2015 SPRING ASIA-PACIFIC LAW NEWSLETTER

Message from the Editors:

As spring 2015 comes to a close, we were witness to numerous noteworthy legal developments. This Newsletter is provided as a service to our committee members, other ABA committees, and the public, as a brief update on some of those key developments.

Our Committee is pleased to acknowledge a committee member who has displayed noteworthy service in providing legal services within the Asian Pacific Region. We are proud to Spotlight Robin Gerofsky Kaptzan for her work in the advancement of labor laws in China.

Our thoughts are with Nepal…

On April 25, 2015, Kathmandu, Nepal experienced an epic earthquake, resulting in the loss of over 4,600 lives. In times such as this, we are reminded of a BBC news story reporting on the lasting consequences of the tsunami in Sri Lanka, one year later. A reporter interviewed a child who had experienced the tsunami, inquiring why the child would not start attending school. The young boy said that he was afraid to go to school because he would learn how many of his friends had died. As legal practitioners, we often find ourselves caught between what is right and what is good. In the face of a humanitarian crisis, such as the current, dire situation in Nepal, we believe that we may all agree that what is right, is good. The active engagement and coordination of our committee is made all the more essential in times such as these, to help do what is good and right in the aftermath of calamity.

With our hope for increasing the rule of law in the Region…

Violations of basic justice and acts of violence continue to affect many parts of the APAC Region. The recent acts of aggression against peaceful civilians and children in Peshawar and Karachi, Pakistan serve as just one reminder of the significant work that remains to advance the rule of law in the Region, and the critical role our committee can play in furthering the rule of law initiative.

Justin G. Persaud, J.D., LL.M.
Asma Chandani, J.D., M.B.L.
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After a General Manager of the Shanghai, China foreign invested business lost most of his claims for compensation from his alleged wrongful termination before the Shanghai Labor Arbitration Tribunal, he initiated litigation in the court. In support of his Appeal, the General Manager submitted a “smoking gun” – a document that clearly rendered the Employer 100% liable. In China, it is permissible to submit new evidence when a party has appealed and initiated litigation in the PRC court regarding a labor dispute. The General Manager’s new evidence miraculously supported every claim upon which he had lost at the Labor Arbitration. The outraged Employer, incensed by the fake contract authenticated by the Shanghai company chop (the seal/stamp in China is the equivalent to a signature in most countries), confidently said that the new evidence was a forgery with the chop used without authority and obtained through wrongdoing. The only route to prove the lack of integrity of the document was for the employer to formally test the authenticity of the document. Although forensic tests confirming the date a document was signed (or chopped) have been used in the United States and other jurisdictions for a while, they are rarely used in China. After having the court-imposed equivalent of a forensic test completed, justice was served when the People’s Court of Shanghai Huangpu District rendered a decision smoldering the “smoking gun”.

In China, the equivalent to a forensic test is called an “Ink Test”, which is used to prove the time when a document was printed, chopped or signed. During a dispute, a party has the right to request the authenticity of a document be tested if it claims the document is a forgery. When making the request, a party has the right to specifically identify the goal of the test – signature, chop, ink, print, etc. If the request is granted, the judge then liaises with a Chinese authentication institution approved by the government to conduct such test. Before making the request, we were told that all environmental factors are considered and all possible measures available would be used in order to render the final conclusion. We were told that there was a risk that the test would be inconclusive, although it is rare for documents allegedly signed more than one

\[1\] This article is based on a labor dispute commenced in early 2012 before the Shanghai Labor Arbitration Tribunal. The General Manager alleged wrongful termination and claimed compensation for income, expenses, severance and commission in Shanghai and non-China related compensation. The Employer denied the claims and asserted the General Manager was not entitled to certain compensation requested as he abused the power given by the investor, it was never agreed, and it was non-China compensation. The dispute was tried in the Shanghai Labor Arbitration Tribunal with the Employer effectively succeeding on all financial claims except that the Arbitrator ordered the employee to return to work. This is a right of an employee under the PRC Labor Contract Law, which the General Manager asserted and which the Employer vehemently opposed due to the disruption to the office and fear of the employees. The General Manager initiated litigation in the People’s Court effectively appealing all of the Shanghai Labor Tribunal’s decision and the Employer initiated another litigation to the People’s Court only objecting to the portion allowing the General Manager to return to work. The People’s Court merged the two litigations. In early 2015, the People’s Court rendered the decision confirming that the Ink Test Application conclusively found the “smoking gun” a forgery. Before the time to appeal to the Shanghai Municipal First Intermediate People’s Court expired, this matter was concluded through a settlement and release agreement, a decision that minimized future expenses and risk of baseless claims being brought again in any court. This matter was handled by Keven Cheng (Partner) and Robin Gerofsky Kaptzan (Senior Foreign Counsel) from Haworth & Lexon Law Firm (Shanghai).
year prior to the test to have an inconclusive result. For a document alleged to have been signed within a year of the test, the risk of an inconclusive finding is greater.

