days, is expected to attract the participation of some 300 attorneys and notaries from both the Florida and French Bars and from the French *Chambre des Notaires* (the association governing all French notaries).

The major aim of this forum is to increase the knowledge and understanding of a variety of current legal and business topics faced by French and Florida lawyers who are active in the fields of cross-border business and investment. These topics include the repatriation of profits, negotiation of corporate acquisitions, establishment and management of busi-

nesses in both countries, drafting of international contracts, immigration issues, and tax considerations. The Forum will offer various workshops and conferences meant to stimulate dialogue and interaction among all participants.

Participants will attend various receptions, dinners, and other activities at beautiful and historic restaurants and buildings in and around Paris. For example, the Forum will begin with an elegant "meet and greet" reception at the famous *Chateau Vaux le Vicornite*, a magnificent monument from the seventeenth century near Paris (see pictures below). All guests will be invited to a traditional French dinner offering some of France's best wines, as well as exciting dinnertime entertainment.

The France-Florida Forum is open

to all, and shall help create, and in some cases expand, contacts among legal professionals in France and Florida. The cost of the package, including flight to and from France and hotel accommodation in Paris, will be approximately \$1200 per person, and the cost of the materials for the seminar has not yet been determined. Members of the Florida Bar who participate in the Forum will be entitled to gain CLE credit that will count towards Florida Bar CLE reporting requirements.

If you wish to register or simply seek more information, please feel free to contact **Marie Leclercq** or **Lucius Smejda** at:

Phone: (305) 358-9995

Fax: (305) 358 9997

E-mail: lexusa(S).aol.com

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# Seminar on the U.S. Court of International Trade to be held in Miami in January 2002

The International Law Section of the Florida Bar and CITBA are pleased to sponsor a seminar on Practice & Procedure Before the U.S. Court of International Trade ("CIT"). The seminar will be held at the scenic and centrally located Hyatt Regency Hotel in downtown Miami, Florida, on January 10, 2002.

The guest speakers for this seminar are Leo M. Gordon, Clerk of the CIT and William Mulligan, Assistant Staff Counsel for the Miami Branch of the Florida Bar. Some of the topics to be discussed by Mr. Gordon, include the purpose and role of the

Court, issues related to jurisdiction and an overview of the Court's current practice and procedure. Mr. Gordon will also discuss recent technological changes and advancements implemented by the Court such as video conferencing and the Case Management/Electronic filing system. Mr. Mulligan will discuss Ethics and Professionalism before the courts. In addition to the guest speakers the seminar will include a question and answer period.

The seminar is open to all legal practitioners, including litigators, international lawyers, paralegals and

administrative assistants, and will serve as an extremely useful tool for those seeking opportunities to expand their practice areas.

Members of the Florida Bar who attend the seminar will be entitled to gain CLE credit that will count towards Florida Bar CLE reporting requirements. If you wish to register or seek additional information, please contact **Francesca Russo-Di Staulo** at:

Phone: (305) 267-9200, ext. 121

Fax: (305) 267-5155

E-mail: fdistaulo@strtrade.com



The Florida Bar International Law Section and  
The Customs & International Trade Bar Association (CITBA) present

# Practice & Procedure Before the Court of International Trade

COURSE CLASSIFICATION: INTERMEDIATE LEVEL



One Location

January 10, 2002

Florida Bar Midyear Meeting  
Hyatt Regency Miami

Course No. 10391

8:00 a.m. – 8:30 a.m.

## Late Registration

8:30 a.m. – 10:30 a.m.

**Purpose of the Court of International Trade ("CIT") and how practitioners can make use of it; rules & regulations of the CIT; practice and procedure before the CIT; major technological changes: electronic filing system; possible new directions for the CIT**

*Leo Gordon, Clerk of the Court of International Trade, New York, NY*

10:30 a.m. – 10:45 a.m.

## Break

10:45 a.m. – 11:15 a.m.

## Questions and Answers

*Gilbert Lee Sandler, Esq., Sandler, Travis & Rosenberg, P.A., Miami*  
*Sidney Weiss, Esq., President, Customs & International Trade Bar Association (CITBA), New York, NY*

11:15 a.m. – 11:30 a.m.

## Break

11:30 a.m. – 12:00 noon

## Ethics & Professionalism Before the Courts

*William Mulligan, Esq., Assistant Staff Counsel, Miami Branch of The Florida Bar, Miami*

## CLER PROGRAM

(Maximum Credit: 4.0 hours)

General: 4.0 hours

Ethics: 1.0 hour

## CERTIFICATION PROGRAM

(Maximum Credit: 4.0 hours)

Business Litigation: 2.0 hours

International Law: 4.0 hours

Credit may be applied to more than one of the programs above but cannot exceed the maximum for any given program. Please keep a record of credit hours earned. RETURN YOUR COMPLETED CLER AFFIDAVIT PRIOR TO CLER REPORTING DATE (see Bar News label). (Rule Regulating The Florida Bar 6-10.5).

## INTERNATIONAL LAW SECTION

Jose A. Santos, Miami — Chair  
Laurence D. Gore, Ft. Lauderdale — Chair-elect  
Lucius Smejda, Miami — CLE Chair  
Tamela J. Stults, Ft. Lauderdale — CLE Vice Chair

## FACULTY & STEERING COMMITTEE

Francesca Russo-Di Staulo, Miami — Program Chair  
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Leonard Rosenberg, Miami  
Gilbert Lee Sandler, Miami

**REFUND POLICY:** Requests for refund or credit toward the purchase of the course book/tapes of this program **must be in writing and postmarked** no later than two business days following the course presentation. Registration fees are non-transferable, unless transferred to a colleague registering at the same price paid. A \$15 service fee applies to refund requests. Persons attending under the policy of fee waivers will be required to pay \$0.

**HOTEL RESERVATIONS:** A block of rooms has been reserved at the Hyatt Regency Miami, at the rate of \$179 single/double occupancy. To make reservations, call the Hyatt Regency Hotel direct at (305) 679-3068. Reservations must be made by 12/16/01 to assure the group rate and availability. After that date, the group rate will be granted on a "space available" basis.

✂ —————  
**Register me for the "Practice & Procedure Before the Court of International Trade" Seminar**

**ONE LOCATION: (024) HYATT REGENCY MIAMI (JANUARY 10, 2002)**

TO REGISTER OR ORDER COURSE BOOK/TAPES, BY MAIL, SEND THIS FORM TO: Angela Froelich, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300 with a check in the appropriate amount payable to The Florida Bar or credit card information filled in below. If you have questions, call 850/561-5633. ON SITE REGISTRATION, ADD \$15.00. **On-site registration is by check only.**

Name \_\_\_\_\_ Florida Bar # \_\_\_\_\_  
Address \_\_\_\_\_  
City/State/Zip \_\_\_\_\_ Phone # \_\_\_\_\_

**ABF: Course No. 10391**

**REGISTRATION FEE (CHECK ONE):**

- Member of the International Law Section or CITBA: \$50
- Non-section member: \$65
- Full-time law college faculty or full-time law student: \$25
- Persons attending under the policy of fee waivers: \$0

**METHOD OF PAYMENT (CHECK ONE):**

- Check enclosed made payable to The Florida Bar
- Credit Card (Advance registration only. Fax to 850/561-5825.)     MASTERCARD     VISA

Name on Card: \_\_\_\_\_  
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Signature: \_\_\_\_\_ Exp. Date: \_\_\_\_/\_\_\_\_ (MO./YR.)



Please check here if you have a disability that may require special attention or services. To ensure availability of appropriate accommodations, attach a general description of your needs. We will contact you for further coordination.

Enclosed is my separate check in the amount of \$25 to join the International Law Section. Membership expires June 30, 2002.

**COURSE BOOK — AUDIOTAPES**

Private taping of this program is not permitted.

**Delivery time is 4 to 6 weeks after January 10, 2002. PRICES BELOW DO NOT INCLUDE TAX.**

_____ COURSE BOOK ONLY: Cost \$30 plus tax	TOTAL \$ _____
_____ AUDIOTAPES (includes course book) Cost: \$50 plus tax (section member), \$65 plus tax (non-section member)	TOTAL \$ _____

**Certification/CLER credit is not awarded for the purchase of the course book only.**

*Please include sales tax unless ordering party is tax-exempt or a nonresident of Florida.* If this order is to be purchased by a tax-exempt organization, the course book/tapes must be mailed to that organization and not to a person. Include tax-exempt number beside organization's name on the order form.

# News from the Texas Service Center

by Larry S. Rifkin, Drucilla E. Bell and Tammy Fox-Isicoff  
Immigration and Nationality Law Committee

*Following is a Q & A from the INS Texas Service Center which will assist you in the processing of your cases.*

\* \* \*

1. INS is regularly issuing EAD cards for less than one year for foreign nationals on B-1 visas. These cards should be issued for a one-year period. Instead, INS is issuing EAD cards valid for the period of stay, which normally expires by the time the card is issued. For example, domestics accompanying H-1B foreign professionals - it takes one-year for a B-1 extension to be adjudicated. By the time the EAD card is processed, employment is authorized for one week. In the mean time the extension is pending and the alien has no proof of work authorization. Foreign airlines employees, B-1 in lieu of E-1--these foreign nationals are permitted to work in the U.S. in lieu of E-1 visas. They constantly travel. By the time their EAD cards are issued, they are given one-day EAD. Can the TSC issue EAD cards for a one year period?

