Snell & Wilmer L.L.P.

# Global Connection

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If you have any questions or would like any assistance regarding the matters discussed in this issue, please contact the authors, one of the attorneys listed below or your regular Snell & Wilmer contact:

Anne Bishop
602.382.6267
abishop@swlaw.com

Barb Dawson
602.382.6235
bdawson@swlaw.com

Brett W. Johnson
602.382. 6312
bwjohnson@swlaw.com

Ashley Kasarjian
602.382.6544
akasarjian@swlaw.com

Bill Kastin
602.382.6554
bkastin@swlaw.com

Gerard Morales
602.382.6362
jmorales@swlaw.com

Scott Shuman
602.382.6283
sshuman@swlaw.com

Dear Friend of Snell & Wilmer:

We hope that 2008 will be a successful year for your business. In our continued effort to bring you timely up-to-date information on global legal issues, our first edition of 2008 includes articles addressing foreign and domestic liability of multinational corporations, Iranian trade sanctions, CDC warnings regarding global health issues and the U.S.-Canada income tax treaty. We also highlight recent international transactions involving our attorneys and significant events at the firm.

Since our last issue, Snell & Wilmer hosted Lex Mundi's North American Dispute Resolution Conference, attended by attorneys from Europe, Asia, and Latin America as well as North America. Lex Mundi is an international affiliation of 160 independent law firms around the globe. Snell & Wilmer's connections through Lex Mundi provide our clients with access to more than 20,000 lawyers in 560 offices in 99 countries. Snell & Wilmer attorneys regularly collaborate with Lex Mundi firms to provide effective and seamless services to our clients wherever in the world their needs arise.

Snell & Wilmer also recently hosted an Arizona visit by David Bohigian, Assistant Secretary for Market Access and Compliance at the U.S. Department of Commerce. The Assistant Secretary addressed an audience of firm clients and other members of local industries regarding the status of the North American Free Trade Agreement and pending free trade agreements with Columbia, Panama, Peru, and South Korea. He explained how companies with existing or prospective businesses in foreign markets may benefit from the various free trade agreements and why they should familiarize themselves with the essential terms of the agreements.

For more information regarding the Commerce update, please visit http://www.tradeagreements.com or contact a member of the Snell & Wilmer International Group at http://www.swlaw.com. Please feel free to contact me directly if you have any questions or if you would like to be included in future international events hosted by the firm.

Best regards,
Barb Dawson,
Co-Chair, International Law Group
Telephone: (602) 382-6235
Email: bdawson@swlaw.com

# FOREIGN AND DOMESTIC LIABILITY OF MULTINATIONAL CORPORATIONS


*Jerry Morales*
*Ashley Kasarjian*

A recent decision of the Los Angeles Superior Court revives the hotly debated issue of the exposure of multinational corporations to liability in the United States for injuries that occur in foreign countries. In Tellez v. Dole, the court held that aggrieved foreign plaintiffs may sue and recover in the United States. In this case, Dole Food Company was sued by agricultural workers on Nicaraguan banana plantations for injuries resulting from a pesticide used on Dole's plantations in the 1970s. In November, approximately $3.3 million in compensatory damages and $2.5 million in punitive damages was awarded to six workers who claim they were made sterile by a chemical, DBCP, which was used in Dole's Nicaraguan banana plantations. These workers are only a fraction of thousands of plaintiffs that have brought claims against several multinational corporations for their injuries resulting from contact with the pesticide.

The significance of this case extends far beyond liability for pesticides, as it represents the increasing acceptance that the United States is the appropriate forum for a foreign plaintiff to bring litigation, even though the conduct in question occurred outside the U.S. The impact of this case is that plaintiffs from factories, farms, or any foreign work site could bring a suit in the United States that previously would have only been permitted in the country in which the conduct and injury occurred.

