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Save the Date!

29th Annual Immigration Law Update (#0508R)

**February 7-8, 2008
Jungle Island
Treetop Ballroom,
Miami Beach**

See brochure,
page 15.

Promotion of the Concept of the Rule of Law Through Implementation of the Central America Free Trade Agreement

By Phillip A. Buhler, Esq., Moseley, Prichard, Parrish, Knight & Jones

I. Prologue – The Rule of Law and the Liberal Tradition

The concept of "The Rule of Law" is the foundation for stable, impartial and tenured systems of jurisprudence in developed and developing modern industrial democracies. It is a concept which allowed the advance of administrative and judicial systems from the absolute rule of individuals and elite groups to governments based upon the will of the broad population. Indeed, this principle has allowed the development of advanced legal

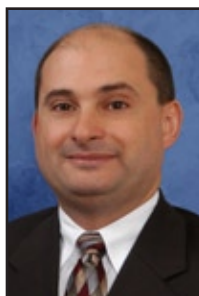
systems which in turn have permitted the introduction of complex transnational commercial relationships and the rapid integration of global commerce and society.

William Pitt acknowledged that "where law ends tyranny begins." Friedrich Hayek, decrying the decline of the rule of law in the mid-Twentieth Century, wrote that "the Rule of Law means that people do not have to answer to the arbitrary decisions of governmental officials, instead they guide their actions by what is prohibited by a clearly

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Message from the Chair:

Section Celebrates Its 25th Anniversary With a Look at Its History and a Focus on Its Future



The Membership of the ILS

I am excited and honored to have been asked to lead the over 1,100 lawyers who make up the current membership of the International Law Section and the thousands of other international practitioners

within the Florida Bar who are not yet members of the ILS. The ILS is unique among all the sections of the Florida Bar because its members practice in virtually every discipline known to the law. Within our membership are lawyers who practice international transactional law, litigation, international arbitration, travel law, tax and estate planning law, immigration law, crimi-

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CHAIR'S MESSAGE*from page 1*

SECTION CALENDAR

Mark your calendars for these important Section meetings & CLE dates:

For more information contact: Angela Froelich:
850-561-5633 / afroelic@flabar.org

October 12, 2007

“INTERNATIONAL INCOME TAX AND ESTATE PLANNING” - CLE (#0547)

Hyatt Regency Downtown, Miami

(See brochure, page 19.)

February 7-8, 2008

“29TH ANNUAL IMMIGRATION LAW UPDATE” - CLE (#0508)

Jungle Island Treetop Ballroom, Miami Beach

(See brochure, page 15.)

February 29-March 1, 2008

“3RD ANNUAL INTERNATIONAL COMMERCIAL ARBITRATION MOOT COMPETITION”

Orlando

April 11, 2008

“INTERNATIONAL LITIGATION AND ARBITRATION UPDATE” - CLE (#0607)

The Biltmore Hotel, Miami

UPCOMING EVENTS:

Argentina Business Legal Exchange – November 2 - 12, 2007

International Business Transactions Seminar – Spring 2008

International Law Certification Review & Update – 2008

nal law, intellectual property law and international insolvency law among others. Our members practice as solo practitioners, in boutique shops and at every major law firm in the state. Our membership truly represents the entire geographic scope of the state with leadership and members from every corner of Florida. As well, we have members in outposts throughout the world.

The Role of the ILS in the Florida Bar

The role of the ILS is to safeguard the practice for international practitioners in Florida by insuring that we are at the forefront of developments and legislation in the international world. We also are charged with continuing the international legal education of all Florida lawyers to insure that we are on the cutting edge of legal practitioners and are focused on fostering the driving of legal business for Florida lawyers. The ILS serves another important role within the greater Bar; as the face of the Florida Bar to many other practitioners and Bar associations around the world. It is our job to fly the flag of the ILS across the globe. We have cooperative agreements with other bar associations around the world. The ILS has hosted and co-sponsored seminars in numerous jurisdictions, including Mexico, Canada, Barcelona, Brazil, London, Grenada, the British Virgin Islands, Anguilla and Russia. As well, many of our conferences in Florida draw practitioners to Florida from every corner of the planet.

Our 25th Anniversary and Our History

It is a double honor to be given the stewardship of the ILS this year in the 25th Anniversary of the founding of the International Law Section in 1982. However, many don't know that the history of the ILS dates back to the founding of the International Law Committee of the Florida Bar in 1956. Since the time of the founding of the ILS and its predecessor, Florida has evolved into a major node in the international world due to its strategic

See “Chair's Message,” page 42

A Call to Action: The Moral Imperative for a Universal Right to Water

By Joelle Hervic*

“The frog does not drink up the pond in which it lives.”

— *Buddhist proverb.*

I. Universal Right to Water

Water permeates all – it soothes, it cleanses, it plays an important role in religious and sacred life, it quenches our thirst, it feeds us – in short - it supports all life on earth. One may therefore reasonably assume that a right to water exists. That assumption would be wrong. Although an implicit right to water has been recognized relatively recently, a universal right to water is yet to be expressly accorded recognition as a fundamental human right. Presently, there is no binding international treaty that enshrines the right to water as an enforceable, universal, legal right requiring states to provide their citizens with clean, safe and affordable water, in addition to basic sanitation services.

With a water crisis of unimagined proportions looming in the very near future due to shrinking freshwater resources, this is an urgent call to the nations of the world to work together to ensure that a universal right to water is implemented. A water crisis - partly generated by global warming,¹ and partly generated by over-exploitation of water resources and water pollution - is predicted to result in several billion people being deprived of sufficient water to live.² According to the World Bank, by 2035, three billion people who currently live in water stressed areas – in particular, in Africa, the Middle East and South Asia - will have **no** access to safe water.³

Now – more than ever – there is an urgent moral imperative for the international community to expressly recognize a right to water. The present situation is already alarming – at this time in excess of 1 billion people, or one in 6 – do not have access to clean water, a statistic which will worsen unless immediate steps are taken.⁴ In 2000, 2.4 billion people did not have

access to basic sanitation.⁵ A child dies of a preventable waterborne disease every 15 seconds, amounting to 2 million childrens’ deaths, annually.⁶ We cannot continue to look the other way. If we do, we do so at our peril.

A. What Are Human Rights?

Human rights depend for their existence on internationally guaranteed standards that define and protect the dignity and lives of individuals and communities. They include civil, cultural, economic, political and social rights. Human rights principally concern the relationship between the individual and the State. Governmental obligations with regard to human rights can broadly be categorized in obligations to *respect, protect, and fulfill*.⁷

The World Health Organization, in its 2003 report, Right to Water, addresses this right in terms of the duties owed to individuals by the State party:

“The obligation to respect requires that States Parties (that is, governments ratifying the treaty) refrain from interfering directly or indirectly with the enjoyment of the right to water...The obligation to protect requires that States Parties prevent third parties such as corporations from interfering in any way with the enjoyment of the right to water...The obligation to fulfill requires that States Parties adopt the necessary measures to achieve the full realization of the right to water.”⁸

In the absence of an international treaty addressing a universal right to water, governments all around the world have acted to enshrine rights in their constitutions which further advance human rights, and which protect the environment, including water, discussed below. There have been calls for a universal right to wa-

ter by prominent leaders and former leaders, including Mikhail Gorbachev, former President of the Soviet Union and now Chairman and Founder of Green Cross International (GCI), for an international convention on the universal right to water.⁹ GCI’s mission is to campaign globally for a right to water and to find a solution to the issue of universal access to water and basic sanitation. To achieve this, GCI is urging governments to negotiate and adopt a Framework Convention on the Right to Water, which, when ratified by the United Nations member states, will specify the rights and duties of key stakeholders in national and international water management, and will give people a legal instrument to claim their right to safe water and sanitation. To promote this cause, GCI is collecting millions of signatures to a Petition for such a right to be adopted.¹⁰

In 2002, in the absence of an explicit and universal right to water, including the right to basic sanitation services, the United Nations Committee on Economic, Social and Cultural Rights took significant steps to advance the cause. Recognizing that “[w]ater is a limited natural resource and a public good fundamental for life and health”,¹¹ the Committee found that a right to water is an implicit and essential component of accepted fundamental human rights which include the right to food, life and health contained in the International Covenant on Economic, Social and Cultural Rights.¹² This represents the most significant step at an international level under the auspices of the United Nations in the development of, and recognition of, a universal right to water.

The Committee drew attention to the fact that a right to water is also expressly recognized in two international covenants applicable to women

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RIGHT TO WATER*from preceding page*

and children. For instance, Article 14(2), paragraph 2, of the Convention on the Elimination of All Forms of Discrimination against Women (1979) provides that States parties shall ensure that women have the right to “enjoy adequate living conditions, particularly in relation to [...] water supply.”¹³ In addition, Article 24(2), paragraph 2, of the Convention on the Rights of the Child (1989) requires States parties to address disease and malnutrition “through the provision of adequate nutritious foods and clean drinking-water.”¹⁴

The right to water is also expressly included in non-binding instruments intended to achieve discrete and defined aims, including the Stockholm Declaration adopted on June 16, 1972, the first international legal document that recognizes the right to a clean environment and also that “[t]he natural resources of the earth including... water... must be safeguarded for the benefit of present and future generations.”¹⁵

Unfortunately, a number of countries, including Canada, have expressed the view that they do not consider General Comment 15 to be authoritative but merely an interpretation of the Covenant: “The General Comments have not been endorsed

by Canada or other States Parties to the Covenant and they do not enjoy any status in law.”¹⁶

The recognition of water as a human right is required in order to provide a much needed international legal framework that would provide standards regarding access to water. This could be used, *inter alia*, to assist in the peaceful resolution of watershed disputes and conflicts and to avert potential flashpoints and resulting geopolitical instability over the use of shared water resources. A universal right to water would further provide the impetus for consensus to be reached regarding the identification of minimum water requirements and the development of appropriate indicators for monitoring violations and measuring progress towards the full realization of the right to water. The implementation of a universal right to water would entitle everyone to sufficient, acceptable and non-discriminatory access to water while providing legal recourse where necessary.¹⁷