**ANSWER:** The TSC will consult with Headquarters regarding this issue.

\* \* \*

2. Adjustment cases that were filed at the TSC in April still have not been issued receipts. Is there a problem in the mailroom? How should these cases be dealt with?

**ANSWER:** See attached Notice to the Public Regarding Receipt Notices issued by the INS Service Center.

\* \* \*

3. INS has issued RFE's on I-140 cases, which question the degree evaluations, when the beneficiaries have been issued H-1B visas based on the degree evaluations. Why is an earlier evaluation, absent fraud or some other extenuating factor, being ignored?

**ANSWER:** An I-140 is treated as a separate application. There is no legal presumption that flows from the prior H-1B1 to the I-140 petition. Each case must stand on its own merits.

\* \* \*

4. Extension or change of status requests for family members accompanying H-1B applicants, filed with the H-1B petition, are often separated from the H-1B petition. The Service, erratically, is treating the family members as an independent I-539, and while adjudicating the principal in months, the family members are taking up to a year to adjudicate. When the H-1B goes to the consulate to obtain the visa, the family members are fearful of leaving with their extensions or requests to change status still pending. Is it Service policy to separate family members? If not, is there a procedure for obtaining an adjudication of the family members when the principal's case which was filed concurrently is approved?

**ANSWER:** These applications should not be separated. It is best to notify the supervisor of the product line via fax as soon as possible that the I-539 may have been separated from the principal's I-129.

\* \* \*

5. What percentage of TSC cases come from Florida?

**ANSWER:** Florida files the most applications with the TSC, however, no specific statistics are available.

\* \* \*

6. Our members report notifying TSC that relatives have become U.S. citizens with the special FAX form provided by AILA rendering their priority dates current; however, cases are still not being processed. What can be done to obtain an adjudication on these cases?

**ANSWER:** Send a request to the supervisor of the product line via fax.

\* \* \*

7. Members have reported accidentally sending reentry permits to TSC. What can be done to get these cases on track and have them transferred to Nebraska?

**ANSWER:** Any reentry permit application erroneously filed with the TSC is forwarded on to the Lincoln, Ne-

braska Service Center.

\* \* \*

8. What should be done, when the TSC grants residence and designates an incorrect INS District Office for the processing of the residence card?

**ANSWER:** Using "c/o Attorney's address" may cause the file to be sent to the District Office closet to the attorney's address. The designation is determined by the zip code entry in the CLAIMS system. Fax any corrections to the supervisor of the product line at the TSC.

\* \* \*

9. Has the processing of nonimmigrant visa petitions slowed since the implementation of premium processing? -What is the anticipated processing for E, H and L visas filed currently without the premium processing fee? -The INS regulations currently require that L nonimmigrant visa petitions be adjudicated in 30 days. Why is this regulation not adhered to?

**ANSWER:** L petitions are slightly behind schedule, but the TSC is working toward a 30 day turnaround. Es and Hs are 60 days for adjudication. No cases have been delayed due to the implementation of the premium processing program.

\* \* \*

10. What is the proper procedure to follow when an alien who has filed a request for an extension of stay to a date certain, which is still pending, needs additional time on that extension? For example, alien in B-2 status requested an extension of stay for three months, to receive chemotherapy. Thereafter, alien had setback and needed surgery. Before, extension is adjudicated, alien advises you that he will need an additional four months in this country.

**ANSWER:** The TSC maintains their policy of "no negative extensions".

\* \* \*

11. What should attorneys do when they receive either a Request For Evidence or other documentation on a case where they have never entered

*continued, next page*

**News from Texas**

from preceding page

an appearance?

**ANSWER:** This is a CLAIMS systems entry error. Fax notice to supervisor of the product line at the TSC.

\* \* \*

12. What should attorneys do when they receive a Request For Evidence or other documentation that doesn't

designate the applicant or petitioner?

**ANSWER:** Fax to the supervisor of the product line at the TSC requesting the Petitioner and Beneficiary information.

\* \* \*

13. What are the current statistics on premium processing? Will it be implemented for I-140 processing? What should members do when a premium processing application is inadvertently sent to the regular

P.O. Box?

**ANSWER:** Premium processing cases filed: June 308 cases, July 511 cases; August 2,200 cases (more than 1,700 of which are H-1s). Headquarters will be evaluating the inclusion of other types of applications, including I-140s, into the premium processing system. It is imperative to use the designated post office box for premium processing, particularly in view of the mail room backlog.

\* \* \*

14. Is *conversion* to premium processing available for cases filed after July 31, 2001?

**ANSWER:** Yes.

\* \* \*

15. Are you processing employment-based adjustment of status cases under Sec. 106(c) of AC21 (I-485 applications pending for more than 180 days where the alien switches jobs)?

**ANSWER:** Yes, we are processing these cases; they are not being held.

\* \* \*

16. Are there any items you would like us to pass on to our members?

**ANSWER:** Yes.

- Attorneys should remember to put their fax number on the form G-28.
- A new phone system should be in place in the near future. This new system will provide more access with 18 Immigration Information Officers manning these lines.
- When filing adjustment cases for multiple family members, use a cover sheet listing ALL family members including name, date-of-birth and any A#s.
- Remember to use the Premium Processing Post Office Box instead of the Federal Express delivery option. It will facilitate the TSC processing your case.
- If you receive a Request For Evidence via fax, be sure to respond via fax. This will facilitate the processing of your case.
- Do not fax AND mail your response to a Request For Evidence. One or the other, but not both (fax is preferable).
- Please utilize the 9/2000 version of Form I-140 until a new version is issued by the INS.

**U.S. Department of Justice  
Immigration and Naturalization Service  
SERVICE CENTER**

**NOTICE TO THE PUBLIC**

**REGARDING RECEIPT NOTICES**

We apologize for the delay in releasing this information. Due to a significant increase of incoming mail at the Service Center, your receipt notice, acknowledging acceptance of your application or petition, may be delayed.

We are expanding our fee receipting capabilities by adding more contract staff, additional data entry workstations and expanded hours of operation. The chart below indicates what applications/petitions are experiencing a delay and the approximate dates the mailroom is currently processing. We regret any inconvenience this situation has caused you. Please allow 5 - 7 business days from the date shown to actually receive your notice in the mail.

If your check or money order has not yet been cashed, please do not cancel it. Canceling your payment could result in the amount being

Form Type	Current Processing Date
I-765	7/-09-01
I-129	8-14-01
I-130	8-6-01
I-140	7-17-01
I-526	0
I-131	7-9-01
I-90 (ALL)	7-26-01
I-102	8-8-01
I-212	0
I-360	7-9-01
I-485	6-28-01
I-539	7-18-01
I-694	0
I-751	7-9-01
I-817	7-9-01
I-824	7-18-01
I-881	0

processed as a bounced check and you may be issued a bill automatically with a \$30.00 processing fee.

## Global Marketplace

from page 1

rules; freedom to choose one's arbitrators, governing law and place of arbitration; and a flexible, informal procedure, which is often more conducive to settlement and avoids the delay, uncertainty and unpredictability of litigation in foreign courts.

The increased use of alternative dispute resolution in the U.S. and around the globe has mirrored the development of the web as a communication and e-Commerce tool and the development of regional trading agreements and economic unions throughout the world. This discourse will focus on the growth of ADR in the global marketplace and the challenges it faces. While I write about the experience of the American Arbitration Association (AAA), it is with the understanding that the AAA, as one of the largest ADR providers, generally mirrors trends across the field as a whole, and is reflected in other institutions and dispute resolution providers.

### Growth in International ADR

When we talk growth in the use of ADR both in the United States, and indeed around the world, the logical place to start is with case filings for arbitration and mediation. If the increase in caseload at the AAA is, as we believe, a valid indicator, the use of ADR is increasing at very high rates. The American Arbitration Association has administered over 1.7 million disputes since its establishment seven decades ago. However, the fastest growth has come in the last 5 years. From 1986 to 2000, the number of cases handled by the AAA more than quadrupled, from 46,683 in 1986 to over 198,000 in 2000. This trend reflects the growth of ADR across the field. Also noteworthy, is the growth in international cases filed over the same period of time. The American Arbitration Association's International Centre for Dispute Resolution (ICDR) has seen a growth from 180 international cases in 1995 to 510 in 2000 – an increase of more than 200%. The Centre is currently on pace to have over 600 cases filed in 2001, one of the largest caseloads of any arbitral provider. To keep pace with this growth, the Association has recently

opened our first European office in Dublin in addition to further expanding our New York Centre.