The General Manager claimed that the “smoking gun” document was executed several years earlier as reflected by the printed date on the document. The Employer, however, alleged the fake was created within one month of the submission to the People’s Court. At the hearing authorizing the Ink Test, the People’s Court Judge ordered (i) the General Manager to submit the original “smoking gun” to the Court and (ii) the Employer to cooperate with the expert from the authentication institution appointed by the People’s Court Judge by providing samples of the Employer’s original business documents. After obtaining authorizations regarding confidentiality clauses in some of the documents, the Employer furnished original contracts, invoices, and other corporate documents that contained the company chop for several months before and after (i) the date on the alleged “smoking gun”, and (ii) the date the Employer alleged the “smoking gun” was created (sometime after the Labor Arbitration Tribunal’s decision was rendered and before the General Manager filed his Appeal, a period of approximately two weeks).

The entire process from submitting the request to the Appellate Court Judge to the issuance of the decision was 3-4 months. We were contacted by the authentication institution’s expert 30 days after the Judge granted our request. We were told the test would take 30 to 60 days and it actually was conducted over a period of more than 60 days from the Employer providing additional documents as requested.

There is a basic fee that each authentication institution will charge, which is about several thousand reminbi (a few hundred USD). An additional fee is also charged and is calculated based on the amount claimed in the case. If the result is inconclusive, only the basic fee will be charged. Although the cost of the test is paid for in advance by the party requesting the Ink Test, a result that the document is indeed a forgery will transfer the responsibility for the cost of the test to the other party with that amount being included in the final decision rendered by the judge.

As it was possible that the result of the Ink Test could have been inconclusive, we considered every factor that might affect the outcome of the Ink Test before making the Application. Even at the hearing, the General Manager, although unsuccessfully, attacked the integrity of the test with arguments (i.e., the original business documents provided by the Employer were forged) that may be successful in a different case if one could not establish the authenticity of the documents provided. In China, the proof that a document is an original is critical in all cases. An Ink Test Application is a bold step in a Chinese civil case, but it is something that should be considered when you believe a forgery may have been submitted in your case.
FEATURED ARTICLES

A Due Credit to Pakistan’s Regulatory Environment

By: Dr. Sajjad A. Malik and Asma Chandani

A proactive judiciary, supportive regulators and an exploding population over the past decade have ushered in marked growth in the telecom and capital markets in Pakistan. The Pakistani judicial system, despite fault-lines, has created a successful perception that it can restore rule of law despite attempts by self-seeking politicians, inscrutable bureaucrats, temerarious intelligence agencies and crony business groups. We saw a prime example of this following the country wide movement for restoration of the former chief justice of Pakistan sacked by then army chief General Pervez Musharraf. Another precedent was dismissal of a sitting prime minister, who was sent home by the court on contempt charges.

Pakistan is a country of nearly 200 million people predominantly living in rural and semi-urban areas; more than 135 million of whom now possess cellular phones. This sea change in mobile consumerism followed as a result of deregulation of telecom sector and the grant of new cell phone operator licenses. Cell phones, once considered a service only accessible to the elite, are now available to the lowest socio-economic groups in Pakistan. The government was also a winner as a result of telecom deregulation, as they witnessed the telecom sector leading the flow of foreign direct investment, becoming the highest tax paying sector and contributing into GDP growth by an impressive 2%.