In order to obtain jurisdiction, a court must have a concurrence of personal and subject matter jurisdiction that would provide the minimum contacts necessary to justify a suit in a particular location. In the past, when a foreign plaintiff brought suit in the United States for injuries occurring in the foreign country, even if jurisdiction could be established, the defendants could get the case dismissed as a result of the legal doctrine of forum non conveniens. Forum non conveniens is a mechanism in which defendants may challenge the plaintiff's choice of forum in order to have a case dismissed. The court makes the determination of which forum is the most "convenient" or "appropriate," in order to assure that the court most capable of resolving an issue is hearing the case. If the case is dismissed in the United States, only four percent of plaintiffs pursue their case in a foreign court. As a result, most claims are abandoned.

In Dole, the plaintiffs reversed the sequence of events by first obtaining a judgment in Nicaragua and then returning to the United States to file a separate suit. Typically, plaintiffs are eager for U.S. jurisdiction because of the prospect of contingent fee representation and punitive damages. However, Nicaragua passed a law providing plaintiffs a mechanism to obtain large monetary judgments against companies, such as Dole, that used the pesticide in the 1970s. The Dole plaintiffs used this law to obtain a $489 million dollar Nicaraguan judgment against Dole and other fruit producers and pesticide manufacturers. The defendants declined to recognize the Nicaraguan judgment, and therefore, the plaintiffs brought the claim to the United States. As a result, Dole could no longer assert the argument in the U.S. court that the case should be dismissed to a Nicaraguan court based upon forum non conveniens.

There are great implications in the Dole decision for all multinational corporations. Instead of cases being dismissed in the United States under the forum non conveniens doctrine and rarely resurfacing, plaintiffs are taking the insight learned from Dole by obtaining judgments in the foreign country and then coming to the United States. The defendants can no longer argue that the U.S. case should be removed to the foreign country because it has already granted a judgment, which the defendant has declined to recognize.

In the case where the foreign country does have an adequate forum that provides an alternative to the United States, the court will weigh the following factors to determine if the suit should be dismissed under forum non conveniens:

- Relative ease of access to sources of proof;
- Availability of compulsory process for attendance of unwilling parties;
- Cost of obtaining attendance of willing parties;
- Issues related to making the case easy, expeditious and inexpensive;
- Administrative burdens derived from the case;
- The local interest in having the case decided in the home forum;
- What substantive and remedial law should apply to the controversy; and
- The unfairness of burdening citizens from an unrelated forum.

Weighing the aforementioned factors is important because the U.S. justice system will become overburdened if it is required to hear suits from all around the world when a more convenient forum exists. Nonetheless, multinational corporations should be aware that they may be subject to jurisdiction in the United States and abroad, and as always, corporations should ensure that they are complying with all relevant standards and procedures. With the rapidly changing legal environment, all multinational corporations should protect themselves and their employees by consulting legal counsel to determine the applicable laws and procedures – locally and abroad – for their industry. In addition, corporations acting globally should investigate any act that has the potential to lead to liability as if it occurred in the United States and dedicate resources to provide for an effective defense well before a case ever reaches a United States courtroom.

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*Gerard Morales is a partner in Snell & Wilmer's Phoenix office. Mr. Morales' practice is concentrated in labor, employment and construction law. He has extensive experience in NLRB unfair labor practice trials, and union elections matters, collective bargaining, labor law issues affecting the construction industry, wage and hour compliance, corporate policy development, and administrative proceedings.*

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*Ashley Kasarjian is an associate in Snell & Wilmer's Phoenix office. Her practice involves Commercial Litigation - including employment related matters.*

# Iranian Trade Sanctions

*Anne Bishop*

Iran has been prominent in the news lately. Although trade between the United States and Iran is already minimal, new trade sanctions by the United States against Iran make this a good opportunity to review the applicable law and remind United States companies to be aware of who they are doing business with. The "golden rule" is that virtually all trade with Iran is prohibited under U.S. law.

Trade sanctions against Iran can be traced back to the 1979 seizure of the U.S. Embassy in Tehran when the U.S. froze about $12 million in Iranian assets. Though most assets were later released, in 1987 President Reagan ordered a new trade embargo against Iran. That embargo was tightened further in 1995 when President Clinton prohibited all petroleum development in Iran.