Today, nearly two-thirds of Fortune 500 companies are including arbitration clauses and other ADR mechanisms in their cross-border contracts. Why? The reasons are both compelling and straightforward. These multinationals seek to operate in the context of a familiar, reliable, and enforceable contract dispute resolution system, which has proven itself to lead to binding and rapid settlement of international business disputes. These multinationals prefer to avoid the recourse of expensive litigation in an unfamiliar and potentially unpredictable venue or court system. They have learned that, when entering into agreements with their international counterparts and governmental entities, incorporating the use of arbitration clauses and other ADR strategies translates into good risk management. I say arbitration here because it presently rules in international commerce by tradition and in the belief that cultural and language differences made mediation or conciliation more difficult in the past.

The growth in transactional global reliance on arbitration and, to a lesser degree, mediation is far from being just a U.S. phenomenon. It is also occurring in every corner of the world. The AAA is affiliated with an international network of over 70 organizations and has entered into strategic relationships with 53 arbitral institutions involving 39 countries in Africa, Asia, Eastern Europe, Russia and the former republics, the Middle East, Central and Latin America and the Caribbean. In the last several years, we have also played a major role in launching a new international arbitral institution with the American Chamber of Commerce in Santiago, Chile and are assisting in the building of a commercial arbitration infrastructure in Argentina and Brazil.

### Enforceability of the International Arbitral Award

At the root of arbitration's broad acceptance in transnational dispute resolution is the near universal enforceability of an arbitration award. In a dispute involving companies in different countries which have ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (a.k.a. the New York

Convention) and there are 120 of them that have done so, enforcement can be easier to achieve than a judicial judgment in which the court has ruled against the foreign party. The New York Convention gives them the same force and dignity of national courts' awards. Many of the same countries (mostly in Latin America) and some that are not covered by the New York Convention (e.g. Brazil) are also signatories to the Inter-American Convention on International Commercial Arbitration (a.k.a. the Panama Convention), which is modeled after the New York Convention. The applicability of the Inter-American Commercial Arbitration Commission's (IACAC) Arbitration Rules of Procedure that may supplant those local national laws in Latin America and other countries, which do not enhance an expedient arbitral process make the Panama Convention attractive.

The U.S. courts, led by the Supreme Court and the 2<sup>nd</sup> Circuit Court of Appeals, with rare exception, have expanded the role for international arbitration. In almost every instance, the courts have strongly favored arbitration. With this support, attorneys are rapidly drafting contracts in response to these developments and the use of arbitration agreements in contracts is becoming increasingly attractive. Parties to international contracts can take comfort in the fact that the American courts will enforce agreed upon forum selection and ADR provisions in cross-border contracts. In spite of this, a couple of challenges exist to the wholesale adoption of ADR in a number of overseas countries.

One is the enforceability of arbitral awards. While most countries are parties to the New York Convention, some nations, such as Brazil and some emerging African countries, are not parties to the Treaty. This places a serious impediment to the adoption of ADR techniques by companies conducting international business in such nations, as certain countries have made a reservation requiring reciprocity to the New York and Panama Conventions.

A similar concern arises with countries that are parties to an established Convention but might not have the political stability or judicial impartiality to promote the use of arbitration.

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## Global Marketplace

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This can take the form of a country that either has too much control over the process (usually non-Panama Convention signatories) or simply will not acknowledge or enforce a pre-dispute contractual agreement to arbitrate. Both of these practices may influence a lack of confidence in the enforceability of arbitral awards in those countries. The good news is that the U.S. State Department is reporting an increase in request for ADR training from countries in Africa and other parts of the world that recognize it as a necessity for participating in the global market.

### Drafting International Agreements

As noted above, in the global marketplace arbitration is the international forum of choice. To ensure that multinational companies will not wind up litigating in a foreign court, it is important for transactional attorneys to incorporate appropriate ADR clauses into cross-border contracts. Since the parties control the arbitration process, when drafting an international arbitration agreement they can dictate the power of the arbitrator, what law will govern, what rules will apply, what remedies are available and many other procedural aspects of the process. Attorneys also are encouraged to designate in the contract the rules under which the arbitration agreement will be administered, the governing law of the contract and to select an internationally recognized institutional appointing and administering authority such as the AAA. In doing so, International parties can avail themselves of the AAA's International Arbitration Rules and supplementary procedures that are closely modeled after the UNCITRAL Model Arbitration Rules. In addition to these rules, the AAA also administers cases under the Commercial Arbitration and Mediation Center for the Americas (CAMCA) Rules (Mexico & Canada); the Rules of the Inter-American Commercial Arbitration Commission (IACAC) for international cases conducted in the United States (OAS States), and the AAA's own Commer-

cial, Patent & Intellectual Property, Construction and other specialized arbitration rules.

Despite the existence of these rules, challenges to appropriate drafting of ADR clauses in international contracts do exist. Firstly, the insertion of an ADR clause into international contracts is commonly an afterthought because those negotiating the deals are generally focused on the economic terms of the deal. The ADR clause is often a last minute detail. Secondly, parties may not give proper consideration to drafting an ADR clause because they are reticent in recognizing the potential for future disputes and fear the reaction of culturally dissimilar business partners. As a consequence, when an ADR clause is used it is often a "generic" ADR clause with no international administering authority, which may not always be the most appropriate for the companies, the business deal being consummated or the countries involved.

Another issue that creates a barrier to effective clause design is the philosophical separation that many times exists between the commercial transactional lawyers drafting the contracts and the litigators that have to deal with the post-dispute clause language. Any lack of communication between the transactional attorney and the litigators, who might try the arbitration case, leaves many open procedural and legal questions that could have otherwise been resolved. In the absence of post-dispute agreement by the parties, the arbitrators, local laws or the applicable default rules of procedure will decide contractual shortcomings that could have been dealt with in the proper construction of the ADR clause in the pre-dispute contract.

### The Role of Culture

Another challenge to the wide spread adoption of the full ADR "tool kit" is that the global market is still very focused on arbitration as most international contracts that do include ADR clauses refer to arbitration as the sole alternative dispute resolution process. The growth of mediation as a first step has been cautious in the international context, as multinational companies have been slow to incorporate mediation and

other alternative dispute resolution techniques into their contracts and processes upfront.

Acceptance of alternative dispute resolution techniques may also relate, in part, to the culture of the countries involved, and their approaches to conflict and decision-making. Individualist values, typically seen in the United States, promote a culture and resulting legal system where a win-lose mentality towards the resolution of disputes exists. In this cultural context, dispute resolution techniques of any kind (ranging from processes to identify problems before they turn into disputes through to litigation) are accepted as a fundamental part of the process of doing business. In many parts of the world, there are numerous examples of neighboring countries that may have long standing political and economic disagreements and cultural clashes that make it difficult to accept countrymen from those other countries on panels or even agree to arbitrate a dispute in a particular locale, language or under a set of specific rules.

In other countries where a more "collective" approach is taken, consensus building is more common and reliance upon formalized dispute resolution techniques is less frequent. The overriding philosophy is less adversarial and attempts are usually made to prevent issues from escalating into disputes. Acceptability and adoption of ADR processes in these countries can be enhanced with system or process designs such as mediation or conciliation, that take into account the collective approach to disputes almost certainly evident in particular countries. It is also important that ADR providers take these factors into consideration when providing neutrals to hear disputes.

### ADR Providers

Domestic reliance on country-specific ADR providers is another factor which may inhibit wide spread acceptance and adoption of uniform international ADR rules, procedures and institutional providers such as the American Arbitration Association (AAA). In many countries, local administrative bodies are relied upon to conduct the bulk of arbitrations and mediations, and knowledge of the

AAA and other arbitral provider's rules, procedures and administrative services are limited. This is an educational dilemma, which concerns all major ADR providers in extending their services to these emerging nations and economies.

In addition to this traditional reliance on local bodies, many parties to international disputes also adopt the "ad-hoc" method where the United Nation's UNCITRAL proceedings are adopted and no administrative body is predetermined. It is possible under these procedures for disputants to completely circumvent administrative bodies if they have access to other sources of neutrals. In these circumstances, education is the key to increasing the profile of the international processes and institutions that are available to disputants. There is an important role for an independent and reliable administering and appointing authority like the International Centre for Dispute Resolution in moving the process along in the face of a recalcitrant party. It is also important if the "institutionalization" of ADR as a dispute resolution mechanism is to occur worldwide, that counsel impress on their clients the importance of having a neutral international body administer the process to maintain its integrity and reduce the fear of nationalistic bias. Again, these are issues best handled in the pre-dispute drafting of the ADR clause and contract.

### **Ensuring Neutrality**

One of the chief attractions of arbitration is that the process can be structured to reduce the fear of nationalistic bias, often a concern in foreign courts. This fear is as valid for American firms as it is for foreign firms who may have concerns with litigating in the American system of jurisprudence. While arbitrations are typically held under the arbitration law of the chosen place of the arbitration hearing, the arbitration may occur in a third country or be conducted by neutrals from third-party nations.