Pakistan has enacted new laws and regulations concerning frequency allocation, network development, environment regulations, telecom taxation, cybercrime, antecedent/ call monitoring, and customer service in the telecom sector. The federal and provincial governments have endeavoured to consult with stakeholders on almost all issues, from enactment of legislation to execution. The courts extended additional comfort by policing against any administrative excesses. In Pakistan, there is total freedom for foreign investors to own a 100% stake, without the involvement of a local partner, and with the ability to repatriate all their profits abroad, unfettered and unconstrained. The successful development of the telecom sector exhibits the strength of its demographics, pro-business courts, and friendly regulators. Pakistan is now attracting foreign investment in power production, renewable energy, mining, and corporate farming.

Another success story is the development of stock market in Pakistan, which for the last several years has consistently performed in the range of 25-35%. In 2015, the stock market delivered gains of 27%. Reforms by the frontline regulators have successfully introduced electronic trading, clearing, settlement, insider trading and customer protection regulations. These have resulted in substantial foreign

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participation by foreign investors and funds. New tax regulations have contributed to the performance of the financial markets. These factors contributed to the Karachi Stock Exchange’s ranking as the third top best performing stock markets in 2014. There is significant room for experienced international players to add depth to Pakistan’s capital markets, as the existing investors are mostly local.

The Federal Board of Revenue of Pakistan is focused on facilitating and encouraging new industry and growth, with policy makers supporting the telecom sector and capital markets in particular through various tax incentives. Following the 18th Amendment to the Constitution of Pakistan, the sales tax on services is now devolved to provinces, but the provinces are continuing to cooperate with the facilitation policy of the Federal Board of Revenue. The general pro-investor trend in tax administration and foreign direct investment is providing a strong foundation for new industries to grow in the geographically strategic, frontier market.
Investing in Thailand: New Tax Incentives

By: Korneeka Koonachoak and Raj Barot

In the past, whenever anyone talked about the tax incentives available in Thailand for a regional hub, we would hear them talk about either the Regional Operating Headquarters (ROH) regime or the International Procurement Center (IPC) regime. Meanwhile, Thailand’s neighboring countries were also quite busy offering increasingly promising tax incentives. As of late 2014, however, we began to hear excited chatter regarding new tax incentives to be introduced in Thailand.

Not to be outdone, the Thai Cabinet finally made the decision to take further measures to increase the country’s competitiveness by announcing two new incentives regimes to replace the IPC incentives (which were expired in 2013) and the ROH incentives (which are set to expire in 2015): (i) the International Headquarters (IHQ) regime and (ii) the International Trading Center (ITC) regime. The IHQ and ITC regimes were officially ratified as laws on May 1, 2015; however, the actual implementation guidelines for the IHQ and ITC regimes are still pending.

At first glance, the two new regimes seem to inherit many existing features of ROH and IPC regimes; although, in practice, the incentives and attached conditions of the ROH and IPC regimes were never quite attractive enough and often failed to address specific needs of the investors. Practical modifications and improvements to the existing features of the ROH and IPC regimes resulted in an “all-in-one” incentives package, whereby an IHQ can simultaneously serve as a headquarters, a trading hub, a treasury center as well as a holding company and an ITC can focus purely on trading functions while still being able to enjoy favorable tax incentives. Of course, we often hear complaints from those who adamantly insist that the IHQ and ITC regimes are simply the ROH and IPC regimes re-packaged and re-gifted to potential investors. For now, however, we can do a preliminary analysis of the incentives provided by the two new regimes and also compare them with the incentives previously offered by the ROH and IPC regimes.

Below are some of the similarities between the old ROH/IPC and the new IHQ/ITC incentives regimes:

- Qualifying service(s), interest and royalty income received from affiliates outside of Thailand would be exempt from corporate income tax (CIT) whereas such income received from affiliates within Thailand would be subject to 10% CIT.
- Dividend income received from outside of Thailand would be exempt from CIT and dividend payments made to overseas shareholders would be exempt from 10% withholding tax (WHT), but only to the extent it is paid out of income that is subject to CIT exemption.
- The scope of qualifying trading income for out-out transactions, where the goods are purchased and sold from/to overseas companies without physically imported into Thailand, trading income would be subject to CIT exemption (instead of 15% under IPC).