Today, almost all trade with Iran is prohibited under the Iranian Transactions Regulations ("ITR") located at 31 C.F.R. 560. The ITR is a pivotal tool in the arsenal of regulations utilized by the United States government to control trade. As discussed in the last issue of the *Global Connection*, another tool that is closely linked to the ITR is the Foreign Corrupt Practices Act. Fines for violations of the ITR can range up to $1,000,000, with individual penalties of up to $250,000 and 10 years in jail. Civil penalties of up to $10,000 may also be imposed administratively.

Iranian goods and services may not be imported or exported into the United States, either directly or through a third-party country. This prohibition extends to subsidiaries, joint ventures, branch offices, and

distributors of U.S. companies located outside the United States, but still incorporated under United States laws. The ITR does not apply to subsidiaries or other affiliates of United States companies incorporated and located abroad. However, the ITR also applies to foreign citizens that are physically located in the United States. There are very few exceptions to the ITR provisions.

The U.S. makes a narrow exception for agricultural exports and articles intended to relieve human suffering. These items must be able to be exported "EAR99," meaning that there are limited export controls related to the product to the rest of the world. There are also very narrow exceptions for the import and export of information materials and goods valued under $100. Finally, non-United States companies can obtain a license for non-EAR99 items, under limited circumstances, when United States origin items are incorporated and substantially transformed into a third country's export product.

Trade sanctions extend to financial dealings with Iran as well. U.S. companies and individuals are prohibited from financing imports or exports or loaning money to Iranian entities. Loans or other financing arrangements that existed in 1995 remain valid and in effect. And, U.S. entities may continue to charge fees and collect interest on these loans. New investments by individuals and companies in Iranian assets are prohibited. Therefore, unless there is pre-approval, financing terms must be cash-in-advance, sales on an open-account, and financing by non-United States, non-Iranian government entities. Thus, it may be possible to have a party in a third country finance the transaction.

The U.S. Department of Treasury, Office of Foreign Asset Control ("OFAC") manages the trade restrictions with Iran. OFAC is responsible for enforcing a variety of controls on business dealings with Iran and Iranian nationals. OFAC maintains lists of controlled entities and individuals that U.S. individuals and companies are barred from doing business within Iran. While it is possible to obtain a license from the Department of Treasury to engage in transactions with individuals or businesses that are placed on the OFAC "denied persons'" lists, this process is difficult and time-consuming.

As stated, it is important to know who you are doing business with on both an international and domestic level. This includes screening of potential customers against the "denied persons'" list maintained by OFAC and multiple other United States governmental agencies, including the Department of State and Department of Commerce. If a possible violation may have occurred, it is important to engage legal counsel to determine the best option to address the situation. The first item of business after engaging legal counsel is to conduct a detailed internal investigation – similar to that performed if a possible violation of SEC regulations or Sarbanes-Oxley has occurred. The investigation will determine (1) whether a violation has actually occurred, (2) the extent of corporate and individual culpability, and (3) a proper response, to possibly include self-reporting the alleged violation to OFAC. The investigation and possible self-referral will not absolve the violation, but may provide mitigation that could lead to no criminal liability, minimize financial penalties, especially if proper internal mechanisms are implemented to avoid future violations. It is important to cooperate with the government investigators, but the cooperation should be based on known facts drawn out in an internal investigation.

The ITR and other sanctions against Iran are constantly in flux based on the political situation. It is important to be cognizant of these changes to operate effectively in the global environment.

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*Anne Bishop is an associate with Snell & Wilmer's Phoenix office. Anne's practice is concentrated in commercial litigation.*

# U.S. – Canada Income Tax Treaty: Recent Developments

*Bill Kastin*

**Summary**. On September 21, 2007, the U.S. and Canada released a new protocol (the "Protocol") to the U.S.-Canada income tax treaty (the "Treaty").[1] Below is a brief overview of some of the issues addressed in the Protocol.

**Cross Border Loans; No Withholding Tax on Interest**. Under the current Treaty, the borrower's home country may impose a ten percent (10%) withholding tax on interest payments paid to the foreign lender. Under the Protocol cross-border interest payments will be exempt from withholding. With respect to arm's length interest paid between unrelated parties, this exemption will apply for amounts that are paid commencing within a few months after the Protocol's effective date. With respect to related party loans, this exemption is phased in over approximately three (3) years.