Pivotal to the success of international arbitration and the subsequent confidence the parties have in the process is the quality of the neutral arbitrator. To ensure the highest quality of international neutrals worldwide with expertise across all

industries and fields, the AAA reviews carefully each individual's credentials, the extent of his or her specific industry expertise, prior arbitration experience, and demonstrated acceptability. Their decisions and awards are binding and are not modified or challenged except by mutual agreement of the parties.

### **Responding to the Growth**

This growth in international arbitration and its attendant needs prompted the AAA to create an International Centre for Dispute Resolution in New York a few years ago to handle a growing caseload, with claims up to a billion dollars and involving parties from more than 72 countries from Kazakhstan to Singapore. Although cases are administered in New York, the locale of the hearing can be anywhere in the world. The International Centre is a truly neutral forum, and in an increasing number of cases administered, neither of the involved parties is from the United States.

In creating the International Centre, one of our goals was to ensure greater sensitivity to cultural and legal differences among the parties. To this end, the International Centre is staffed by multi-lingual attorneys experienced in the administration of the many different rules applied to international arbitration. This multi-lingual capacity enables us to have greater success in encouraging parties to try mediation. Thus breaking through the language barrier.

Additionally, the AAA has created the first entity of its kind in the world – the Global Center for Dispute Resolution Research, conceived as the principal research institute devoted to understanding the development and utilization of ADR services on a global basis. The proponents of this center realized that growth in international ADR is occurring without a corresponding growth in fact-based knowledge in the field, as there is simply no data. Presently available data, to the degree that any exists, focuses primarily on mediation and arbitration in the construction, labor, insurance and securities industries in the United States. Ironically, there is little knowledge of how they are used outside of the United States at a time when world trade is accelerating. Existing anecdotal evidence about the effectiveness of ADR methodologies is not enough

for rigorous research upon which a future course can be based.

### **The Future of International Arbitration**

As the velocity and volume of online commerce increases, and business is transacted in the context of marketplace where geography and borders become immaterial, technology will reduce the time and effort needed to communicate, diagnose problems and resolve conflicts. By relying on a solid foundation of recognized systems for the resolution of international disputes, including web-based filings and deliberations, international trading partners can conduct business and know that, if a dispute arises, they will be able to resolve the conflict without resorting to litigation. More importantly though, while contributing to the smooth flow of international trade they also will have an opportunity to salvage their valuable business relationships.

Avoiding the uncertainty, delay and unpredictable nature of foreign court systems is a critical concern for every company involved in cross-border business. Through arbitration, and to a lesser extent mediation, disputing business partners can resolve disputes privately in a cost-effective and timely manner through a reliable forum conducive to the needs of a fast-paced global marketplace. In a worldwide marketplace, successful businesses recognize the value of fostering an environment in which controversies are anticipated, managed and resolved in an impartial, timely and cost-effective manner.

\* \* \*

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search for this cure is narrowed to a species: the red bromeliad. Dr. Campbell and Dr. Crane fervently ransack the surrounding forest appropriating thousands of the bromeliads, thinking they are the source of the molecule. They ran laboratory experiments on each sample prepared from each of the thousand plants. The indigenous people of the area helped prepare the samples since they are familiar with the plant, which they use for local consumption. All the tests of the samples failed to produce the curing molecule. The cure was not in the bromeliad, it was in the ants that lived in the roots of the bromeliad.

Unfortunately for both, the research doctors and the indigenous peoples, a fire destroyed not just the on-location laboratory and the village, but also the immediate surrounding forest where the red bromeliad primarily was found. The doctors and the indigenous people must now move through the rainforest in hopes of finding another area in which this plant grows.<sup>2</sup> The story may be fictional but shows a very important point that often gets overlooked: what if the research had been fruitful? What rights would remain with the indigenous peoples or country where this local flora and fauna was found once the foundation scientists obtain a patent for the molecular structure of the substrate?

These are the questions posed today in a system where a *bundle of rights* provided in an intellectual property protection scheme may not be sufficient to protect indigenous peoples like those in the Medicine Man<sup>3</sup> story. The rights herein concerned with are: traditional knowledge and indigenous heritage. This piece attempts to describe the intellectual property rights scheme that has developed and how it has failed to address the protection of indigenous knowledge.<sup>4</sup> Part II deals with the conflicting claims that plague the discussion of protection for indigenous or traditional knowledge. Part III addresses the history and the emergence of the existing protection schemes, especially in the arena of biotechnology, and the difficulties in

protection through an international intellectual property rights scheme of these biotechnology resources due to inherent characteristics of traditional knowledge. It also addresses the emergence of efforts to deal with the indigenous or traditional knowledge through a UN Human Rights system. Part IV, states a current prediction on how the Human Rights efforts will fare for future claims of indigenous knowledge protection. Finally, Part V discusses proposed alternatives to the framework envisioned and improvements in the current protection framework in the area of biodiversity.

### Conflicting Claims

At the extreme ends of the controversy, indigenous peoples views of the existing protection scheme is at odds with the views of the multinational corporations. In the middle of the controversy is the view of the governmental bodies overseeing the allocation of these rights. These groups have the difficult task of establishing a delicate balance between the many competing interests.

### Indigenous Peoples Claims

Their poignant view is that there is piracy of traditional knowledge. Indigenous peoples claim that existing intellectual property protection schemes do not address the subject matter of traditional knowledge. In order to appreciate the merits of their claims, consider the following two cases:

**“Neem tree patent”:** The extracts of the neem tree seed have been widely used in Asia and Africa for medicinal and pesticidal purposes.<sup>5</sup> The extract was patented<sup>6</sup> in the U.S. for the qualities of controlling insects and fungi in crops.<sup>7</sup> The finding that such use of controlling pests can be patented is contrary to U.S. patent law provided such use is not “new”.<sup>8</sup>

Collection of the *Maytenus buchananii*: The National Cancer Institute (NCI), fueled by the indigenous knowledge of the Digo peoples, indigenous to the Shimba Hills of Kenya, collected 27.2 tons of the plant from a forest reserve.<sup>9</sup> The plant has been used for years by the Digo for treatment of cancer.<sup>10</sup> The appropria-

tion has been accomplished without the consent of the Digo nor has NCI acknowledged the origin of the knowledge or its useful properties.<sup>11</sup>

To better understand the claims of the indigenous peoples, one needs to understand how the present intellectual property rights system has failed them. The beginning of this process is defining the subject matter of traditional knowledge and how it fits in the scheme of the present intellectual property system. Traditional knowledge can be defined by its general characteristics: creation through a long period of time which has been passed down from generation to generation; new knowledge is integrated to the existing as knowledge is improved; improvement and creation of knowledge is a group effort; and ownership of indigenous knowledge varies between indigenous peoples.<sup>12</sup> As will be discussed further, these general characteristics help the framework analyst to categorize these rights outside of the intellectual property right’s scope of protection.<sup>13</sup>

The last step is trying to categorize indigenous knowledge into patent law subject matter in order to realize how ill-fitted is intellectual property law to the needs of the indigenous peoples. Much of the recent debate in this issue has emerged from discussion on the viability of extending current intellectual property rights protection systems to traditional knowledge.<sup>14</sup>

First, the main purpose of a patent protection system is to encourage innovation and promote knowledge.<sup>15</sup> Traditional Knowledge however, is shared and transmitted throughout the culture for non-commercial uses.<sup>16</sup> In essence, this knowledge may be “sacred” and as such is transmitted among kin, with the purpose of empowering the local community and the environment in which the particular indigenous group lives.<sup>17</sup> Second, inventions protected by patent law must be new, non-obvious and useful.<sup>18</sup> Indigenous knowledge may be an invention but is one that has passed down from generations and therefore may not meet the level of novelty needed for patent protection. Indeed, “patents only apply to ‘new’ knowledge... [and therefore patents] are not useful for protecting traditional or ‘old’ knowledge.”<sup>19</sup> Moreover, patents are limited in duration

and are vested on “inventors.”<sup>20</sup> This “inventor” is rewarded with an exclusive right for a limited time.<sup>21</sup> Two problems arise regarding indigenous knowledge. First, there is difficulty in finding the true “inventor” or owner of a patent originating in indigenous knowledge since this knowledge is communally held and thus not attributable to a single person.<sup>22</sup> Second, the exclusive right of a patent is granted so the owner of the patent may use these negative rights to gain commercial gain and reap the rewards of its genius.<sup>23</sup> Third, compare the notion that patents do not give the inventor positive rights to the object of the patent nor does it proscribe rights to economic returns<sup>24</sup> with the issue that less developed countries have very few individuals that may be capable of enjoying such benefits of a patent system due to general lack of education and financial resources.<sup>25</sup> This translates to minimum use of this “Western” style of patent protection by less developed countries,<sup>26</sup> which in turns leads us to infer that such patent protection, as it exists today, is ill-fitted to the social and economic conditions of the indigenous populations that are precisely in need of a system of protection.