It is also necessary to recognize the pivotal role of water in sustainable economic and environmental development. The adoption of a universal right to water would underpin the adoption of a new ethical and right-based approach to sustainable water management. Such an approach would prioritize the right to water, which is essential for securing social

justice, dignity, equality and peace in 2004, Klaus Toepfer, UNEP Executive Director, spoke at the World Water Forum in Kyoto of an “urgent need” for international organizations to “act as the water equivalent of marriage guidance counselors, amicably resolving differences between countries and communities who may be straying apart.”¹⁸

Without a change in course, one way or another, water shortages will affect all of us - either directly or indirectly, perhaps as a result of conflict over water causing geopolitical instability, perhaps as a result of drought, or as a result of flooding. Those of us who now are fortunate enough to have reliable access to clean, fresh water provided by municipalities at little cost to the consumer, cannot afford the luxury of believing that water will always be available “on tap.” Water shortages can occur quickly, with the most graphic and recent occurrence occurring in England where heavy rain in July 2007 caused the worst flooding in 60 years. With the Thames Valley and entire counties inundated with water, a state of emergency was declared. The disastrous floods have created food and drinking water shortages, panic buying and looting.¹⁹

B. Placing a Value on Ecosystems

Ecosystems are infinitely precious, offering extraordinarily valuable resources: It is time to account for their value. The environmental costs of the depletion of natural resources, species and the resulting rapid erosion of human rights and quality of life are immense and are not reflected in the national accounting system, the main economic indicators comprising gross domestic product, inflation and unemployment. The Gross National Product (GNP) is used to measure national performance and personal consumption, but many believe that its value is limited for a number of reasons, including its failure to include the net value of changes in externalities-such as the environment-resource base.²⁰

There are few reports on ecosystem health. By definition, therefore, in terms of present market logic, natural ecosystems and their resources do not exist. Paradoxically, markets cannot exist without ecosystems and

International Law Section General Meeting Schedule

Below is the *new* schedule for the International Law Section meetings at The Florida Bar General Meeting held at the Tampa Airport Marriott.

Friday, September 7, 2007:

10:30 a.m. - 12:00 p.m.	ILAC Committee Meeting (Lee)
12:15 p.m. - 1:15 p.m.	Luncheon (Duval)
1:30 p.m. - 3:30 p.m.	Executive Council Meeting (Duval)

(**Bold** indicates new times.)

Delay and Sanctions in International Arbitration

By Melvyn J. Simburg

I. What Are the Applicable Rules?

A. Enforceable Award. The arbitration must be conducted in a manner that results in an enforceable award. Therefore, as attorneys, we look at the negative side of the question: What are the grounds for setting aside or refusing to enforce an award? There are three primary areas of inquiry.

1. The New York Convention;¹
2. The Federal Arbitration Act (FAA) in the United States,² other international treaties and conventions, and other implementing statutes regarding recognition and enforcement; and
3. The terms of the arbitration clause or submission agreement.

B. The New York Convention. Article 5 of the New York Convention addresses recognition and enforcement of awards. Refusal to enforce includes the following grounds:

1. "The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or the arbitration proceedings or was otherwise unable to present his case."³
2. Parts of the award deal with issues outside the arbitration submission or address matters beyond the scope of the arbitration submission.⁴
3. Recognition or enforcement of the award would be contrary to the public policy of the country in which recognition and enforcement are sought.⁵

Enforcement of foreign arbitral awards in the U.S. is governed by 9 U.S.C. §§ 201–208. Section 207 provides that an arbitral award submitted to a court in the U.S. within three years after issuance of the award is to be confirmed unless the court finds that one of the grounds in the Convention for refusal or deferral of recognition or enforcement exists. The public policy grounds in Article

5.2(b) of the Convention bring the FAA into play.

C. Federal Arbitration Act. Section 10 of the FAA governs vacation of an arbitral award, but the grounds for vacation would be sufficient to prevent enforcement in the U.S. of an award that might not otherwise be subject to being vacated by a U.S. court.

D. Learning Points. Under the FAA, an award can be attacked for partiality of an arbitrator, refusal to postpone a hearing, and refusal to admit evidence. There is pressure on arbitrators to avoid bases for attacking an award. There is no countervailing basis for attack based upon delayed proceedings, complexities due to avoiding an appearance of bias, questionably based postponements, or causing the parties to incur undue time and expense by allowing excessive testimony and evidence. The task of the advocate in arbitration is to help the arbitrators manage the process efficiently by limiting the time and procedures to only those that are necessary for a fair process and an adequate opportunity to present each party's case. What is actually required in arbitration is fundamental fairness, not an exhaustive proceeding.⁶

II. International Arbitration Rules

Virtually all rules for the administration of international arbitration proceedings provide that arbitration is intended to be efficient, expeditious, and economical, and they allow arbitrators to restrict the scope of proceedings to accomplish those goals. Discovery is not automatically allowed in international arbitration proceedings. Learning Point: The parties should rely upon their own investigations rather than discovery to prove their case.

A. UNCITRAL Rules.

1. The UNCITRAL Rules provide that "the arbitral tribunal may

conduct the arbitration in the manner it considers appropriate, provided that the parties are treated with equality and that each party is given a full opportunity of presenting his case."⁷ Under these Rules, hearings take place only if requested by a party. Otherwise, the arbitral tribunal decides whether to hold hearings and whether the proceedings are conducted on the basis of documents and other materials.⁸

2. There is no provision for discovery in the UNCITRAL Rules; there is simply a provision that allows the arbitral tribunal to require parties to produce documents, exhibits, or other evidence.⁹
3. An electronic copy of the UNCITRAL Arbitration Rules can be found at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf>.
4. The UNCITRAL Arbitration Rules are supplemented by two informal documents: (1) the 1982 Recommendations to Assist Arbitral Institutions and Interested Bodies with Regard to Arbitrations under the UNCITRAL Arbitration Rules; and (2) the 1996 UNCITRAL Notes on Organizing Arbitral Proceedings. These documents can be found on the UNCITRAL web site at <http://www.uncitral.org>.

B. WIPO Arbitration Rules. The WIPO Arbitration Rules can be found on the WIPO web site at <http://www.wipo.int/amc/en/arbitration/rules/index.html>. Article 38 of the WIPO Arbitration Rules provides that the tribunal may conduct the arbitration in the manner it considers appropriate, but in all cases the tribunal must ensure that the parties are treated with equality and that each party is given a fair opportunity to present its case. In addition, however, Article 38 provides that "the Tribunal shall ensure that the arbitral procedure

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DELAY AND SANCTIONS

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takes place with due expedition.”¹⁰

1. Unlike most other arbitral proceeding rules, the WIPO Rules provide a definition of confidential information and procedures for dealing with confidential information.¹¹
2. The WIPO Rules do not address discovery. They do, however, specifically provide that the tribunal has discretion at the hearing to limit or refuse the appearance of any witness, including fact witnesses and expert witnesses, on the basis of relevance or redundancy.¹²
3. These Rules also allow the tribunal to set time limits for the production of documents and that failure to timely produce without good cause allows the tribunal to draw its own conclusions from such failure and to make an award based upon the evidence before it.¹³

C. International Arbitration Rules of the International Centre for Dispute Resolution of the American Arbitration Association (ICDR).¹⁴

1. The ICDR Rules were amended in May of 2006 to add Article 37, which provides emergency measures of protection. This kind of interim relief, however, does not affect the general issues of discovery or delay.
2. The rules governing the arbitration direct the tribunal to conduct the proceedings with a view to expediting the resolution of the dispute. The full text of Article 16 is as follows:

Article 16

1. Subject to these rules, the tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.
2. The tribunal, exercising its discre-

tion, shall conduct the proceedings with a view to expediting the resolution of the dispute. It may conduct a preparatory conference with the parties for the purpose of organizing, scheduling and agreeing to procedures to expedite the subsequent proceedings.

3. The tribunal may in its discretion direct the order of proof, bifurcate proceedings, exclude cumulative or irrelevant testimony or other evidence, and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.
4. Documents or information supplied to the tribunal by one party shall at the same time be communicated by that party to the other party or parties.

Similar provisions for expediting proceedings can be found in Article 14.1 of the Arbitration Rules of the London Court of International Arbitration and in Article 20.1 of the Arbitration Rules of the International Chamber of Commerce.

III. Dealing With Delay

A. What is improper delay? Improper delay is any action or inaction intended to prevent an expeditious arbitration process. Intentional delay tactics undermine the arbitration process. They specifically undermine the goals and purposes of arbitration, which are to provide a speedy and low-cost method of resolving disputes. Intentional delays obviously lengthen the arbitration process, but they also mean more time is spent on the arbitration process itself, thereby increasing costs to and burdens on the parties. In some circumstances, such delay can prevent adequate relief.

B. Delay at the Initiation of Arbitration. Some delay tactics begin at the initiation of proceedings, even before the prehearing process. There can be challenges to the arbitration by seeking court-ordered stays. There can also be challenges to arbitrators and challenges to jurisdiction of the arbitration over the parties or over the issues. Such challenges can be legitimately based and reasonably pursued if they have a reasonable basis in law and fact. If such a challenge does not have a reasonable basis, then

it is frivolous. If a frivolous motion is filed in court, monetary sanctions or other relief may be available from the court as a result.

C. Administrative Remedies. Delay issues can arise from poor wording of the arbitration clause. One of the best methods of preventing delay in the future is to make sure that the arbitration clause is clear and precise. If there are prearbitration issues that counsel cannot agree upon, they can sometimes be resolved by discussions with the arbitral institution's administrative representative. These administrative conferences can be used to streamline the process as long as one side is not using the administrative conferences to delay the beginning of the arbitration proceedings.

D. Scheduling Difficulties. If there are going to be delay problems, they will frequently arise from the difficulty one side has with scheduling procedural events in the arbitration. An advocate can request that the arbitrator evaluate the merits of claimed difficulties in scheduling and schedule events as rapidly as practicably possible. If an arbitrator does agree to postpone a scheduled event, it is proper to request that all events be postponed to a specific date rather than simply continued.