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Ex-patriate employees are offered a reduced personal income tax (PIT) rate of 15% (instead of the normal progressive PIT rates of 5%-35%); however, the IHQ/ITC regimes offer the reduced PIT rate for a period of 15 years instead of the 8 years offered by the ROH regimes and the 5 years offered by the IPC regime.

Now, major improvements offered by the new IHQ/ITC regimes include:

- An expanded scope of qualifying trading income for out-of-country transactions that includes income from related trading services, such as procurement services income.
- CIT exemption on capital gains from the transfer of shares in affiliates outside of Thailand – this incentive was introduced to promote the IHQ as an attractive holding company.
- Specific business tax (SBT) exemption on interest income earned as a result of providing a loan (SBT on interest income would normally be imposed at 3.3%) – this incentive was introduced to promote the IHQ as the choice treasury center.
- An extended period of incentives, whereby the IHQ/ITC incentives are valid for 15 years as opposed to the 10+5 years offered under the ROH regime and the 5 years under the IPC regime.

Arguably, the most interesting features of the new IHQ regime are (i) the CIT exemption on capital gains from the transfer of shares in overseas affiliates and (ii) the WHT exemption for dividends paid to the IHQ’s overseas shareholders from income that is subject to CIT exemption (e.g., income from dividends that the IHQ receives from overseas affiliates). With this flow through feature, the IHQs’ ability to serve as a group holding company is vastly enhanced. Note, however, that IHQ regime neither offers CIT exemptions on capital gains when the IHQ transfers its shares in Thai affiliates nor does it offer WHT exemption for dividends paid to the IHQ’s overseas shareholders from dividend income received from Thai affiliates. Another interesting feature of the IHQ regime is the treasury function which has never before been granted any tax incentives in Thailand.

In any case, while the all-in-one incentives package offered by the IHQ/ITC regimes visibly reflects Thailand’s genuine efforts to increase its competitiveness and to catch up with neighboring countries, potential investors may not appreciate the significance of the new regimes. The new regimes offered by Thailand do not provide any unique incentives not already offered by neighboring countries. Presently - taking into account restructuring and relocation costs - the tax incentives offered by the IHQ/ITC regimes alone may not be sufficient to incentivize existing headquarters in neighboring countries to relocate to Thailand.

Nonetheless, when compared to Singapore, Malaysia, and even to Hong Kong, the IHQ regime serves as a much more competitive candidate for future “green-field” investments. It is especially attractive for new projects that involve setting up Thailand as a base of operations for further expansion into the CLMV or ASEAN markets (e.g., Thailand plus one model of the Japanese investors or Thai multinational companies that want to expand to the new AEC markets).
Korean Supreme Court’s New IP Rulings

By: Chunghwan Choi

The Korean Supreme Court Provides Clarity on Product-By Process Claims:

1. Patentability of Product-by-process claims

   A. Summary of Decision

   Patentability of product-by-process claims shall be based solely upon the product itself, in which the structure or characteristics/property of the product is specified by the claim limitations including the process to make the product.

Prior to the present Supreme Court decision, the Korean Supreme Court precedent ruled that the inventiveness of product-by-process claims should be determined based on the product claimed over the prior art without considering the process, unless the claimed product can only be defined by the process steps by which the product is made, or where the process steps can impart distinctive structural characteristics of the product.

   B. Implications of the Present Decision

   In the en banc decision, the Korean Supreme Court held explicitly that the novelty and inventiveness of product-by-process claims shall be determined based solely upon the claimed product over the prior art, in which the structure or characteristics/property of the product is specified by claim limitations including the process to make the product. The Korean Supreme Court clarified that the patentability of the product in product-by-process claims does not depend on its process to make the product and process limitations are construed only as means to specify the structural features or the characteristics/property of the product.

By overruling previous contradictory precedent, the Korean Supreme Court removed ambiguity and announced the universal rule for determining the patentability of product-by-process claims, stating that the process steps in product-by-process claims do not serve as claim limitations even though the invention could not otherwise be adequately defined or the product could only be defined by reference to the process which the product is made. In light of the present Supreme Court en banc decision, the Korean Intellectual Property Office (KIPO) is expected to apply same Examination Guidelines for determining the novelty and inventiveness of product-by-process claims, regardless of special circumstance where the invention could not otherwise be adequately defined or the product could only be defined by reference to the process which the product is made.