### **Multinational Corporations: Pharmaceuticals**

Developed nations and patentees argue that the scope of protection in an intellectual property scheme is needed for enhancing health product development, medicines, and encouraging research and development in potential cures for diseases.<sup>27</sup> Additionally, medical research is extremely expensive and unpredictable considering that many species have never been studied.<sup>28</sup> In essence, the use of traditional knowledge not only helps in encouraging medical research, but is also useful for increasing its efficiency, thus lowering the costs and increasing the predictability.<sup>29</sup> However, even with the available intellectual property protection in major markets, the United States still labels piracy as one of its greatest obstacles in developing global intellectual property protection comfort.<sup>30</sup> With existing patent law protection, they argue, the entire world community benefits by encouragement of disclosure of inventions and promotes the knowledge and in-

novation needed to advance in technology and cure diseases.<sup>31</sup> These rights must be exclusive for a long period of time in order for the investment in research and development can be recovered in the marketplace.

### **Governmental Entities and National Organizations**

The World Intellectual Property Organization (WIPO) is one of the entities, more precisely an agency of the United Nations,<sup>32</sup> in the “middle” of the controversy. With a role in the international community to promote and protect intellectual property throughout the world in collaboration with other international organizations it has failed to meet the expectations of the indigenous peoples while regarding highly the interests of the developed nations and its corporations. Another international player, the World Trade Organization (WTO), which administrates the Trade-Related Aspects of Intellectual Property (TRIPS), is involved in the conflict of protecting developed nation’s intellectual property rights and the interests of developing countries and other groups who fear this protection will be economically detrimental and culturally devastating.<sup>33</sup>

WIPO has recently begun to explore the indigenous peoples claims with the fact-finding missions deployed during 1998-1999. These findings are just beginning to come out as a result of a program to identify key areas where “economic, technological, cultural and social change may impact on the IP system.”<sup>34</sup> The group of indigenous peoples has been identified as a potential beneficiary of such an objective due to the “little or incomplete exposure to the IP system.”<sup>35</sup>

### **Past Trends in Decisions**

This section addresses each of the protection frameworks available for indigenous knowledge, beginning with intellectual property law regimes.

#### **1. WTO: TRIPS and Article 27**

Under the GATT forum, the Uruguay Round beginning in 1986 resulted in the signing of the Trade Related Aspects of Intellectual Property Rights (TRIPS), which “institu-

tionalized the international laws of intellectual property rights”.<sup>36</sup> Under this agreement, patent law minimums were enacted.<sup>37</sup> Article 27 is particularly relevant as it defines the subject matter of patentability.<sup>38</sup> The language used in the treaty, “patents shall be available for any invention” that comport with the novelty, non-obviousness and utility requirements imparts a criteria of patentability subject matter so general it can be said to cover human altered biological matter.

However, this protection fails to protect the indigenous knowledge of which we are concerned.<sup>39</sup> As already stated, indigenous knowledge would not meet the novelty requirement as it is knowledge that is passed down through generations and shared with other communities.<sup>40</sup> It also fails to meet the non-obviousness requirement.<sup>41</sup> In addition, it is doubtful that plant variety innovations and the related knowledge are sufficiently inventive for this traditional knowledge to meet the criteria of non-obviousness of patent law and TRIPS.<sup>42</sup>

The latest attempts to draft additional guidelines and principles have been undertaken by the WTO.<sup>43</sup> However, many concerns were voiced during the Seattle, Washington meeting of 1999, regarding the participation of pharmaceuticals and other corporations dominating the WTO<sup>44</sup> which together with the powers of WTO, has effected imposed corporate-managed trade rules on the indigenous communities.<sup>45</sup> These concerns were voiced in the Indigenous Peoples’ Seattle Declaration,<sup>46</sup> with allegation of “theft” and “patenting” of the biogenetic resources rendered permissible under the TRIPS agreement.<sup>47</sup> The pharmaceutical corporations that pushed for this type of life-form protection have argued that without such protection, piracy of the exported products would deter investment in research since the costs of development would be recovered.<sup>48</sup> The U.S. delegates have even supported this view and have asked developing nations opposed to TRIPS to open the doors and allow bio-prospecting and contracts between the corporations and the countries.<sup>49</sup> The TRIPS controversy remains.

#### **2. UN: Convention for Biological Diversity**

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Indigenous knowledge has other characteristics related to environmental evolution that fall under the scope of the Convention for Biological Diversity (CBD).<sup>50</sup> Article 8(j) provides a guide to supply each nation with the power to legislate,

respect, preserve and maintain knowledge, innovations and practices of *indigenous and local communities* embodying traditional lifestyles relevant for the conservation and sustainable use of *biological diversity* and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices . . . .<sup>51</sup>

The term “biological diversity” is defined in Article 2(1) of the CBD as “the variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part. . . .”<sup>52</sup> From this definition follows that protection for genetically altered microorganisms are not expressly excluded from being produced, and in fact protection may be even encouraged in order to *preserve* the knowledge. Article 8(j) is problematic in establishing protection for indigenous knowledge, precisely because it does not address directly the conflict of indigenous knowledge in biological diversity and the intellectual property rights that could be asserted under TRIPS and Western style patent law.

First, the level and form of protection is left for each of the states to do.<sup>53</sup> Moreover, there is an argument that Article 8(j) goes so far as to not proscribe any measures of protection.<sup>54</sup> Second, Article 8(j) only encompasses preservation, respect and maintenance of knowledge and not any guarantee of rights for the indigenous peoples.<sup>55</sup>

Because of the difficulty in fitting indigenous knowledge in its totality within the scheme of intellectual property rights in combination with the CBD, expansions in the current

methods of protection have been suggested. The recent fourth Conference of the Parties (COP-4) recognized the “importance of indigenous and local communities embodying traditional lifestyles for the conservation and sustainable use of biological diversity.”<sup>56</sup> To advance this idea, it welcomed the cooperation of the World Intellectual Property Organization (WIPO) in its understanding of Article 8(j) of the CBD and it further established the Working Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity (Workgroup).<sup>57</sup> This Working Group met for the first time in Seville during March 2000 to address the applicability of legal regimes available for protection of knowledge related to biological diversity.<sup>58</sup> The result of this first meeting is encouraging and it aides in promoting cooperation at the international level in exploring different avenues for protection. However, the discussions resulting from the note prepared by the executive secretary point out to recommendations of finding harmony in the different existing levels of protection.<sup>59</sup> While these efforts are being explored by this Workgroup and its principal actors, the recognition of a need for protection is a big step in finding harmony, yet the level of protection sought after through Article 8(j) of the CBD is limited to biological diversity related knowledge.

### 3. WIPO and the Fact Finding Missions

During the 1998-1999 biennium, WIPO undertook fact-finding missions designed to seek and analyze the needs and expectations of indigenous peoples with regards to protection of their traditional and indigenous knowledge.<sup>60</sup> These missions concluded that traditional knowledge was considered to be “*per se* excluded subject matter” for intellectual property protection.<sup>61</sup> It was also found that even if some forms of traditional knowledge can be protected under intellectual property laws, the enforcement regimes are not sufficient to protect this knowledge fully.<sup>62</sup> The new biennium of 2000-2001 “is focused on the development of practical activities designed to test current approaches to, and future possibilities for, managing the interfaces between intellectual property protec-

tion and TK.”<sup>63</sup> This progress is much needed but may still fall short of the expectations of traditional knowledge holders since the recommendations would not fully support protection of all traditional knowledge.

### 5. UN: Human Rights System Recognition

Prompted by the concerns of the indigenous peoples that recognition of traditional and cultural rights was needed in order to “preserve and develop their own cultures and diverse cultural heritage,” the United Nations began official efforts to establish a forum for voicing these concerns and a search for a scheme of protection.<sup>64</sup> These efforts led to the development of *Principles and Guidelines* for the protection of the heritage of indigenous peoples.<sup>65</sup> Under these *Principles and Guidelines*, the scope of protection extends to indigenous peoples and their heritage, and the indigenous knowledge protected is defined through the term “heritage.”<sup>66</sup> This heritage encompasses, however broadly, “property” which would be consistent with subject matter enjoying possible protection in an intellectual property rights scheme, in particular patent protection.<sup>67</sup>

In contrast with an intellectual property rights system, the rights under the *Principles and Guidelines* are not asserted or proscribed under a specific legal entity, are not limited in terms of duration, and have potentially unlimited subject matter protection. These distinctions are important because, as previously stated, many aspects of indigenous knowledge cannot be categorized under a patent law protection subject matter.<sup>68</sup> Also, the notions of territoriality and sovereignty inherent in a traditional legal system limit the scope of enforcement and recognition of holders of traditional knowledge that would otherwise be recognized through a worldwide human rights system. Under a Human Rights systems, countries would be required compliance, as a *de minimis* threshold, with the national legislation of other countries where the traditional knowledge comes from.<sup>69</sup>

### IV. Prediction

As already expressed in Part III, with the current protection systems attempted through the Convention on Biological Diversity (CBD), Intellectual Property Rights system and

Human Rights Recognition scheme, there is still a gap of unfairness that afflicts the indigenous people. They all fail to give substance to a framework of protection that will provide indigenous peoples with significant redress. The issue up until now has been in recognizing the rights of the owners and dissipaters of traditional knowledge. However, there is still a need for further enforcement and more narrowly tailored approach to protection that will provide indigenous peoples with an adequate framework in which to situate their knowledge.