**Limited Liability Companies and Hybrid Entities**. Under the current Treaty, the treatment of a U.S. limited liability company ("LLC") taxed as partnerships for U.S. federal income tax purposes, and their members, may lead to double taxation. Under the Protocol, in certain instances, "look-through" treatment may be available, allowing members of an LLC to benefit from Treaty provisions such as reduced withholding rates. This "look through" treatment may be available provided the LLC member is taxed in the U.S. on such LLC-related income, the same as if such income were earned directly by such member.

**Permanent Establishment**. Under the current Treaty, a U.S. corporation will not be subject to Canadian tax on its business profits from conducting business in Canada unless it has a "permanent establishment" in Canada. Under the Protocol the definition of a permanent establishment is expanded in the context of service providers. As a result, even if a U.S. corporation would not otherwise have a "permanent establishment" in Canada under the continuing definition of that term, such service provider may be deemed to have a permanent establishment in Canada if it provides services in Canada for an aggregate of 183 days or more, in any 12-month period, and either:

i. such services are with respect to the same project, and performed for customers who either are residents of Canada or who maintain a permanent establishment in Canada; or

ii. such services are performed by an individual in Canada for such 183-day period, and more than 50% of the gross revenues of that enterprise are derived from those services.

U.S. taxpayers transacting business in Canada, or with Canadians, should seek assistance from tax counsel to determine how the Treaty, as amended by the Protocol, may impact such transactions.

To ensure compliance with Treasury Regulations governing written tax advice, please be advised that any tax advice included in this communication is not intended, and cannot be used, for the purpose of (i) avoiding any federal tax penalty or (ii) promoting, marketing, or recommending any transaction or matter to another person.

1 *As of the date this article was submitted for publication the Protocol had not yet been ratified. In general, the Protocol will be effective on the later of ratification and January 1, 2008; however, several provisions have other effective dates.*

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*Bill Kastin is an associate in Snell & Wilmer's General Federal Tax Group where his practice is concentrated in problem solving and planning for individuals, corporations, S corporations, partnerships and limited liability companies. Bill advises the firm's non-U.S. clients on the U.S. tax implications of their U.S. investments (inbound transactions), and the firm's U.S. clients on the U.S. tax implications of their foreign investments (outbound transactions).*

# New CDC Warnings Prompt Global Businesses to Review Emergency Policies and Procedures


*Brett W. Johnson*
*Scott A. Shuman*

This winter a dangerous disease will spread across the country, killing an estimated 36,000 Americans, and that's a good year. This is not a movie plot or a terrorist conspiracy; it's the flu.

For years the government has been warning of a potential flu pandemic, and on February 1, 2007 the Centers for Disease Control and Prevention ("CDC") introduced the "pandemic severity index." This index is used as a classification scale for reporting the severity of flu pandemics in the United States, and ranks flu outbreaks in terms of expected deaths. The scale also provides a set of guidelines to help communicate actions communities should follow in potential pandemic situations. The scale's lowest ranking, Category 1 would kill less than 90,000 people, whereas the highest ranking, Category 5 would kill more than 1.8 million people in the United States alone.

In announcing the new index, the CDC director stated, "pandemic influenza is not necessarily imminent, but we believe it is inevitable. And it's not a question of if, it's a question of when, so we do have to prepare."[1]

Currently, there are only enough antiviral drugs to treat around 22 million Americans and experts expected the disease to spread faster than new vaccines can be developed. This is due to the multitude of transmission mechanisms involved in international trade, travel, and the flight patterns of migratory birds.[2] Even if we were capable of producing enough vaccines, the strain would eventually mutate and diminish the effectiveness.

If a pandemic occurs, human resource departments may be hard pressed to keep employee positions filled. In addition, the Department of Justice anticipates that between ten and forty percent of law enforcement employees will not report for duty during a pandemic.[3]

With the government increasingly warning about the threat of a pandemic outbreak, it is becoming more likely that companies operating globally could face serious exposure in the event of a pandemic. This leaves business owners the question, is your company prepared?