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4 Chunghwan Choi, other than Co-Chair of the SIL Asia Pacific Committee, is a senior partner with Lee & Ko in the Technology, Media, and Telecommunications Group and IP Group in the firm’s Seoul office.
6 Korean Supreme Court Case No. 2004 Hu 3416 (June 29, 2006).
Afterward, the patent applicants should be aware that the patentability of product-by-process claims cannot be asserted based on the novelty/inventiveness of the process because the process limitations are only construed as means to specify the structure or characteristics/property of the product, unless the structure or characteristics/property of the product specified by the process limitations are novel/inventive over the prior art. In this regard, whether the novel/inventive structure or characteristics/property of the product can be drawn by the unique process will be key factors to determine the patentability of product-by-process claims.

2. **Infringement of Product-by-process claims**

   **A. Summary of Decision**

   Product-by-process claims in claim interpretation should be construed the same way for patentability and for infringement.\(^7\) Prior to the present decision, the Korean Supreme Court did not rule on how product-by-process claims should be construed for purposes of infringement.

   **B. Implications of the Present Decision**

   The present decision has significance in that the Korean Supreme Court has established a rule of claim construction to determine the scope of product-by-process claims for the purposes of infringement in patent infringement trial and patent scope confirmation trial.

   In the present decision, the Korean Supreme Court states that product-by-process claims must be construed the same way for determining patentability and infringement.\(^8\) Accordingly, determining the scope of product-by-process claims for the purposes of infringement shall be based solely upon the claimed product, in which the structure or characteristics/property of the product is specified by claim limitations including the process to make the product and process limitations are construed only as means to specify the structure or characteristics/property of the product.

   However, the Korean Supreme Court left room for different interpretations, stating that product-by-process claims may be construed to be limited by process recited in the patent claims if the scope of claims construed is clearly overbroad and unreasonable in view of the invention disclosed in the specification.

   Consequently, for patent infringement cases with product-by-process claims, it is now even more important to identify the product specified by claim limitations including the process to make the product in view of the patent claims and disclosure in the specification.

\(^7\) Korean Supreme Court Case No. 2013 Hu 1726 (February 12, 2015).
\(^8\) Korean Supreme Court Case No. 2011 Hu 927 (January 22, 2015) En Banc Decision.
**Marrying Your Partner without Getting a Business License**

**An Alternative to a Joint Venture in China**

By: Robin Gerofsky Kaptzan and Jason Xia

For decades, foreign and Chinese companies have been forming joint ventures. They have effectively been getting married for twenty to thirty years without really dating. As China’s markets rapidly change and private equity companies, many with short-term goals, seek acquisitions of or mergers with Chinese companies, alternative structures have evolved providing an equity equivalent. Through a series of contractual relationships with a creative valuation and compensation, companies can establish a short-term (i.e., 3-6 years) co-operation (with an optional renewal) with both parties contributing and equally benefiting in growth, like in a joint venture. The key is to make these arrangements fair and enforceable. This article addresses the cooperation model, legal hurdles and contractual structure under the PRC laws and regulations.

1. **The Equity Equivalent**

Although compensation is paid quarterly or annually, there is also a one-time payment at the end. Whereas joint venture parties enjoy a distribution of equity when the joint venture dissolves, this model provides a formula to calculate an exit payment (also known as a termination fee, end payment, success fee, balloon payment) (“Exit Payment”) representing a portion of the business’ increased value. Although in our deal the foreign party received the Exit Payment, it could also be paid to the Chinese party. The party contributing the less tangible assets is usually the one to receive the Exit Payment. The key is the concept of an Exit Payment is valid under PRC laws as a payment triggered by a collateral condition (or condition precedent) - the termination - identified in the contract.

**Reasonableness.** A concern is that PRC law requires the payment to be reasonable based on real services provided. Failure to demonstrate both may result in the Administration of Foreign Exchange not releasing the Exit Payment if being sent outside China. Although it is not Chinese black letter law, reasonableness is a recognized principle for when both parties receive the same benefit or detriment for a defined condition triggering a payment.