In short, WIPO will need to address the plight of the indigenous peoples of the world and a reconciliation will have to take place between all the different alternatives for protection that will eventually lead the leaders of this organization to develop a custom set of principles that will fit the scope and purpose of traditional knowledge. These principles, in my humble opinion, are better suited for a *sui generis* framework. Such a proposal is discussed in the next section.

### **Appraisal of Alternatives and Recognition in the Global Community**

It has been suggested that in order to enhance innovation incentives in less developed countries, a new type of patent-incentive system is needed to help commercialize foreign patents not being used.<sup>70</sup> The suggestion is one that brings about the notion that an intellectual property rights protection system modeled after the Western, US, model should be modified into a more "open-minded" system that will take into consideration less-developed countries and indigenous peoples' socially relevant criteria.<sup>71</sup> Another suggestion given is to provide a widely recognized general registration system under which indigenous people can record their findings and knowledge such that under patent law, these publications can be recognized as experimental uses for purposes of barring others from patenting the subject matter.<sup>72</sup>

However, the most sensible alternative is a *sui generis* system of rights protection specifically for traditional knowledge (or heritage) as defined in the *Principles and Guide-*

*lines* discussed in part V of this article. The argument has been made at least for the area of biotechnology and biodiversity, where a patent law type of protection is still needed.<sup>73</sup> The proposed *sui generis* system would be one which would draw from the existing patent protection laws, proposed Human Rights *Principles and Guidelines*, WIPO's fact-finding missions, customary principles, and indigenous knowledge characteristics in order for protection to be comprehensive and useful.<sup>74</sup> At a minimum, such provisions should include:

Subject Matter definitions using the *Principles and Guidelines'* definition of indigenous/traditional knowledge to ensure the inclusion of know-how, farming techniques and breeding technology. The framing of the subject matter definition needs to pay special attention to the phraseology of "rights" since this concept is not inherent in many social systems.<sup>75</sup> It also needs to be vast enough to protect the wide range of both tangibles and intangibles that may encompass the concept of "heritage."<sup>76</sup>

Duration of protection limitless with regards to indigenous peoples as holders of the knowledge subject of protection.

Automatic expiration on assignments or licenses to third parties at which time such third party would have to obtain *consent again* for the commercialization and dissemination of knowledge.<sup>77</sup>

Owner/s of knowledge to be bestowed on a clan, community, individual, or another person in the capacity of representative of a community such that patent protection laws in other countries can recognize "inventors" in such persons. In addition, inventorship could be recognized in circumstances in which there is a "chain of inventors," that is, inventors in a generational chain of transmission and the chain of development and marketing of these products.

Arbitration committee available as a forum for indigenous peoples and third parties when negotiating agreements.

Compulsory licensing or other just remedies available for takings

without compensation.

The reasons or motivations for adopting a special international convention on the subject can be listed. First, there is much subject matter that needs protection; second, there is a need for conservation of this knowledge; third, there is much increased attention to this subject evinced by the *Principles and Guidelines*; fourth, the fear of loss of this knowledge is imminent; and fifth, environmental concerns bring this subject to the forefront in that preservation of this knowledge is preservation of biological diversity.<sup>78</sup>

It has been suggested that a recognition scheme that attempts to categorize indigenous knowledge in terms that suggest "ownership" and commercialization is inapposite to the very idea of what indigenous knowledge stands to represent.<sup>79</sup> However, it seems that without an enforcement mechanism in which this knowledge can be reduced to a practical value understood by both Western legal systems and others, there will be little effect to the enactment of this recognition system.

Such a system would not be complete of course without a public awareness in understanding the importance, impact, and need for preserving indigenous culture and to reduce the incidence of appropriation of heritage.<sup>80</sup> Not only would the indigenous peoples would need to be appraised of their rights and remedies,<sup>81</sup> but also the world in general.

In conclusion, although an intellectual property rights scheme seems wholly inconsistent with the views of indigenous peoples, there could be a *sui generis* system derived from this intellectual property system that would fit the needs of the indigenous peoples. The need for dialogue is one of the most important aspects of developing this *sui generis* system. This dialogue must be engaged in both, at an international level and at a national level to ensure the voices of the indigenous peoples are heard. Pharmaceutical corporations seeking to develop technology based on indigenous knowledge would still benefit from such, however, the economic benefits and the credit for the source should be awarded justly. In addition, the safeguards on biodiversity, would further protect the disappearance of

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plant variety that threaten the world community. It is important after all to recognize that nature and its derivatives are for the community to enjoy, not just for a few who can afford it.

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### Endnotes

<sup>1</sup> MEDICINE MAN (Buena Vista Films 1985). The following story is taken directly from the plot of this motion picture as it relates to the issue of a pharmaceutical company's research for a cure and the involvement of indigenous people.

<sup>2</sup> The story in Medicine Man is illustrative of the many of the issues accosting the search for medicinal purposes in indigenous fauna and flora in indigenous environments. This article examines the issue of medicinal purposes found in fauna and flora that can be synthesized and therefore once the molecular structure is found, such is appropriated by researchers to manufacture it in a lab.

<sup>3</sup> See *supra* note 1.

<sup>4</sup> The difficulties of defining "indigenous peoples" are not addressed in this article. However, discussions as to categorization and definition of this class has been the subject of many legal discussions. See e.g. S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 75, 77-81 (1996); JOHN MUGABE, *INTELLECTUAL PROPERTY PROTECTION AND TRADITIONAL KNOWLEDGE* 2 (1999) (using the definition expressed by the International Labor Organization); Stephen B. Brush, *Whose Knowledge, Whose Genes, Whose Rights*, in VALUING LOCAL KNOWLEDGE, INDIGENOUS PEOPLE AND INTELLECTUAL PROPERTY RIGHTS 4-6 (Stephen B. Brush & Doreen Stabinsky, eds. 1996) (attempting a definition of indigenous knowledge and later acknowledging the difficulty in defining indigenous peoples due to the different cultural makeups involved); Russel Lawrence Barsh, *Indigenous Peoples in the 1990s: From Object to Subject of International Law?*, 7 HARV. HUM. RTS. J. 33 (1994); Russel Barsh, *The World's Indigenous Peoples*, at <http://www.calvertgroup.com/investor/ind-sri-know-ib-ip-barsh.html> (last visited Aug. 24, 2000); Benedict Kingsbury, "Indigenous Peoples" in *International Law: A Constructivist Approach to the Asian Controversy*, 92 AM. J. INT'L. L. 414; Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 93-128 (1999).

<sup>5</sup> See GIRSBERGER, *supra* note Error! Bookmark not defined., at 91 n.320. See also

Downes, *supra* note Error! Bookmark not defined., at 280; Emily Marden, *The Neem Tree Patent: International Conflict Over the Commodification of Life*, 22 B.C. INT'L & COMP. L. REV. 279, 280 (1999).

<sup>6</sup> U.S. Patent No. 5,298,251 (issued Mar. 29, 1994); U.S. Patent No. 5,356,628 (issued Oct. 18, 1994); U.S. Patent No. 5,372,817 (issued Dec. 31, 1994); U.S. Patent No. 5,405,612 (issued Apr. 11, 1995); U.S. Patent No. 5,409,708 (issued Apr. 25, 1995).

<sup>7</sup> See *Environmental Audit*, *supra* note Error! Bookmark not defined.. See also Downes, *supra* note Error! Bookmark not defined., at 280

<sup>8</sup> *Environmental Audit*, *supra* note Error! Bookmark not defined..

<sup>9</sup> JOHN MUGABE, *INTELLECTUAL PROPERTY PROTECTION AND TRADITIONAL KNOWLEDGE* 6 (1999).

<sup>10</sup> *Id.* The plant prescription was focused on "maytansine", produced from the *Maytenus buchananii*, which was believed to treat pancreatic cancer. *Id.*

<sup>11</sup> *Id.* Other NCI efforts to appropriate traditional knowledge in Cameroon and Samoa have been documented with similar results. *Id.* In the case of the bio-prospecting of prostratin, an anti-HIV compound, NCI has begun pre-clinical developments. *Id.*

<sup>12</sup> See GIRSBERGER, *supra* note Error! Bookmark not defined., at 85. See also Rosemary J. Coombe, *Intellectual Property, Human Rights & Sovereignty: New Dilemmas in International Law Posed by the Recognition of Indigenous Knowledge and the Conversation of Biodiversity*, 6 IND. J. GLOBAL LEGAL STUD. 59 1998, for the suggestion of different perspectives of indigenous knowledge for the purpose of extending protection under an intellectual property protection. *Id.* at 77.

<sup>13</sup> *But see generally* Downes, *supra* note Error! Bookmark not defined. (proposing that although IPRs are not suitable for traditional knowledge, IPRs could be seen as a valuable tool for the control the knowledge, share it, and benefit from it).