E. Use of Prehearing Conference to Counteract Delay. There are steps that can be taken in the prehearing process to move the arbitration proceeding along more expeditiously, particularly if there appears to be a desire for delay by one of the parties. The arbitration panel usually must take these steps, but an advocate can request that the panel act. For example, there is usually a prehearing conference early in the arbitration process. In order to avoid claims of surprise or a party not being prepared to address particular issues, a prehearing checklist can be created by the arbitrators and sent to the parties in advance. The parties should be advised in advance to bring their calendars to the prehearing conference so that the panel can set the hearing date and all other scheduling dates. The parties can also be advised in advance that they need to know the calendars of their clients and of trial counsel if a different attorney

See "Delay and Sanctions," page 30

Limiting EU States' "Golden Shares" & Interventionist Policy – The Struggle Continues

By Lawrence H. Eaker, Jr.

For Americans well-accustomed to a *laissez-faire* economy, the concept of government ownership and state intervention within a nation's economy can be quite troubling. Within Europe's "mixed economies," however, the right of state intervention is generally accepted – especially when designed to protect the "general interest" (*i.e.*, preserving local employment and tax revenues or protecting national strategic industries). A favored method of ensuring such protection within the European economies is the grant of so-called "golden shares" to the government when undertaking the privatization of certain companies. The special rights attached to such golden shares entitle the government to then exercise certain corporate governance powers totally out of proportion to its shareholding. The golden shares concept, however, is generally defined to include not only the government holding of special shareholder status, but also the grant of special rights to the government via corporate articles of association, special agreements, government legislation, and administrative regulation. The types and extent of special rights granted to governments within these privatized companies vary widely, but most include at least one of the following powers:

- (a) the right to place limits on the maximum number of shares that may be held by foreigners;
- (b) the right to approve acquisitions of major shareholdings;
- (c) the right to appoint members of the board of directors; and
- (d) the right to veto certain company decisions (especially those pertaining to the sale of strategic assets and fundamental changes to the corporate structure).

Regardless of such claimed strategic national interests, however, many investors from other EU Member States have considered such special

rights regimes as conflicting with long-cherished values, such as the equal treatment of shareholders, the exercise of corporate control in relation to risk assumed, and, of course, the freedom of enterprise.

The European Court of Justice (ECJ) has decided eight cases since the year 2000 concerning the right of Member States to enjoy golden shares in privatized companies within the European Union's (EU's) Single Market. In addition, the EU Commission has investigated (and, in some instances, filed formal infringement proceedings against) many recent high-profile state interventions within certain privatizations and proposed intra-EU mergers, such as the French Gaz de France – Enel, the Spanish Endesa – E.ON, and the Italian Autostrade – Abertis cases.¹ And, in an even broader attack, the Commission has called on France to modify its 2005 legislation creating an authorization procedure for foreign investments in certain "sensitive" sectors of activity.² Currently pending before the ECJ is the highly publicized and very contentious "*Volkswagen Law*" case, which was filed by the Commission against the Federal Republic of Germany in 2005.³

While recognizing, in general terms, the legal right of Member States to design their domestic economies as they so please, the EU's law-making institutions have made it clear that once formerly state-owned "undertakings" have been privatized, the Member States must strictly limit their intervention within the control/management structures of these companies so as not to violate other "fundamental principles" of EU law,⁴ namely, the freedom of movement of capital and the freedom of establishment provided under Articles 56 and 43 of the EC Treaty, respectively.⁵

This article will examine the struggle taking place between the EU's Member States and their EU institutions. The objective is to more clearly

identify the developing limits on state intervention within the EU's Single Market to provide a higher degree of legal certainty for those seeking to invest within newly-privatized EU-based companies. Accordingly, there will first be presented a brief review of the series of decisions leading up to the most recent of the EU golden shares cases – the September 2006 *KPN/TPG* decision – in order to best define these special rights and the legal framework governing them. This Article will then turn to a description of the recent *KPN/TPG* decision and the clear analysis set forth by the ECJ as to the legal limits of such special rights. Finally, this Article will conclude with an application of these newly-clarified limits on golden shares to the pending *Volkswagen Law* case.

Historical Background & Legal Framework – The Proportionality Principle

Pushed by the massive wave of privatizations within the expanding EU during the 1990's and by an activist Commission, the ECJ has been faced since the year 2000 with a continuing series of cases concerning the acceptable limits to special rights enjoyed by states in those privatized companies. Coupled with the galloping pace of growth in cross-border mergers and acquisitions engendered by the 1992 Single Market Program, EU authorities were thus forced to act in order to establish a level playing field for EU investors and to ensure an acceptable degree of legal certainty within the EU financial markets. The Commission had already adopted, in 1997, its "Communication on certain legal aspects concerning intra-EU investment," wherein it interpreted the two fundamental EU legal freedoms at issue in light of various measures adopted by Member States that might constitute obstacles to such investor rights.⁶ Importantly, as will later be

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GOLDEN SHARES*from preceding page*

reflected by the ECJ decisions, this Communication included both portfolio and direct investments within the definition of legally protected capital movements. Portfolio investment concerns so-called “passive investors,” those not seeking an active role within corporate management structures. Direct investment concerns so-called “strategic investors,” those seeking an active role within a company’s management structure.

In addition, the Commission drew a clear distinction between different categories of measures – those that are discriminatory and those that are non-discriminatory – concerning investors from other EU Member States. Discriminatory measures under review by the Commission included national legislation which placed caps on foreign investments within certain key sectors of the economy. In the Commission’s view, such discriminatory measures are contrary to Articles 56 and 43 of the EC Treaty unless covered by certain exceptions, such as those involving narrowly construed public policy or public security reasons.⁷ With respect to non-discriminatory measures, they are permitted as long as they are based upon a set of objective and stable criteria that have been made public and can be justified on imperative requirements in the general interest. But, the restrictive measures must not go beyond what is necessary to achieve their objective (*i.e.*, they must be compatible with the principle of proportionality).

The 2000 to 2005 ECJ Decisions: Examples of Various “Golden Shares” Regimes

The following series of cases decided by the ECJ from 2000 to 2005 provide explicit (and rather creative) examples of the grant of special rights in privatized EU companies:

- 23 May 2000 – *Commission v. Italy* (Case C-58/99)⁸ regarding the framework privatization Law No 474/1994 and related decrees concerning government control in ENI, STET, and Telecom Italia (imposing a prior authorization

procedure for investments above certain thresholds, the right of government veto of fundamental corporate changes, and the government’s right to appoint directors);

- 4 June 2002 – *Commission v. Portugal* (Case C-367/98)⁹ regarding the framework laws and regulations concerning the privatization of undertakings in the banking, insurance, energy, and transport sectors (limiting foreign shareholdings); *Commission v. France* (Case C-483/99)¹⁰ regarding the Decree of 1993 vesting in the state an *action spécifique* in Société Nationale Elf-Aquitaine (imposing a prior authorization procedure for investments above certain thresholds, the right of government veto of strategic decisions, and the government’s right to appoint directors); *Commission v. Belgium* (Case C-503/99)¹¹ concerning two 1994 Royal Decrees, which vested in the state golden shares in Distrigaz and Société Générale de Transport par Canalisations (imposing the right of government veto of strategic decisions pertaining to the country’s energy supply and the government’s right to appoint directors);
- 23 May 2003 – *Commission v. Spain* (Case C-463/00)¹² regarding the provisions of privatization Law 5/1995 and related decrees, which gave the government control in Repsol, Endesa, Telefonica, Argentaria, and Tabacalera (imposing a prior authorization procedure for investments above certain thresholds and the right to veto fundamental corporate changes and certain strategic decisions); *Commission v. United Kingdom* (Case C- 98/01)¹³ concerning special rights granted to the government within the Articles of Association of the British Airport Authority (imposing a prior authorization procedure for investments above certain thresholds and the right to veto fundamental corporate changes and certain strategic decisions); and
- 2 June 2005 – *Commission v. Italy* (Case C-174/04)¹⁴ regarding the suspension of voting rights attached to shareholdings

exceeding 5 to 14 percent of the undertakings investing in gas and electricity companies.

With the sole exception of the Belgian *Distrigaz* case, all of these special rights regimes were held by the ECJ to constitute illegal obstacles to the free movement of capital enshrined in Article 56 of the EC Treaty. In particular, the Portuguese and Belgian cases very well explain the dichotomy in legal analysis between discriminatory and non-discriminatory measures. In the case against Portugal, the court was faced with a framework law restricting foreign participation in privatized companies involved in the banking, insurance, energy, and transport sectors. In such a blatant case of discrimination, the court rejected Portugal’s claimed exception for public policy and public security interests.¹⁵ In the Belgian *Distrigaz* case, however, the court was faced with a Belgian government golden shares regime wherein the minister of energy had the right to oppose, *ex post facto*, any transfer of technical installations and management decisions concerning company shares that might jeopardize national supplies of natural gas. Holding the measures as compatible with the fundamental principles of Community law, the court took pains in pointing out that, in the Belgian situation 1) no prior approval was required; 2) intervention by authorities was subject to strict time limits; and, finally, 3) the administrative process required a formal statement of reasons, which could then form the basis for effective judicial review.¹⁶

The KPN/TPG Case or “What We Have Here Is a Failure to Communicate”

While most EU company and competition law specialists would assume as of 2005 that no EU Member State would continue to apply special rights regimes that seem to clearly go beyond the well-stated legal limits established in the above-listed ECJ decisions, some Member States continued to “roll the legal dice” one more time in the hope of snatching victory from the jaws of defeat. That certainly seems to be the situation in the *KPN/TPG* case decided by a five-judge chamber

See “Golden Shares,” page 33

Women's International War Crimes Tribunal

By Erika Mariz & Samantha Satish*

I. Introduction

The Women's International War Crimes Tribunal on Japan's Military Sexual Slavery ("Women's Tribunal" or the "Tribunal") was a People's Tribunal created to shed light on war crimes allegedly committed by Japanese soldiers against women across Asia before and during World War II. The Women's Tribunal's primary purpose was to expose the silent suffering of between 80,000 and 200,000 women who, from 1931 to 1945, were forced to become sexual slaves for men in the Japanese military (the "comfort women system").¹ The Allied Powers failed to try these crimes at the conclusion of World War II during the convening of the International Criminal Tribunal for the Far East, otherwise known as the Tokyo Tribunal.² Instead, the Women's Tribunal tried high-ranking members of the Japanese military, high-level political officials, and the state of Japan for rape and sexual slavery as crimes against humanity for their activities in Asia from the 1930s to the 1940s³ and to end any future impunity for wartime sexual crimes and preclude their reoccurrence.⁴

As a People's Tribunal which was not created by a legal entity, the Women's Tribunal lacked the power to enforce its legal judgments. As a result, its findings carry only moral weight.