It is essential the formula not be perceived as a penalty or liquidated damages charged to one party and thus unreasonable. Any difference paid to one party versus the other could create this perception. Under PRC Contract Law, a party would be permitted to claim the Exit Payment is a penalty or liquidated damage and request the amount be changed – upward or downward- by the court or tribunal by asserting it is unreasonably high or low. To minimize this risk, the terms could include that liquidated damages is for breach and the Exit Payment is part of general compensation with a payment date at termination.

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9 Robin Gerofsky Kaptzan is a New York licensed attorney with over 2 decades legal and business experience. She is a Senior Foreign Counsel for the Shanghai office of Haworth & Lexon Law Firm, a full service Chinese law firm. She has been residing in China for over 17 years and has been assisting foreign companies and their China subsidiaries. Jason Xia is a Chinese licensed attorney with over 10 years of legal experience. He is a partner of Wintell & Co., a Chinese law firm. Mr. Xia has actively participated in a significant number of international investment matters, providing a broad range of legal advice to non-Chinese investors.

10 PRC Contract Law, Article 114 (2).
It is also possible the amount is deemed unreasonably high and a windfall. If funds are to be sent outside China, the Administration of Foreign Exchange may suspect money laundering and scrutinize the Exit Payment requiring the parties to jump hurdles and delaying payment.

*Formula.* An Exit Payment could be a multiple of a certain number created from a formula - 5x for one party and 7x for the other, or a combination. Alternatively, the parties could have multiple Exit Payments in different contracts. By splitting the payments, each payment might be enforceable and reasonable under PRC Contract Law.

2. **Legal Issues**

Critical clauses should also be included to create built in protective shields.

*Law.* The choice of law should be considered carefully to confirm which will best support the creative business model. In some circumstances, excessive foreign country regulations and banking laws could potentially nullify a deal, instead of validating it. Avoiding hurdles and red tape may be accomplished by designating the choice of law as China.

*Jurisdiction.* Ensuring that a dispute resolution forum will be qualified and fair is essential. Chinese arbitral tribunals are less expensive and quicker. However, many prefer a non-China jurisdiction in which the arbitrators or judges may be more familiar with issues. Although PRC law allows a non-China jurisdiction in a pure China deal, there are risks as there is support denying this option. The optimal solution is for disputes to be resolved in one forum. By including different jurisdictions in contracts related to the same cooperation, a dispute with overlapping issues could be litigated in two countries, which should be avoided.

*Limited Termination Circumstances.* In order for the Exit Payment to operate as intended and cooperation goal to be implemented, the terms should only allow the relationship terminated and Exit Payment obligation triggered (1) when the term expires, or (2) in extreme situations of material breach (i.e.: egregious IP infringement, bankruptcy). A breach or even a curable material breach should be handled through resolution mechanisms while performance under the contracts continues. To allow a simple breach or curable material breach to disallow the Exit Payment, would be contrary to the essence of the Exit Payment as a party’s value in the cooperation. If a JV partner breaches, the disputed issues are addressed without altering the parties’ equity interest, which is the goal in this approach too.

3. **Contracts**

In a perfect world, this alternative arrangement should include four contracts that all cross reference each other.

*Master Agreement:* This agreement sets out the legal and operational framework, parties’ intentions and contracts. Termination of any related contract triggers termination of the cooperation unless the parties carve out specific exceptions, such as continuation of the supply or service element of the relationship.
Service Agreement: This agreement should cover all services provided, such as training, marketing, materials, management advice, etc.

Supply Agreement: This agreement would generally be an exclusive relationship (China or regionally). The region should be dictated by the capability of the party and industry.

License Agreement:11 This agreement is registered in China as required by law12 and for protection of intellectual property as brand loyalty is being built. Although Chinese companies often propose one cooperation agreement including the license rights, separating obligations is the best practice. Having one contract allows the entire commercial contract’s terms to be disclosed, when privacy should be employed.

If one party is a new or small business, security for the Exit Payment should be considered (i.e., guarantee with jurisdiction outside China, lien on a non-China asset, promissory note enforceable outside China). Consideration should also be given to how to maximize taxes based on when, where and which contract payment is made.

4. Conclusion

For the spirit of the cooperation, careful thought should be given to the structure to minimize or eliminate the risk involved and to ensure an enforceable Exit Payment term. Although no two deals or their terms are ever alike, the goals of a JV or this approach are the same: to have a harmonious enforceable relationship.