When evaluating your organization's preparedness, think about Hurricane Katrina's aftermath, but on a global scale. For example, a sales force scattered across the world and far from home poses one of many complex challenges. A global supply chain and overseas service outsourcing centers are other potential challenges to consider that could "severely disrupt, travel, trade, and tourism" if nations were to tighten border controls.[4]

Companies, especially those that operate on a global scale, should review their policies and procedures to ensure that their individualized contingencies are established. A few issues to consider during the review include:

- The company's specific role, responsibility, and obligation if and when a pandemic occurs and the impact that local, state, and federal laws may have on any corporate response. Companies that dedicate the resources in advance and plan appropriately will be in the best position to address a pandemic (or other) crisis.
- Set-up of a dedicated planning committee with senior-management to address emergency scenarios. The planning committee should address human resources, insurance, communication, security, and continuity of operations concerns during a crisis period.
- Ensure you have the technology necessary to support all of your company's policies and procedures.

In addition, a review of existing policies and procedures should involve an evaluation of the specific and unique legal issues that companies will face to prevent

overwhelming the legal department during an emergency. These include:

- Quarantine orders directed toward facilities or individuals.
- Workers compensation and other insurance related issues.
- How to work with local, federal, and foreign governments to address employee concerns (such as getting employees home) and pre-planning.

Continuity of operations will be essential for a global corporation's survival as planning can alleviate potentially devastating legal consequences. With the start of the New Year, global companies should take an opportunity to review their policies and procedures in an effort to anticipate all types of emergencies and establish a plan that will ensure continuity of operations and worker safety.

*1 See Tony Pugh, CDC Develops System to Gauge Severity of Pandemic, MCCLATCHY-TRIBUNE INFORMATION SERVICES, February 1, 2007, available at http://www.mcclatchydc.com/staff/tony_pugh/story/15517.html.*

*2 See Lawrence O. Gostin and Benjamine E. Berkman, Pandemic Influenza: Ethics, Law, and the Public Health, ADMINISTRATIVE LAW REVIEW (Winter, 2007), p. 123.*

*3 Donald G. McNeil, Jr., Closings and Cancellations Top Advice on Flu Outbreak, N.Y. TIMES, February 2, 2007.*

*4 See Pugh, supra note 1.*

*5 EDWARD P. RICHARDS ET AL., THE ROLE OF LAW ENFORCEMENT IN PUBLIC HEALTH EMERGENCIES: SPECIAL CONSIDERATIONS FOR AN ALL-HAZARDS APPROACH 5 (September, 2006) (a document prepared by the Police Executive Research Forum (PERF) for the U.S. Department of Justice Office of Justice Programs).*

*6 See Gostin, supra note 2.*

*Brett Johnson is an associate with Snell & Wilmer's Phoenix office. Brett has a practice concentrated in litigation and health care services.*

*Scott Shuman is an associate with Snell & Wilmer's Phoenix office. Scott's practice is concentrated in health care litigation, compliance and regulatory matters, including Medicare and licensing board investigations, and commercial litigation. Experience includes intellectual property (patent, trademark, and trade dress infringement), construction, real estate, and consumer lending matters, as well as medical malpractice and EMTALA.*

# Recent Representations – Highlight on Litigation

With three decades of experience in international law, and a diverse client base, attorneys with Snell & Wilmer's international practice provide reliable and effective legal representation for businesses and investors in the United States, and for those conducting business abroad.