II. Historical Background

Although the comfort women system began in the early 1930s, it was not until after the Rape of Nanking that the Japanese government became actively involved in the systematic expansion of the system in an effort to protect the Imperial Army's image. The government reasoned that the use of comfort women would confine rape to militarily-controlled facilities and thus conceal these atrocities from the international press. The Japanese government also believed that the use of comfort women, and the reduction

in rapes, would lessen anti-Japanese sentiment among invaded populations and decrease their resistance. The government also hoped that a confined system with military doctors would reduce the incidence of diseases and reduce medical expenses. Finally, the isolation of the comfort women would preclude them from revealing any military secrets.⁵

The Japanese acquired the comfort women mostly from Korea, but also from Taiwan, China, the Philippines, the Dutch West Indies and other parts of Southeast Asia.⁶ The Japanese military utilized several tactics for acquiring women, ranging from misrepresentation of employment opportunities to using middlemen to forcible abduction.⁷

III. Silence Is Broken

In 1988, a women's group in the Republic of Korea learned of research by Professor Yun Chung-Ok on the Japanese military's treatment of women before and during World War II and began further investigation.⁸ As a result of their investigation, the group sent a letter to the Japanese Prime Minister in 1990, demanding a public apology for the use of the comfort women system.⁹ In response, Japan denied any acts of sexual slavery and claimed that all brothels used by the military were private enterprises.¹⁰ In 1993, after former victim Kim Hak-Sun initiated legal proceedings against the Japanese government, Japan finally admitted that the women had been coerced into forced sexual labor but maintained that it had no legal responsibility.¹¹

Former comfort women tried to seek judicial remedies through the Japanese court system. However, the courts rejected these suits on various bases including: laches, statutes of limitations, no private right of action for violations of international law, and extinguishment of claims by peace treaties at the end of World War II.¹²

IV. The Tribunal

In 1998, the Violence Against Women in War Network, Japan ("V Net") proposed the development of a People's Tribunal.¹³ NGOs from affected countries joined V Net to create the International Organizing Committee to draft the Women's Tribunal's Charter.¹⁴ The Women's Tribunal convened in Tokyo from December 8-12, 2000.¹⁵

The Women's Tribunal was a People's Tribunal, which meant that its authority did not come from a state or intergovernmental organization but from the peoples of the Asia-Pacific region.¹⁶ As a Peoples' Tribunal, it had no power of enforcement but could make recommendations.¹⁷ The Tribunal did not attempt to replace the role of a state, but instead stepped into the vacuum left by the States.¹⁸

The Charter of the Women's Tribunal was approved by judges with legal expertise in diverse areas.¹⁹ It gave the Tribunal jurisdiction over crimes against humanity. The Charter imposed individual criminal liability -- including under the theory of command responsibility -- and imposed liability on the State for acts or omissions. Critically, because the crimes took place more than half a century ago, there is no statute of limitations for crimes against humanity.²⁰

The most notable of the accused was Japanese Emperor Hirohito, who had been spared from prosecution by the Allied Powers. The other defendants were high-ranking members of the Japanese military and government who had not previously been charged with crimes related to sexual slavery, and the Government of Japan, which was served notice of the proceedings on November 9, 2000, but chose not to respond.²¹ It is important to recognize that the people of Japan were not on trial.²²

The evidence at the Women's Tribunal included testimony from thirty-five of the seventy-five survivors

continued, next page

WAR CRIMES TRIBUNAL

from preceding page

present.²³ Some of the most poignant quotes leave the reader with an indelible imprint:

“I was a virgin. Ten men raped me. One got off and another replaced him. They treated us like animals.”

– Suhanah, Indonesia²⁴

“I could keep neither my sense of humiliation nor my dignity. I felt like a living corpse.”

– Kim Soon-Duk, Korea²⁵

“We went back home and we were crying. We couldn’t tell anyone or we would be executed. It was so shameful so we dug a deep hole and covered it.”

– Maxima Regala Dela Cruz, Philippines²⁶

“My husband said, ‘it is better to have a left over dog than a left over person.’”

– Belen Alonso Sagun, Philippines²⁷

“I lost my life. I was regarded as dirty woman. I had no means of supporting myself, and my job opportunities were extremely limited. I suffered terribly. The next generation of Japanese people must know my suffering and that their parents did such bad things.”

– Teng-Kao Pao-Chu, Taiwan²⁸

Surprisingly, two Japanese soldiers testified about their use of comfort women and corroborated the stories of the victims. It is remarkable that these brave men testified because although the system was ubiquitous, men from that era are in denial over the system’s existence and the men had to be secreted into and out of the building before and after testifying.²⁹ The Tribunal also examined evidence such as government records, memoirs, and an *amicus curiae* brief.³⁰ Because of the vast amount of evidence, the judges rendered a preliminary judgment on December 12, 2000, but issued the final judgment a year later.³¹

To prove crimes against humanity, the complainant must show that the prohibited acts were committed (1)

before or during war, (2) as part of a large-scale or systematic attack committed against a civilian population, and (3) in connection with war crimes or crimes against the peace.³² Moreover, the accused must have participated directly with the instigation or commitment of the crimes. To impose command responsibility, the accused must have been a superior who knew or had reason to know that subordinates *may* be involved in criminal activity and failed to take sufficient measures to prevent or suppress the crimes or punish the perpetrators.³³ The Tribunal determined that a State would be responsible for wrongful acts when it “either through its own conduct or through the conduct of its agents or organs, acts in violation of an international duty or thereby commits an international wrong.”³⁴

The Tribunal included the crime of “sexual slavery” under crimes against humanity by utilizing the definition of “slavery” from the 1926 Slavery Convention and combining it with: (1) the act of exercising any or all powers attaching to the right of ownership over a person by exercising sexual control over a person or depriving a person of sexual autonomy; and (2) the intentional exercise of these powers.³⁵ The Women’s Tribunal chose the term “sexual slavery” over “forced prostitution” because it felt the latter term obscured the gravity of the crime and gave the false impression that women volunteered for these acts.³⁶ Furthermore, the term “forced prostitution” would stigmatize the victims as “immoral” or “used goods.”³⁷

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V. Japan’s Defense

Instead of granting summary or default judgment to the complainants, the Judges considered all anticipated defenses by the accused by requesting a Japanese attorney to submit an *amicus curiae*.³⁸ Also, the Judges considered arguments that the Japanese government had made in domestic cases and the responses given by Japan to the UN after being condemned for the comfort women system.³⁹

Japan’s defenses and those in the *amicus curiae* can be summarized as follows.

(1) The Tribunal lacks standing because only states and international organizations recognized

by states have jurisdiction to adjudicate claims.⁴⁰

(2) By prosecuting defendants posthumously, the defendants’ due process rights are violated since they cannot be present at trial and consequently cannot defend themselves.⁴¹

(3) The claims are barred by the principle of *nullum crimen sine lege*, which means that a person cannot be prosecuted for acts that were not recognized as crimes at the time of the acts’ commission.⁴² In other words, prosecuting rape and sexual slavery as crimes against humanity violates the principle of non-retroactivity because they were newly recognized by the Charters of the Nuremberg Tribunal and International Military Tribunal for the Far East (IMTFE). Moreover, it was argued that the prohibition of slavery was not established as customary international law at the times the acts took place.⁴³

(4) Rape in the context of war did not violate the 1907 Hague Convention or customary international law at the time the alleged acts were committed. Further, the 1929 Geneva Convention is inapplicable as Japan was not a signatory, and the Convention did not constitute customary international law.⁴⁴

(5) The Emperor’s position as leader of Japan gave him absolute immunity under international and domestic law since he was a figurehead with no real power.⁴⁵

(6) The consequences to Japanese culture would be too great if the Emperor was brought to trial because he is a “symbol of the State.”⁴⁶

(7) Accused commanders and superiors were unaware of the extent to which women were forced to be sexual slaves.⁴⁷

(8) Actions before and during World War II are time-barred because these events occurred more than fifty years ago.⁴⁸

(9) Comfort women have no right to reparations because individuals lack standing to sue a State.⁴⁹

See “War Crimes Tribunal,” page 36

A Practitioner's View of the Economic and Social Effects of Failure to Pass the Comprehensive Immigration Reform Bill

By Larry S. Rifkin, Esq.



When the Democrats won the majority in Congress last November, many in the immigration legal community believed that the 110th Congress would finally achieve a comprehensive immigration reform bill. But on June 28, 2007, the Senate failed to pass the immigration reform bill, with only 46 senators voting in favor of the legislation. Piecemeal legislation may follow, but a bill that addresses our country's immigration problems will be delayed until at least 2009, when the next president takes office.

Comprehensive immigration reform is essential to our economy, our national security, and our society. Lawmakers have an obligation to find rational and humane solutions to fix immigration laws that serve our current economic and social needs. Current U.S. immigration laws do not adequately handle the country's 12 million or so undocumented immigrants, businesses' need for employing both low and high skilled workers, threats to our national security, and unreasonable backlogs in family and employment-based immigration. Any comprehensive immigration reform bill will have to increase the number of employment visas, provide a path to legalization for undocumented immigrants already in the country, and create tougher and more effective enforcement.