11PRC Trademark Law, Article 43 states: license right must be in writing
12PRC Trademark Law, Article 43 also states: Where a party is licensed to use another party’s registered trademark, the licensor shall submit the trademark license to the Trademark Office for its records. A trademark license without recordation with the Trademark Office cannot be used against any third parties
**Mutual Defense Treaties are Obsolete**

By: William P. Schwab

This month marks the 100th Anniversary of ANZAC, the Australia / New Zealand Army Corps, and honors their collaboration, spirit, and sacrifice during WWI. ANZAC Day, April 25, was originally designated to honor the fallen at Gallipoli, but continues as a day of remembrance to commemorate all New Zealand and Australia’s fallen. This shared contribution and suffering unites members of these two nations closer than a mutual defense treaty ever could. Americans are also closely bound to Aussies and Kiwis, through common interests, heritage, and strong national identities, but not, as commonly understood, by a mutual defense treaty.

The United States has seven mutual defense treaties with other nations, five of which are with Pacific nations: Japan, Korea, Australia, Thailand, and the Philippines, the most recent of which came into existence over 55 years ago. Australia, interestingly, has been the only nation to ever invoke a mutual defense treaty, and that was in defense of the United States following the attacks of 9/11 as a mechanism to join nascent coalition forces unifying in the Global War on Terrorism. New Zealand also joined the coalition effort, however the U.S. abrogated its defense treaty responsibilities towards New Zealand and effectively ended an alliance in the 1980’s in a roil over nuclear armed or powered ships entering New Zealand’s ports. Though New Zealand has never since been considered an ally, defense relations between the two nations have virtually returned to normalcy with a “partnership” on par and even exceeding the interaction of codified U.S. defense treaty allies.

Similarly, when it comes to the national interest of the United States, defense treaties’ importance has eroded. By law, the U.S. must restrict “assistance to the government of any country whose duly elected head of government is deposed by military coup or decree”. Such assistance includes “defense articles”, “defense services”, and “military education and training.” U.S. assistance has not ceased for Egypt, Thailand, or the Maldives to name recent examples. The United States, it appears, will pursue or continue relationships that are in its own national interests, regardless of what is legislated. This furthers the notion that defense treaties may be obsolete.

The United States should let actions speak in place of codified defense treaties. Evidence above indicates economic interests trump mutual defense treaties. The president has stated “the United States

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13 William P. Schwab is an international lawyer and Colonel in the U.S. Army Reserve, who served on Active Duty for over six years at Headquarters, U.S. Pacific Command in Honolulu, HI. The ideas discussed here are solely the author’s.


17 Id. at (b)(4).


is a Pacific power” and that “we will...expand our networks of cooperation with emerging partners throughout the Asia-Pacific...for securing common interests.” The rebalance, or the administration’s Pivot to the Pacific, will support emerging relationships. Yet, more countries understand the US “rebalance” to the Pacific as essential for trade and economic survival.

However, the few nations with defense treaties with the U.S. hold these documents sacrosanct, leveraging the agreements towards focused interaction, and occasionally as a trade bargaining chip. As the largest industry in the U.S., the impact of defense and the military on U.S. economics is undeniable. However, it is time to void mutual defense treaties, though continue to recognize the place in the world as a defense powerhouse. Acknowledging this as a current, inviolable truth, the U.S. can move forward and focus efforts on economics and trade which could advance our security posture well into the 21st Century.

Key to dominance seems counterintuitive. To ensure U.S. near supremacy in defense, the U.S. should shift a focus away from defense arrangements towards agreements more economically beneficial. We are on the verge of approving the Trans Pacific Partnership Agreement, as highlighted in the recent newsletter. Experts indicate “trade is central to our foreign policy; without this deal, the so-called pivot to Asia will be hollow.”

With a look to history, not unlike the ANZAC spirit, the U.S. has many potential economic and defense partners. Therefore, to honor and embolden U.S. current and future allies, bilateral and multilateral agreements should be based on economic reciprocity, or focused to improve U.S. trade. To strengthen the U.S. defense position in the world, antiquated mutual defense treaties shared by a precious few, should be disavowed in lieu of pursuing new economic-based relationships. This could ensure U.S. preeminence well into the 21st century in both GDP and defense.

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