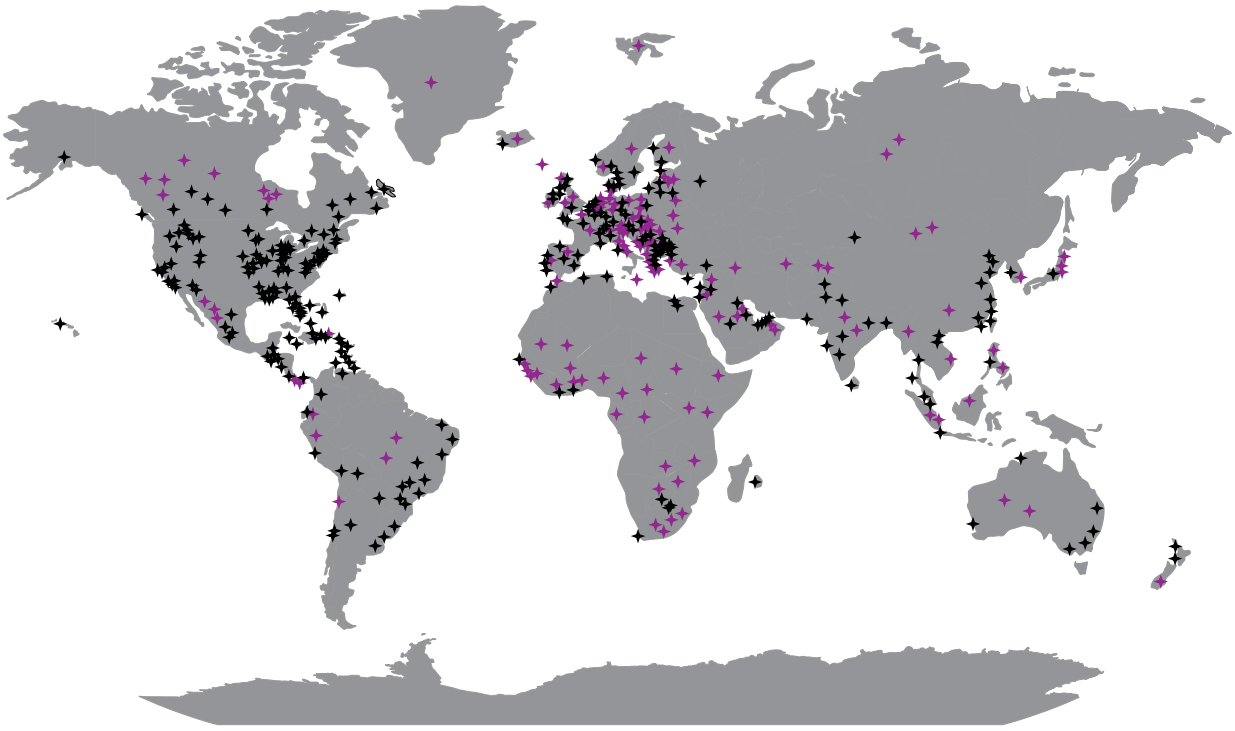
Our firm also has substantial experience in litigation and dispute resolution involving non-U.S. and multi-national companies. We have broad experience in disputes in the U.S. courts as well as in coordinating multi-jurisdictional litigation involving disputes in non-U.S. courts. Our experience in such matters spans the breadth of our general litigation practice including, alternative dispute resolution, appellate, commercial, condemnation, construction, corporate, criminal defense, employment, environmental, natural resources and energy, general litigation, health care services, intellectual property, medical device and pharmaceutical, product liability, retail services, securities, and tax controversy.

Below is a listing of international representations for which Snell & Wilmer has served as lead counsel.

- Prosecution of foreign patent and trademark applications, and counseling on matters involving foreign intellectual property portfolios.
- Representation of manufacturer based in Germany in United States litigation and alternative dispute resolution involving both United States and German lawsuits.
- Drafting of master franchise agreements, development agreements and disclosure documents for franchise development rights in Canada, Mexico, Asia, Europe, Africa, Middle East and Australia.

- Coordination of corporate compliance analysis in 22 Central and South American countries for United States-based global manufacturer.
- Obtaining foreign patent protection throughout European countries, including enforcement activities for infringement and infringement clearance. Also, actively obtain trademark rights in over 40 countries for franchises and global manufacturing companies.
- Representation of both United States and non-United States corporations, and corporate executives in litigation matters in the United Kingdom, Europe, Mexico and Peru.
- Representation of United States companies in debt recovery efforts in Mexico and Canada.

## Snell & Wilmer International Practice Network and Experience



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