The challenge in Congress will be to balance pro and anti-immigration forces into sound legislation that will begin to repair the nation's broken immigration system. Perhaps the bill failed in Congress this summer because of legislative tactics, failure to compromise on amendments, or particular provisions of the bill dealing with "amnesty" or guest workers. On one side were those who focused

on the labor needs of business and the United States' historic openness to immigrants. On the other side were concerns about national security, the displacement of U.S. workers, and the control of illegal immigration.

Perhaps the immigration reform bill failed in Congress not because of lack of compromise on specific sections of the bill, but rather because of the general sentiment against *illegal* immigration among U.S. voters. According to a June Gallup Poll, only 17% favored increased immigration, 42% said it should be kept at present levels, and 39% said it should be decreased.¹ The 39% who believe immigrants are bad for the economy want to build a wall along the southern border and adamantly oppose illegal immigrants becoming citizens. This 39% would have translated into a significant number of votes in the upcoming presidential elections. Until current immigration laws demonstrate to the public their ability to control illegal immigration and enforce the border, voters will associate immigration with illegal immigration rather than focus on its positive aspects.

The hope is that the legislature will examine immigration issues of immediate priority to U.S. competitiveness and economic growth. Failure to overhaul our immigration system will have a negative impact on our economy. Our economy needs foreign workers in low and high skilled jobs; however, under current immigration laws, it is virtually impossible to bring these workers into the United States legally or to obtain employment authorization documents for those already in the country without them. Maintaining a supply of able workers of all skill levels keeps our economy strong and helps maintain our place in a world of increasing global competition. The priority for businesses is to get the workers they need promptly, without more roadblocks and delays. Our immigration

laws should be geared toward achieving that goal.

Realistic Levels of Employment-Based Visas

A comprehensive immigration reform bill should include realistic ceilings on employment-based visas. One major area in need of reform is the H-1B visa program because the current cap of 65,000 is insufficient to meet the demands of our economy for highly skilled professionals. The H-1B visa program has been the main avenue for businesses to recruit and retain highly skilled workers from around the world and to hire foreign students who have obtained a U.S. education. This year's limit on H-1B visas was reached after only one day - the first time in history the annual cap was reached so quickly. USCIS received approximately 150,000 applications on the first day applications were accepted.² This is evidence that the current cap on H-1B visas is too low to meet the needs of U.S. businesses and highly skilled foreign professionals.

Since 1990, U.S. employers have relied on H-1B visas to hire highly educated foreign workers for up to six years. Because of pressure from labor unions, Congress has maintained low caps on the number of H-1B visas available. The cap has fluctuated from a low of 65,000 to 195,000 in the late 1990's, during the "dot.com" boom and because of pressure from the high tech industry. Despite Congress increasing the cap, the demand for H-1B visas continued to press against the statutory ceiling. In 2004, the H-1B cap reverted from 195,000 per year to 65,000, where it currently stands once again. Since 2004, the cap has been consistently reached before the start of the fiscal year.

A comprehensive immigration reform bill would raise the 65,000

continued, next page

IMMIGRATION REFORM BILL

from preceding page

ceiling on new H-1B visas to levels commensurate with the country's demand and U.S. businesses' needs. Rather than seeking to go against laws of supply and demand, our immigration policy should embrace them. An expanded H-1B program would allow U.S. businesses to hire the workers they need and enable the United States to maintain its competitive edge in a global economy.

The immigration reform bill that failed to pass in the Senate proposed to raise the cap to 115,000 in 2008 and subsequently to 180,000 per year. In light of the number of applications USCIS received this year on just the first day, a 115,000 cap is low. Congress must create an effective H-1B visa program with realistic levels to allow foreign workers to fill jobs in industries where there are severe shortages of U.S. workers.

Need for Both Low and High Skilled Workers

A comprehensive immigration reform bill should provide legal avenues for both low and high skilled workers. Despite the critical role played by foreign workers in many less skilled job categories, the current immigration system offers very few employment-based visas for these workers. Since Congress failed to provide temporary workers with a workable visa, they will continue to enter the country illegally and to work without authorization. Under the current system, nearly all of the

visa preference categories for workers in less-skilled jobs are subject to arbitrary numerical caps that do not even come close to matching the level of labor demand in the U.S. economy. There is no reason to choose between the two levels of skill since both are needed in our economy. As with the H-1B cap, it is important that the quota be consistent with the flow generated by supply and demand.

Several legislators of the failed immigration reform bill proposed to create a temporary work visa program that would grant two-year work "Y visas," renewable two or three times, as long as the foreign worker left the country for one year between each period.³ This program would be unworkable for Y visa holders or for employers who want a reliable workforce. Immigrants would be forced to uproot their families or to leave them behind in their home countries. Additionally, Y visa holders could not apply for permanent residency from this status and the cap on the admission of temporary workers was set below current labor demands. It is problematic to deny temporary workers an opportunity to live with their families, establish a home, integrate into local communities, and eventually apply for permanent residency.

The bill also proposed to replace the current employer-sponsored immigration system with a merit-based point system. Under this system, persons could work toward receiving an immigrant visa through a merit based point system that would favor applicants with higher levels of education, with a job offer requiring specialized skills or in high demand, who speak English, and who had certain family relationships in the United States.⁴

This point-based system would advantage workers without advanced education and skills. There need be no tradeoff between the two groups. Each should be considered independently since they both contribute equally to our society. What is important is to reach a balance between the levels of low and high skilled workers and to set those at realistic levels.

Legalization of Undocumented Immigrants

The country needs sound and humane immigration laws. It is not feasible or humane to deport the approximately 12 million undocumented immigrants currently living in the United States. Many of these persons have been in the United States for over 10 years with deep family and social ties to this country. Undocumented immigrants work and contribute to our economic strength as a nation. On balance, the economic benefits of undocumented immigrants far outweigh the costs since they are participating workers, consumers, business owners, and taxpayers.

Failure to pass a comprehensive immigration reform bill results in undocumented immigrants continuing to live in limbo, at risk of deportation, afraid of bargaining with their employers, and unable to participate in politics. A comprehensive immigration reform bill would include a reasonable road to legalization for the undocumented immigrants currently living in the United States. A practical solution is to grant permanent residency and eventually citizenship to those who learn English, pay their

See "Immigration Reform," page 27

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The Eternal Adjustment Applicant Frequently Asked Questions

By Tammy Fox-Isicoff and H. Ronald Klasko

1) Who can travel after an adjustment application is filed?

Adjustment applicants who have a valid H-1B, H-4, L-1 or L-2 visa can travel. Adjustment applicants with advance parole documents can travel.

The travel outside of the United States by an applicant for adjustment who is not under exclusion, deportation, or removal proceedings shall not be deemed an abandonment of the application **if he or she was previously granted advance parole** by the Service for such absences, and was inspected and paroled upon returning to the United States.¹

2) Do those who hold H-1B or L visas or their derivatives need evidence of the filing of an adjustment to travel on an H or L?

The travel outside of the United States by an applicant for adjustment of status who is not under exclusion, deportation, or removal proceedings and who is in lawful H-1 or L-1 status shall not be deemed an abandonment of the application if, upon returning to this country, the alien remains eligible for H or L status, is coming to resume employment with the same employer for which he or she had previously been authorized to work as an H-1 or L-1 nonimmigrant, and is in possession of a valid H or L visa (if required) **and the original I-797 receipt notice for the application for adjustment of status.** The travel outside of the United States by an applicant for adjustment of status who is not under exclusion, deportation, or removal proceedings and who is in lawful H-4 or L-2 status shall not be deemed an abandonment of the application if the spouse or parent of such alien through whom the H-4 or L-2 status was obtained is maintaining H-1 or L-1 status, the alien remains otherwise eligible for H-4 or L-2 status, and the alien is in possession of a valid H-4 or L-2 visa (if required) and the original of the I-797 receipt notice for the application

for adjustment of status.²

As a matter of general practice, USCIBP has not required the presentation of the adjustment receipt for aliens traveling on an H or L visa. USCIS has announced that it will take months to issue receipts for July 2007 filings. Accordingly, it may be impractical for USCIS to enforce this provision in practice.

3) Does an adjustment applicant need employment authorization to work if the adjustment applicant reenters the United States on advance parole and remains the beneficiary of an expired, valid H-1B or L-1A visa?

An adjustment applicant's otherwise valid and unexpired nonimmigrant employment authorization is not terminated by his or her temporary departure from the United States, **if prior to such departure the applicant obtained advance parole** in accordance with 8 CFR 245.2(a)(4)(ii). If the alien's H-1 or L-1 employment authorization would not have expired had the alien not left and returned under advance parole, the applicant's failure to obtain a separate employment authorization document will not negate the alien's ability to work. It is important to note that this rule only applies to those who have not been employed outside the terms of their H or L.³

4) Can an alien who enters on advance parole extend H-1B or L status?

An alien who held an unexpired, valid H-1 or L-1 nonimmigrant visa, but who was paroled into the U.S., may apply for an extension of H-1 or L-1 status if there is a valid and approved petition, as long as the alien has not worked outside the H-1 or L-1. If the Service approves the application for an extension, the alien's parole is terminated.⁴

5) If the principal H-1B enters the United States on advance parole, can the spouse continue to enter

the United States on an H-4?

There are two schools of thought on this. One is that the H-4's status is dependent on the principal's status; and if the principal is on advance parole, the spouse must also enter on advance parole. The other is that if the spouse has not violated the essential terms of his/her H status, a legal fiction is created that the H status is still valid and thus the H-4 can continue to travel on the H-4.

6) Is it wise to extend H or L visas if an adjustment is pending?