<sup>14</sup> See Coombe, *supra* note 12, at 77.

<sup>15</sup> See *id.*

<sup>16</sup> See Coombe, *supra* note 12 at 80-81. See also Erica-Irene Daes, *Protection of the Heritage of Indigenous People*, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Office of the High Commissioner for Human Rights, United Nations, ¶ 26-27, (1997) U.N. Doc. E/CN.4/Sub.2/1997/17 for a description of the communal responsibility over the knowledge and how the sale of this knowledge would mean the end the significant meaning of such knowledge to the community.

<sup>17</sup> See BATTISTE, *supra* note Error! Bookmark not defined., at 67.

<sup>18</sup> Article 27(1) of TRIPS; 35 U.S.C. § 101. See Martin A. GIRSBERGER, *Biodiversity and the Concept of Farmer's Rights in International Law* 139 (1999) (discussing the elements of patent protection of article 27 of TRIPS); see also Daes, *Protection*, *supra* note Error! Bookmark not defined., at ¶ 136 (stating the basic requirement of novelty is met only when the subject matter is not found anywhere in the world).

<sup>19</sup> Daes, *Protection*, *supra* note Error! Bookmark not defined., at ¶ 135.

<sup>20</sup> Thomas D. Mays, *Quid Pro Quo: Alternatives for Equity and Conservation*, in

VALUING LOCAL KNOWLEDGE, *supra* note 4, at 267. See also GIRSBERGER, *supra* note Error! Bookmark not defined., at 170 (stating the difficulty of providing patent protection given the requirement of a specific inventor).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 266. See also GIRSBERGER, *supra* note Error! Bookmark not defined., at 170 (citing Stephen B. Brush, *Indigenous Knowledge of Biological Resources and Intellectual Property Rights: The Role of Anthropology*, 95 Am. Anthropologist 653, 663-64 (1993)); Gary Paul Nabhan, et al, *Sharing the Benefits of Plant Resources and Indigenous Scientific Knowledge*, in VALUING LOCAL KNOWLEDGE, *supra* note 4, at 192 (advancing the argument that an individuals can not be authors of ethnobotanical knowledge, neither is a particular group or even living individuals, but rather a chain of people linked through generations of oral transmission and informal experiments).

<sup>23</sup> See Mays, *supra* note 12, at 267 (stating that disclosure of the invention is the *quid pro quo* for the grant of exclusivity).

<sup>24</sup> See David Silverstein, *Intellectual Property Rights, Trading Patterns and Practices, Wealth Distribution, Development and Standards of Living: A North-South Perspective on Patent Law Harmonization*, in INTERNATIONAL TRADE AND INTELLECTUAL PROPERTY 168 (George Stewart, Myra Tawfik & Maureen Irish eds., Westview Press 1994).

<sup>25</sup> See *id.* at 170.

<sup>26</sup> In fact, one study portrayed that over 90% of the unexpired patents in less developed countries are owned by foreigners. See GIRSBERGER, *supra* note 16.

<sup>27</sup> See BÉNÉDICTE CALLAN, *PIRATES ON THE HIGH SEAS, THE UNITED STATES AND GLOBAL INTELLECTUAL PROPERTY RIGHTS* 5 (1998). The argument of various "knowledge-intensive" industries, like software, pharmaceuticals, and entertainment, is that such protection is needed to recuperate the costs of doing research and how this would impact future involvement in research expenditures. *Id.* at 14.

<sup>28</sup> BATTISTE, *supra* note Error! Bookmark not defined., at 126.

<sup>29</sup> *Id.* By obtaining knowledge from indigenous communities, bio-prospecting now becomes more accurate in the determination of what species to analyze and for what use.

<sup>30</sup> See *generally*, *id.* The statistics presented by a 1993 report show that \$60 billion annually are lost by entrepreneurs from infringement of intellectual property and losses due to piracy nationwide are estimated at \$200 billion annually. See *id.* at 27.

<sup>31</sup> WIPO, *supra* note Error! Bookmark not defined..

<sup>32</sup> UN CHARTER arts. 57, 63.

<sup>33</sup> Gumisai Mutume, *Finance: Poor Countries Can Benefit From TRIPS Regimes*, Inter Press Service, Aug. 17, 2000 available at 2000 WL 4092438. A report produced by the Institute for International Economics notes that developing countries are initially opposed to intellectual property laws and as they begin to export more innovations their interest in improvement of intellectual property rights increases. *Id.* These concerns of developing nations were voiced at the Seattle WTO conference held in November of 1999. *Id.*

<sup>34</sup> WIPO, *supra* note Error! Bookmark

not defined., at Introduction 2.

<sup>35</sup> *Id.*

<sup>36</sup> RYAN, *supra* note Error! Bookmark not defined., at 1.

<sup>37</sup> GATT: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, April 15, 1994, arts. 27-37, 33 I.L.M. 1125.

<sup>38</sup> Article 27 states as follows: Patentable Subject Matter:

[P]atents shall be available for *any inventions*, whether products or processes, in all fields of technology, provided that they are *new*, involve an *inventive step* and are capable of *industrial application* . . .

*Members may exclude* from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect *ordre public* or morality, including *to protect human, animal or plant life or health or to avoid serious prejudice to the environment*, provided that such exclusion is not made merely because the exploitation is prohibited by their law.

TRIPS, art. 27 (emphasis added).

<sup>39</sup> Daes, *supra* note 16, at ¶ 144.

<sup>40</sup> See GIRSBERGER, *supra* note Error! Bookmark not defined., at 140 (stating that Indigenous knowledge of plant food varieties and their cultivation have been analyzed extensively by this author in light of the TRIPS Agreement requirements for patentability).

<sup>41</sup> *Id.* at 141. See also, *Id.* at 121 for the discussion on how hereditary knowledge would not be protected either under Article 22(1) of the TRIPS Agreement. *But see, Id.* at 129 for the argument that the legal qualifications in Article 27(1) work contrary to the primary purpose of TRIPS, to eradicate discrimination.

<sup>42</sup> GIRSBERGER, *supra* note Error! Bookmark not defined., at 141. See also *id.* at 140 (stating that traditional knowledge regarding plant varieties and biodiversity may not satisfy the requirement of novelty of TRIPS).

<sup>43</sup> See World Trade Organization and Indigenous Peoples. WTO Meeting in Seattle, Washington: November 29-December 3, 1999,

[http://www.ienearth.org/intellectual\\_property.html](http://www.ienearth.org/intellectual_property.html), (last visited March 14, 2001).

<sup>44</sup> Valerie Taliman, Native Peoples protest WTO Activists fear threats to sovereignty, Indian Country Today, at [http://www.ienearth.org/intellectual\\_property.html](http://www.ienearth.org/intellectual_property.html) (last visited March 14, 2001).

<sup>45</sup> *Id.*

<sup>46</sup> Indigenous Peoples' Seattle Declaration, on the occasion for the Third Ministerial Meeting of the World Trade Organization, 30 November – 3 December 1999, [http://www.ienearth.org/intellectual\\_property.html](http://www.ienearth.org/intellectual_property.html) (last visited March 14, 2001).

<sup>47</sup> *Id.*

<sup>48</sup> Miao, *supra* note Error! Bookmark not defined..

<sup>49</sup> Dr. Vandana Shiva, Promoting Biopiracy, Promoting TRIPs Reform: Seattle and the Politics of the WTO, Nov. 16, 1999, at [http://www.ienearth.org/intellectual\\_property.html#biopiracy](http://www.ienearth.org/intellectual_property.html#biopiracy).

<sup>50</sup> U.N. Conference on Environment and Development: Convention on Biological Diversity, May 22, 1992, 31 I.L.M. 818. [hereinafter CBD].

<sup>51</sup> CBD art. 8(j). (emphasis added).

<sup>52</sup> *Id.* art. 2(1) (emphasis added).

<sup>53</sup> MUGABE, *supra* note 9, at 22 (discussing the limitation of Article 8(j)).

<sup>54</sup> *Id.* (establishing that the general and noncommittal language of Article 8(j) was promoted by governments not wanting a strong commitment to protection of indigenous rights).

<sup>55</sup> *Id.*

<sup>56</sup> Sigfried Wiessner, *Indigenous Peoples, in General Developments*, 1999 Y.B. INT'L ENVTL. L. 193, 211 (1999).

<sup>57</sup> *Id.* at 211-12.

<sup>58</sup> *Id.* at 212.

<sup>59</sup> *Id.* at 213.

<sup>60</sup> WIPO, *Summary, Reflections and Conclusions, supra* note Error! Bookmark not defined., at 2.

<sup>61</sup> *Id.* at 8.

<sup>62</sup> *Id.* at 9 (exploring also the usefulness of intellectual property for protecting indigenous knowledge by changing the intellectual property law to accommodate traditional knowledge).