This depends on a number of factors:

- a) cost
- b) easier to travel with H or L as opposed to advance parole and there is no need for annual extensions of these documents
- c) there is a limit to the period of stay in H or L; an applicant might use up this limit while the adjustment is pending, negating any possibility of using the visa if the adjustment is denied
- d) the sponsor employer's H-1B dependency
- e) if the adjustment application is denied, the applicant will still have H or L status if the underlying visa is extended
- f) employment authorization is automatically extended on the filing of an H or L extension; this is not the case with employment and advance parole extensions
- g) employment authorization and advance parole extensions require name checks that can take a long time
- h) advance parole and employment authorization must be renewed four months before expiration to be safe; the failure to calendar this will result in the loss of these benefits
- i) maintenance of the H or L by the principal will enable a spouse or

continued, next page

ETERNAL ADJUSTMENT*from preceding page*

been denied, but an appeal has been filed? Yes.⁷

child who did not file for adjustment, or missed the priority date cut-off, to continue to remain in the United States with the principal. It will also protect the after-acquired spouse by according status as an H-4 or L-2.

7) Does an H-4 lose status as an H-4 if granted EAD?

Only if the H-4 uses the EAD. If the H-4 has the EAD and does not use it, the H-4 maintains H-4 status.⁵

8) Does this same analysis apply to the L-2?

No. Since the L-2 has employment authorization, employment on the L-2 will not disrupt L-2 status.

9) What period of time can an H-1B obtain when filing for an extension?

The H-1B can be approved for any period of time remaining on the H-1B plus recover any time spent outside the United States. Moreover, the H-1B can be approved for an additional three years if the I-140 has been approved and the priority date is not current when the H-1B extension is filed, or one year if 365 days have elapsed since the filing of the labor certification or I-140. The I-140 or labor certification must have been pending at least 365 days from the requested start date on the extension.⁶

10) Is an alien still eligible for the extension if the I-140 has**11) Will the principal lose O-1 status upon applying for adjustment?**

Not necessarily. If the O-1 continues to work in a manner commensurate with the O-1 status, then the O-1 maintains O-1 status. On the other hand, if the O-1 works other than for the O-1 petitioner, the O-1 will lose O-1 status.

12) Does this also hold true for an F or an H-3 who maintains status during the pendency of the adjustment?

Yes, although the F or H-3 may not be able to extend status, the filing of the adjustment application does not terminate lawful nonimmigrant status.⁸ If the adjustment is denied, the alien would be very likely be unable to obtain an F-1 or H-3 visa and would likely encounter problems seeking readmission because of lack of nonimmigrant intent.

13) If an adjustment application is filed for the principal, and a child or spouse is outside of the United States, can the child or spouse reenter the United States on an H or L visa?

Yes, if the principal is maintaining status on an H-1B or L.

14) What if the principal has entered the United States on advance parole?

This is not clear. The Cronin memo permits the holder of an unexpired, valid H or L visa to extend status if the principal is on advance parole and

status. Thus, it can be argued that the derivative is in status as long as the H or L has not otherwise violated status. USCIS has never held that an H-4 is out of status because the principal traveled outside the United States. Nevertheless, this area remains unsettled.

15) If the principal filed for adjustment when his/her priority date was current, can a spouse or child later file for adjustment, even if the priority date is not current?

No. The priority date must be current at the time of the filing of the adjustment.

16) Can an H-4 who has employment authorization travel and reenter on an H-4?

Yes, unless the H-4 has actually taken up employment. The holding of the employment authorization document does not in and of itself alter the H-4's status.⁹

17) If the principal H-1B is in the United States and working outside the parameters of the H-1B with an employment authorization document, can the spouse use the H-4 to travel?

No. If the principal is present in the United States and has not maintained H-1B status, the H-4 is not entitled to that status.

18) Can a principal be the beneficiary of a nonimmigrant visa petition filed by a different sponsor while the principal's adjustment is pending?

Yes. There is no requirement that the alien be employed by the sponsor on a permanent residence petition. Nevertheless, there is a requirement that the alien have the intention to be employed by the sponsor. This intention can change once the visa petition is approved and the adjustment application has been pending 180 days.¹⁰

19) Does an alien have to be in the United States when an advance parole is filed? When approved?

The applicant must have been granted advance parole, unless present in the United States on an H-1B or

See "Eternal Adjustment," page 39

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Articles between 7 and 10 pages, double-spaced, involving the various disciplines affecting international law may be submitted on computer disk with accompanying hard copy, or via electronic format in Word or WordPerfect (with the use of endnotes, rather than footnotes.) Please contact Manjit Gill at msgill@becker-poliakoff.com for submissions to the *Quarterly* and for any questions you may have concerning the *Quarterly*.

DEADLINE FOR NEXT ISSUE IS OCT. 15, 2007.

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SCHEDULE OF EVENTS

THURSDAY, FEBRUARY 7, 2008

7:45 a.m. – 8:15 a.m.

Registration and Continental Breakfast

8:15 a.m. – 8:30 a.m.

Opening Remarks

Scott Devore, Esq., Chapter Chair, S. Fla. Chapter of the American Immigration Lawyers Association (“AILA”)

8:30 a.m. – 9:30 a.m.

Winning Strategies for L’s and E’s

- start-up issues for both
 - dealing with poorly informed consulates and third country processing
 - small company issues
 - dealing with functional managers
 - L extensions and E extensions where the petitioning companies have not grown
 - dealing with L time limits, especially L-1Bs
 - considerations in choosing L visas over E visas, and vice versa
 - difficulties converting L to EB1-3
- Eugenio Hernandez, Esq., Miami, Florida (moderator)
Timothy Murphy, Esq., Miami, Florida
Larry S. Rifkin, Esq., Miami, Florida

9:30 a.m. – 10:45 a.m.

Strategies for Employment of Temporary Workers

- what visas remain options for temporary workers
 - dealing with quota restrictions and processing delays
 - proving nonimmigrant intent
 - strategic processing of H-2Bs
 - H-3 and J visas
 - practice tips and timing strategies
- Jeff Bernstein, Esq., Miami, Florida (moderator)
David Grunblatt, Esq., Newark, New Jersey
Nita Itchhaporia, Esq., San Jose, CA

10:45 a.m. – 11:00 a.m.

Coffee Break

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EB-5 Investor Green Cards through American Life Inc. at the Seattle Regional Center

Tammy Fox-Isicoff, Esq., Miami, Florida (moderator)
William Stock, Esq., Philadelphia, PA
H. Ronald Klasko, Esq., Philadelphia, PA (Past President AILA)
Efren Hernandez, Esq., Washington, D.C.

11:00 a.m. – 12:30 p.m.

Employment Based Immigration – Where Are We Now?

- labor certification and PERM update
- defining “extraordinary”
- securing the best priority date for your client
- creative avenues for obtaining residence
- dealing with the fluctuating quotas
- portability and the advantages and disadvantages of filing for adjustment versus consular processing
- is your client in status, or eligible for Section 245(k) or 245(i)

The Future of Immigration Forms, Case Management and I-9 ComplianceSM

Sponsored by:

12:30 p.m. – 2:00 p.m.
President’s Luncheon (included in registration fee)
Linda Swacina, District Director, USCIS, Miami, Florida (invited)
Ira Kurzban, Esq., Miami, Florida - Federal Court Update

2:15 p.m. – 3:15 p.m.

Coping with Enhanced Employer Enforcement

- I-9 requirements
 - what to do to correct an I-9 error
 - dealing with mis-match letters
 - when is an employer under constructive notice
 - utilizing DHS verification systems
 - know your clients’ rights
- Jack Finkelman, Esq., Miami, Florida (moderator)
Bo Cooper, Esq., Washington, D.C.
Eileen Scofield, Esq., Atlanta, Georgia

3:15 p.m. – 4:00 p.m.

Strategies for Case Management and Ethical Considerations

- timing of H filings and managing client expectations
 - dealing with rumor mill
 - changes in priority date processing and case management
 - strategies to keep children turning 21 within their parents’ cases
 - labor certification fee payment
- Jeffrey A. Devore, Esq., Palm Beach Gardens, Florida (moderator)
Bo Cooper, Esq., Washington, D.C.
William Stock, Esq., Philadelphia, PA

4:00 p.m. – 4:15 p.m.

Coffee Break

4:15 p.m. – 5:15 p.m.

Issues in Family Immigration

- securing the best priority date
 - learning your Ks
 - nuances in I-751 processing
- Scott Devore, Esq., Palm Beach Gardens, Florida (moderator)
Michael Shane, Esq., Miami, Florida
David Berger, Esq., Miami, Florida

5:15 p.m. – 7:00 p.m.

Cocktail Reception-Talk to the Experts.

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8:30 a.m. – 9:15 a.m.

Can You Help the Illegal Foreign National?

- avoiding and dealing with unlawful presence
 - grandfathering
 - VAWA
 - asylum and its risks, before and after one year in the U.S.
 - putting your client in proceedings (is this possible?)
- Anis Saleh, Esq., Miami, Florida (moderator)
Rebecca Sharpless, Esq., Miami, Florida
Lourdes Martinez-Esquivel, Esq., Miami, Florida

9:15 a.m. – 10:45 a.m.

Dealing with the Effects of Clients' Criminal Activity on their Immigration Status

- is your client removable?
 - expanded grounds of removability and impact on Section 212(c)
 - preserving issues for judicial review
 - dealing with Blake-type issues
 - filing affirmatively for 212(c) and determining eligibility
 - to travel or not to travel
 - the MIA pilot program
 - legal update—what is a CIMT, crime of violence, etc.
- Mary Kramer, Esq., Miami, Florida (moderator)*
Stuart Karden, Esq., Palm Beach Gardens, Florida
Jeff Joseph, Esq., Denver, Colorado
The Honorable Denise N. Slavin, Immigration Judge, Miami, Florida (invited)

10:45 a.m. – 11:00 a.m.

Coffee Break

11:00 a.m. – 12:15 p.m.

Applying for Relief before the Court, USCIS, or the Consulate

- what acts can be waived, and by which waivers (fraud, unlawful presence, health, Section 212(d)(3), Section 212(h), cancellation for non-lpr and lpr)
 - how to package your waiver and present your case
- Jeff Joseph, Esq., Denver, Colorado (moderator)*
John Pratt, Esq., Miami, Florida
Antonio Revilla, Esq., Miami, Florida
David Leopold, Esq., Cleveland, Ohio
The Honorable Stephen Mander, Immigration Judge, Miami, Florida

12:15 p.m. – 2:00 p.m.

Awards Luncheon (included in registration fee)*Senator Bill Nelson (invited)***Hot Topic Update**

2:15 p.m. – 3:15 p.m.

BIA and Federal Court Update: Strategies for Dealing with Bad Precedent in Business and Enforcement Immigration Law

- recent decisions of import (BIA and Federal Courts)
- court stripping provisions, and laws limiting jurisdiction
- strategies for distinguishing unfavorable case law
- should your clients move to a better jurisdiction, and, if so, when?

*Anis Saleh, Esq., Miami, Florida (moderator)**Lucas Guttentag, Esq., San Francisco, California**Jeff Joseph, Esq., Denver, Colorado*

3:15 p.m. – 3:30 p.m.

Coffee Break

3:30 p.m. – 4:30 p.m.

Federal Court Redress for Adjudication Delays

- is mandamus alive and well?
 - recent decisions of import
 - choosing your circuit
 - Sec. 336(b): what constitutes an "interview"
- H. Ronald Klasko, Esq., Philadelphia, Pa. (moderator)*
Stephen Bander, Esq., Miami, Florida
Linda Osberg Braun, Esq., Miami, Florida

****** All panels will also address ethical issues and considerations affecting their respective topics ******

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International Income Tax and Estate Planning

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

One Location: October 12, 2007 • Hyatt Regency Downtown
400 S.E. 2nd Avenue • Miami, FL 33131 • 305-358-1234

Course No. 0547R

Friday, October 12, 2007

7:45 a.m. – 8:00 a.m. **Late Registration**

8:00 a.m. – 8:50 a.m.

Foreign Law Considerations and United States Definitions of Residence and Domicile

William H. Newton III, Miami

8:50 a.m. – 9:40 a.m.

Practical Approaches to Transfer-Pricing: The Impact on Your Clients

Robert Feinschreiber, Feinschreiber & Associates, P.A., Key Biscayne

9:40 a.m. – 9:55 a.m. **Break**

9:55 a.m. – 10:50 a.m.

International Tax Aspect of the Internet and E-Commerce

Seth Entin, Greenberg Traurig, P.A., Miami

10:50 a.m. – 11:40 a.m.

Utilization of Tax Treaties for the International Client

William Streng, University of Houston Law Center, Houston, TX

11:40 a.m. – 12:30 p.m.

United States Tax Considerations in Utilization of Off-Shore Trusts

Leslie Share, Packman Neuwahl & Rosenberg, Miami

12:30 p.m. – 2:00 p.m. **Lunch (on your own)**

2:00 p.m. – 2:50 p.m.

Potpourri of International Tax Compliance Issues and Update on Expatriation

*Andrew Weinstein, Holland & Knight, LLP, Miami
Kevin Packman, Holland & Knight, LLP, Miami*

2:50 p.m. – 3:40 p.m.

Current Focus of IRS in the International Context

Andrew Tiktin, IRS Counsel, Miami

3:40 p.m. – 3:55 p.m. **Break**

3:55 p.m. – 4:50 p.m.

Coordinated Tax and Immigration Considerations for Foreigners Investing in the United States

Michael A. Bander, Bander & Associates, P.A., Miami

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
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RULE OF LAW

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defined law.” Very recently, a Chinese lawyer who has challenged the lack of a fair and impartial legal system in his own country, and has been persecuted for this challenge, wrote his summary of the principle:

“The opposite of rule of law is rule of person. In contrast, a key aspect of rule of law is ‘limitation’. Rule of law puts limits on the discretionary power of government... The rule of law ensures that individuals have a secure area of autonomy and have settled expectations by having their rights and duties pre-established and enforced by law.”

Quoting the Eighteenth Century philosopher Charles de Secondat Montesquieu, “We are free because we live under civil laws.”¹

In the summer of 2006 lawyers and businessmen in the Dominican Republic, the United States and most of Central America experienced full implementation of the Dominican Republic – Central America Free Trade Agreement (hereinafter CAFTA). This regional trade agreement, following on the general model of the North American Free Trade Agreement (NAFTA) and the parameters of the General Agreement on Tariffs and Trade (GATT), is intended to establish a comprehensive legal regime to reduce and eventually eliminate most national barriers to the trade of goods and services between the United States and the countries of Central America and the Dominican Republic.

There is a substantial history in much of Central America of efforts to create free and open markets and promulgate a stable legal regimen to encourage development through foreign commerce. The nations of Central America, initially established as the United Provinces of Central America, obtained independence from Spain scarcely a generation after the United States, and were governed in the formative years (the 1820s) by a classic liberal regime. The government sought to break with the statist and mercantilist Spanish imperial system by opening the region to foreign commerce and reducing or eliminating

the influence of the landed holdings of the Church and Iberian/Creole aristocracy. The Liberal policies of this government included elimination of many barriers to foreign investment and trade, promotion of capitalist enterprises and settlement of foreign nationals (principally British and later German and North American).²

Unfortunately, these policies did not lead to uniformly positive results. The influx of foreign investment and commerce into the nascent United Provinces caused economic and social dislocations in certain areas and led to resentment of outside influence and a certain insularity that endures. The struggle between rival interests and their reaction to the opening of Central America to free trade also led to a series of civil wars and polarization between Liberal and Conservative parties that existed well into the Twentieth Century. The failure of Central America’s first liberal regime was reflected most starkly in the break-up of the nascent Central American republic by 1840 into the respective states which exist today. Not only did this reaction create difficulties for foreign trade and relations, but also established internal barriers within the former United Provinces which in part still exist.

II. The CAFTA – A Summary and Overview³

CAFTA is a broad free trade agree-

ment governing tariff and regulatory matters for the trade of goods and services between the United States, on the one hand, and Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and the Dominican Republic on the other. As set forth more fully in Section III below, CAFTA follows a succession of free trade agreements between the United States and other countries in Latin America and other parts of the world.

On October 1, 2002, President George Bush notified Congress of the Administration’s intention to enter into negotiations for a free trade agreement with the five Central American countries. Those negotiations took place between January and December 2003. Negotiations were completed with all of these countries except Costa Rica, which withdrew and later renewed negotiations which were ultimately completed in January 2004. Separate negotiations between the United States and the Dominican Republic also began in January 2004 and with the decision to incorporate the Dominican Republic into CAFTA, those negotiations were completed by March 15, 2004. CAFTA was ultimately signed by all seven party nations on August 4, 2004.⁴

Ratification of CAFTA by the signatory countries has been a longer, and in some cases, much more difficult process. In the United States,

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after a contentious debate in Congress and nationally, the U.S. Senate passed implementing legislation on June 30, 2005 with the House of Representatives following with a very close vote on July 28, 2005. President Bush signed the legislation into law on August 2, 2005.⁵

In Central America, several party nations saw their national legislatures ratify CAFTA by large margins, and relatively soon after formal signing in 2004. The Salvadoran legislature was the first to ratify CAFTA on December 17, 2004, followed by the Honduran legislative ratification on March 3, 2005 and Guatemalan ratification on March 10, 2005. The Dominican Republic ratified CAFTA on September 6, 2005 with an almost unanimous vote in the Chamber of Deputies and the Senate.⁶

Ratification has been most difficult in Nicaragua and Costa Rica. The Nicaraguan ratification process involved strident opposition in some quarters, and CAFTA was finally ratified by a narrower margin on October 9, 2005.⁷ The ratification process in Costa Rica has been held up based upon objections by unions and others to several aspects of CAFTA, including in particular opening up of trade in insurance and telecommunications services and the possibility of privatization of certain State industries.⁸ President Oscar Arias, who favors CAFTA, won election in 2006 by a narrow margin on his support for the agreement and in July 2007 he prevailed in the Costa Rican court system in his effort to hold a national referendum on CAFTA. That referendum is scheduled to be held on October 7.⁹

CAFTA contains a provision, at Chapter 22, Article 22.5, that the Agreement shall enter into force on January 1, 2005 provided that the United States and one or more other signatories notify the depository that they have completed their applicable legal procedures, but if the Agreement did not enter into force on January 1, 2005, the Agreement shall enter into force after the United States and one or more other signatories make such a notification, on such later date as

they may agree. Due to both ratification and implementation issues, the 2005 date was not met. Respective official government websites indicate that CAFTA entered into force in El Salvador on March 1, 2006 and in Honduras and Nicaragua on April 1, 2006. After several delays CAFTA went into force in Guatemala on July 1, 2006 and in the Dominican Republic on March 1, 2007. The CAFTA provisions now apply in the United States as to the countries which have implemented the Treaty.¹⁰

It should also be noted that CAFTA does not change the customs and trade relationships between the nations party to the Treaty in Central America and the Dominican Republic. Trade between these countries is governed by existing bilateral agreements which to a great extent have reduced or eliminated many of the prior trade barriers.¹¹ One of the arguments in the Costa Rican debate is that CAFTA will encourage the Central American countries to come together themselves. Some progress is being made between Honduras, Guatemala and El Salvador on this score, but on the other hand opposition to CAFTA in some quarters has stalled negotiations with the European Union on a similar agreement.¹²

III. Precursors and Successors

The reduction of tariffs and other trade barriers and the effort to open up free trade in Central America substantially predates the beginning of the CAFTA negotiations. In fact, the opponents of CAFTA usually fail to acknowledge that all of the signatories to the Convention have enjoyed substantially the same privileges *vis à vis* their trade with the United States for over twenty years. In many respects, CAFTA only serves to equalize these trade advantages by reducing or eliminating most of the barriers to U.S. products and businesses entering Central America and the Dominican Republic as those countries' products and businesses have enjoyed moving in the other direction.

In the early 1980s, the United States recognized the necessity of encouraging economic advancement in the Caribbean Basin, encompassing not only the Caribbean island nations

littoral, including Central America. This was due in no small part to a number of political disruptions and the threat of the spread of communism, notable with the Nicaraguan Revolution in 1979, civil wars and unrest in El Salvador, Honduras and Guatemala and the expansion of the regional narcotics drug trade, with the connivance of a number of corrupt governments, from the northern coast of South America to the United States.