<sup>63</sup> *Intellectual Property and Traditional Knowledge, Innovations and Creativity* (Mar. 14, 2001), at <http://www.wipo.int/traditionalknowledge/introduction/index.html>.

<sup>64</sup> Daes, *supra* note Error! Bookmark not defined., at ¶ 2. Dr. Daes authored this working paper on recommendation by the Commission on Human Rights as Special Rapporteur of the Sub-commission to address the issues of identifying the ongoing problem and to suggest practical measures. This study together with a second progress report published in 1999 (U.N. Doc. E/CN.4/Sub.2/1999/18) prompted the Sub-Commission, resolution 1999/19 of August 26, 1999, to propose a workshop coordinated by the United Nations High Commissioner for Human Rights to consider "future codes of conduct for implementing projects in indigenous communities." Sigfried Wiessner, *Indigenous Peoples, in General Developments*, 1999 Y.B. INT'L ENVTL. L. 193, 200 (1999).

<sup>65</sup> See *Report of the Seminar on the Draft Principles and Guidelines for the Protection of the Heritage of Indigenous People*, Sub-Commission on the Promotion and Protection of Human Rights, 52<sup>nd</sup> Sess., Agenda Item 7, U.N. Doc. E/CN.4/Sub.2/2000/26 (2000), [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.2000.26.En?OpenDocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2000.26.En?OpenDocument) [hereinafter, *Principles and Guidelines*]. This is not the first attempt to recognize the voice of indigenous peoples however. In 1993 an agreement was drafted by the United Nations Working Group on Indigenous Populations reflecting the concerns of over 300 million people around the world considered still indigenous. See Wiessner, *supra* note 64, at 13; see also *Draft of United Nations Declaration on the Rights of Indigenous Peoples* (U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1) [hereinafter *Declaration on Indigenous Rights*].

<sup>66</sup> See *Principles and Guidelines, supra* note 65, at ¶¶ 12-13. Protection for indigenous peoples survival can be thus indirectly

accomplished by the protection of the indigenous knowledge as previously established in the Introduction to Dr. Daes Report on the Protection of the Heritage of Indigenous People in 1997, See Daes, *supra* note Error! Bookmark not defined., at ¶ 1.

<sup>67</sup> See *Principles and Guidelines, supra* note 65, at ¶ 13 for the definition of heritage of indigenous peoples which lists "cultural property" and "all kinds of *scientific, agricultural, medicinal, biodiversity-related* and ecological knowledge, including *innovations based upon that knowledge*, cultigens, remedies, medicines and the use of flora and fauna. . ." *Id.* (emphasis added). See also Sigfried Wiessner, *Indigenous Peoples, in General Developments*, 1999 Y.B. Int'l Env't'l L. 193, 198 (1999).

<sup>68</sup> See Daes, *supra* note Error! Bookmark not defined., at ¶ 141.

<sup>69</sup> See Coombe, *supra* note 12, at 104. The need for a new system of protection for biodiversity had already been contemplated with the Convention on Bio-Diversity (CBD), in Article 8(j). However, the doctrine of territoriality fully impregnates this attempt of recognition for protection and therefore a broader scope of recognition was needed. See *id.* at 101-104.

<sup>70</sup> See Silverstein, *supra* note 24, at 170.

<sup>71</sup> See *id.* at 171.

<sup>72</sup> See Coombe, *supra* note 12, at 113. The bar is recognized under US Patent law since experimental uses protects the subject matter from being exploited by others, that is subject matter is not in public use. See *City of Elizabeth v. American Nicholson Pavement Co.*, 97 U.S. 126, 137 (1877). However, there is a limit as to how long a subject can be under experimentation. *Id.* at 136. See also *Lough v. Brunswick Corp.* 86 F.3d 1113, 1120 (Fed. Cir. 1996) (setting forth additional factors to be considered in determining whether the use is experimental or public use).

<sup>73</sup> See generally Downes, *supra* note Error! Bookmark not defined.; Murashige, *supra* note Error! Bookmark not defined..

<sup>74</sup> As it has been argued that modification of the present intellectual property is not possible and that as a matter of course, we must "stop building castles in thin air." Patel, *supra* note Error! Bookmark not defined., at 319. Patel suggests that before continuing in the development of a new framework of protection, that we abandon the hopes of this possibility and that we recognize the policy considerations behind protection. *Id.* I agree with Patel inasmuch as a modification of intellectual property rights to fit indigenous knowledge is futile. However, much can be learned from the effects of building a system of protection using privatization or rights and privileges and the enforcement means currently existing in an intellectual property rights regime. The problem with using an intellectual property model is not that it does not work, but only that the categories acceptable for protection under it were not created with traditional knowledge or "heritage" in mind. The characterization by Patel of indigenous knowledge as being part of the "common heritage of humanity," *id.*, creates an unworkable solution founded on ideology and not on the reality that this knowledge is science and technology just as much as any discovery

*continued, next page*

## Indigenous Knowledge

from preceding page

made in a research laboratory.

<sup>75</sup> Lyndel V. Prott, *An International Legal Instrument for the Protection of the Intangible Cultural Heritage?*, in *In Einem Vereinten Europa dem Frieden der Welt zu Diensten*, 666 (Claus Dieter Classen et. al. eds., Duncker & Humblot, Berlin 1999). Prott notes that the use of terms “folklore” may be demeaning to some cultures and suggests the use of the term “folklife.” *Id.* The

focus of protection, according to Prott, should be on the “social process” and not in the object or tangible produced by the process, *id.*, since there is disparity between the concepts categories assigned by Western legal systems and the ways of the indigenous peoples. *Id.* at 667.

<sup>76</sup> *Id.* at 668 (noting that intangible cultural heritage includes traditional and oral heritage religion, rituals, designs and themes, music, poetry, drama, dance, styles or dress, crafts, skills, cuisine, tracking and hunting, husbandry, textiles, medical practice, sports and games, methods of conflict resolution, etc. . . ).

<sup>77</sup> Notice that consent would always need to be a predicate to allowing third parties to obtain a patent, copyright or trademark on matter originating in traditional knowledge. Without the original consent, third parties’ use of the knowledge would be in violation of the rights awarded and therefore a valid cause of action for the indigenous peoples and developing countries wanting to contest it.

<sup>78</sup> Prott, *supra* note 75, at 660-62.

<sup>79</sup> See Prott, *supra* note 75, at 684-86.

<sup>80</sup> Githaiga, *supra* note Error! Bookmark not defined., at ¶ 107.

<sup>81</sup> *Id.* at ¶ 108.

# Litigating PRC Disputes in Hong Kong

by Laurence D. Gore, Esq., Ft. Lauderdale

A recent Hong Kong court decision may encourage foreign and local businesses to take proceedings in Hong Kong if they fall into a dispute with a PRC party.

This case involved a Thai seller which sold goods to a Chinese buyer, the goods being shipped from Thailand to China via Singapore.

The Defendant was the Wuzi branch of a substantial state-owned PRC entity which opened a letter of credit on behalf of the Chinese buyer in favour of the seller of the goods.

The seller commenced proceedings in Hong Kong against the Defendant which had a branch in Hong Kong.

The Defendant rejected documents presented under the letter of credit, whilst at the same time forwarding an original bill of lading to its cus-

tommer, the Chinese buyer, enabling it to obtain possession of the goods without paying for them.

The Defendant asked the Hong Kong Court to stop the Hong Kong proceedings by granting a stay on the basis the appropriate forum was the PRC. Although the dispute was more closely connected with Wuzi than with Hong Kong, the seller was able to resist a stay and keep the proceedings in Hong Kong going if it could prove to the Hong Kong Court that as a foreign company it would not obtain justice in the PRC.

In the event, the seller was able to persuade the Court on evidence that there was a risk that it would not receive substantial justice in the PRC. More specifically, the seller’s solicitor contended that the seller would

run up against 3 problems if the Hong Kong proceedings were halted and the dispute decided by the PRC Court. First, fairness before the PRC courts when dealing with a dispute between a state-owned entity and a foreign enterprise; second, difficulties in the enforcement of the judgment; and third, difficulties remitting outside the PRC the proceeds of a judgment made within the PRC.

What makes this decision rather remarkable is that the judge accepted the generic evidence filed by the seller’s solicitors, namely Working Reports of the Supreme People’s Court in 1999, which acknowledges problems in the judiciary including “local protectionism” and in 1998 and 1999 recognizing problems of serious delay enforcing judgments in the PRC.

Since many PRC entities have offices in Hong Kong which gives the Hong Kong court jurisdiction as of right, it may be easier in future to litigate a dispute that has a natural connection with the PRC in Hong Kong rather than in the PRC.

When entering into contracts with PRC organizations you should ensure each contracts include a clause permitting any disputes to be adjudicated in Hong Kong.

If you ever have a dispute or are entering into a new contract with a PRC entity, we have experienced commercial and litigation lawyers who may be able to help you. Please do not hesitate to contact us at [lawyers@angelawangco.com](mailto:lawyers@angelawangco.com), Telephone No.: (852) 2869 7772 or Fax No.: (852) 2868 0708.

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