The administration of President Ronald Reagan established the Caribbean Basin Initiative as an effort to rejuvenate the Caribbean Basin economies and therefore reduce the incentive for radical political changes and criminal activity. The core aspect of the Caribbean Basin Initiative was the enactment of the Caribbean Basin Economic Recovery Act of 1983 (CBERA).¹³ Under the CBERA the President was authorized to grant duty-free treatment to all eligible articles originating from any beneficiary country in accordance with provisions of the Act. "Beneficiary countries" are listed in the Act, including each of the current signatories to CAFTA. The President could designate a country as a beneficiary to the CBERA if it met certain conditions, and was prohibited from designating a country as a beneficiary under certain conditions, most notably if it was a communist country; had nationalized, expropriated or otherwise seized property owned by a U.S. citizen; or had repudiated or nullified existing contracts or violated patent or trademark conventions.¹⁴ Section 2703 of the CBERA identifies commodities produced in the beneficiary countries which would be eligible for duty free treatment.

In 1990 the United States enacted the Caribbean Basin Economic Recovery Expansion Act of 1990 (Expansion Act)¹⁵ with the goal to both reaffirm the CBERA and to amend it to improve its operation. The Expansion Act addresses certain types of products in greater detail, increases duty-free allotments, more fully addresses rules of origin for the components of products and even contains amendments to the section dealing with worker rights.

In 1994 the elected leaders of thirty-four countries in North and

South America met at the Summit of the Americas. They agreed to work towards the negotiation and conclusion of a Free Trade Area of the Americas by the year 2005. In working towards that goal, a number of countries entered into negotiations with the United States to establish localized free trade agreements, the ultimate goal to combine them into a free trade area encompassing the entire Western Hemisphere.

On January 1, 1994, the North American Free Trade Agreement (NAFTA) entered into force between the United States, Canada and Mexico.¹⁶ One of the effects of NAFTA was that it eliminated the advantages enjoyed by the beneficiary countries of the CBERA and related provisions of the Caribbean Basin Initiative against Mexico in relative trade with the United States. At the same time, NAFTA became a model for the expansion of free trade regimes in Latin America.

Political stability seemed to return to Central America with the conclusion of civil wars and success of democratic elections in Nicaragua and El Salvador and efforts to control the narcotics trade in the Caribbean. At the same time, natural disasters in the form of several catastrophic hurricanes struck the Caribbean and Central America in the late 1990s, leading to severe economic disruption.¹⁷ As a result of these trends through the 1990s, in 2000 the United States enacted the United States – Caribbean Basin Trade Partnership Act (CBTPA)¹⁸ as part of the Trade and Development Act of 2000.¹⁹ The main purpose of this Act was to provide the twenty-four beneficiary countries of the Caribbean Basin Initiative enhanced trade preferences to equalize their U.S. trading privileges with those of Mexico under NAFTA and to encourage negotiations towards the Free Trade Area of the Americas. A key effect of the CBTPA was to significantly expand preferential treatment for apparel made in the Caribbean Basin region. The CBTPA would also give NAFTA-like parity on a temporary basis, pending expansion of the FTAA negotiations.²⁰ The enactment of CAFTA now supersedes these various Caribbean Basin treaties with respect to the beneficiary countries.

Shortly after the CBTPA was en-

acted negotiations began in 2003 for CAFTA. At the same time, the United States and Chile entered into a free trade agreement²¹ and by early 2007 the United States was negotiating or had signed bilateral trade agreements with Panama, Colombia, Peru and Bolivia.²² Prospects for the Colombian agreement appear dimmed due to opposition in the Democratic-controlled Senate based upon issues with Colombia's anti-guerilla campaign and alleged human rights abuses, and other political issues may yet derail negotiations with Bolivia and Peru. While the nations of the Americas were unable to reach their goal of creating a Free Trade Area of the Americas by 2005, the extent of smaller regional free trade agreements, and the potential merger of these agreements (as was done with the Central America and Dominican Republic negotiations) gives promise that the free trade concept can be expanded through much of the region.

IV. The CAFTA as an Engine to Promote the Rule of Law

In many respects CAFTA serves as a vehicle for promoting honest and stable government. An increase in legitimate trade, critical for economic development and growth in all of the party states, can only be accomplished where the legal environment gives reassurance of security and protection to those involved in trade and investment. There are five areas addressed by CAFTA which are critical to the promotion of a stable economic environment grounded in the Rule of Law.

A. Transparency and Anti-Corruption

The Preamble to CAFTA sets forth that the member states “seek to facilitate regional trade by promoting efficient and transparent customs procedures that reduce costs and ensure predictability for their importers and exporters.” The parties also resolve to “promote transparency and eliminate bribery and corruption in international trade and investment.”

Chapter V provides technical and practical applications for this goal. Article 5.2 mandates simplified procedures to timely release goods, thereby reducing the opportunity for extortion

and corruption in the import process. Article 5.5 requires the parties to cooperate in achieving compliance with their respective laws, and in particular requires parties with reasonable suspicion of unlawful activity related to the laws and regulations governing imports to coordinate with other parties and share information in efforts to combat unlawful activity. Article 5.10 requires that a state party, upon written request of an importer, must provide an advanced written ruling on the application of tariffs prior to the importation into its territory of goods from another party. This provision may have the effect of reducing the opportunity for corrupt customs officials to extort money from importers by holding arrived goods under false pretenses.

Chapter VII, pertaining to the elimination of technical barriers to trade, may likewise serve indirectly to reduce the opportunities for localized corruption by requiring parties to adhere to international standards and guidelines that reduce the opportunities for local officials to set their own rules for improper purposes. This is an ideal example of the application of the Rule of Law, setting uniform and widely recognized norms and standards to eliminate opportunities for chaos or corruption. Article 7.7 deals entirely with the issue of transparency. This article mandates that each party shall allow citizens of the other parties to participate in the development of standards, technical regulations and conformity assessment procedures. All such standards are to be published and made available to the public. This requires complete openness in the promulgation and enforcement of regulations and should also make these regulations reasonably uniform. This will give importers assurance of set laws. Hopefully such uniform regulations will be approved by all party states with their joint participation. Article 7.8 sets up a committee on technical barriers to monitor the implementation and administration of this Chapter.

Chapter IX, pertaining to government procurement, sets out in Article 9.13 to “ensure integrity in procurement practices.” Referencing the anti-corruption measures of Article 18.8, this article requires each party

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to adopt or maintain procedures to declare ineligible suppliers that the party has determined have engaged in fraudulent or other illegal actions in relation to government procurement.

Chapter XVIII is solely devoted to the issues of transparency and corruption. Section A addresses transparency. In addition to requiring open communication between the parties and publication of each party's laws, regulations, procedures and administrative rulings, Article 18.4 establishes administrative proceedings for persons of another party directly affected by a party's administrative decisions. Section B pertains solely to anti-corruption. Article 18.8 requires each party to adopt or maintain necessary legislative or other measures to establish as criminal offenses certain matters affecting international trade or investment, including bribery of public officials, acceptance by public officials of bribes or favors, directly or indirectly, or aiding and abetting such practices.

B. Investment and Property Guarantees

The Preamble sets forth that the parties seek to "create and expand a secure market for the goods and services produced in their territories . . ." and to "ensure a predictable commercial framework for business planning and investment." One of the principal objectives set forth in Chapter I is to provide adequate and effective protection and enforcement of intellectual property rights in each party's territory. The key chapter for this concept, however, is Chapter X - Investment. In addition to guaranteeing equal treatment for investors of other party states, Article 10.7 contains a clear limitation on any governmental expropriation or nationalization of a covered investment, either directly or indirectly. This article sets a general prohibition, with exceptions made for public purpose, in a non-discriminatory manner, and only upon prompt payment of "adequate and effective compensation" in accordance with provisions contained in the article. The article also specifies that such compensation must be equivalent to

the fair market value of the expropriated investment, be paid without delay and be fully realizable and freely transferable. Finally, Article 10.10 addresses a problem that has arisen as disguised nationalization in the past. This article mandates that no party may require an enterprise to appoint to senior management positions natural persons of any particular nationality. This prevents a state from gaining control over a foreign investment by requiring the company to cede control of the management of the investment to local persons with connections to corrupt local officials.

Chapter XI likewise contains, at Article 11.9, another protection against indirect nationalization by requiring free transfer of payments out of the territory of a party to prevent control over the finances of an investment and other currency restrictions that inhibit free investment.

C. Coordination and Uniformity in Domestic Laws and Equal Treatment Under Same

A third pillar for the establishment of the Rule of Law are terms in CAFTA to promulgate uniformity in domestic laws of each party affecting trade and to encourage coordination between the parties to create uniformity in their domestic laws and equal treatment of their traders and investors.

In the Preamble the parties resolve to "ensure a predictable commercial framework for business planning and investment," particularly recognizing "the interest of the Central American parties in strengthening and deepening their regional economic integration." Economic integration can only be accomplished where there is uniformity of the legal regime governing trade and commerce so as to allow the free flow of goods and services.

The Preamble also states that the parties are committed to building on their respective rights and obligations under the Marrakesh Agreement established in the World Trade Organization and other multi-lateral and bi-lateral instruments of cooperation. Under Chapter III, Article 3.2 commits each party to accord national treatment to the goods of another party in accordance with Article III of the GATT 1994, and incorporates Article III of the GATT 1994 into CAFTA. The potential for discrimi-

tariffs in each party is precluded by Article 3.3 which eliminates, either gradually or immediately, most national tariffs. Article 3.5(a) permits free transit through the territory of the party states of vehicles and containers carrying products in international trade, and Article 3.11 prohibits the imposition of export taxes on any goods. These articles under Chapter III eliminate most domestic tariff regimes and thereby create a uniform open trading system, with the same system applicable in each party.

Chapter IV approaches the concept of uniformity and equalization in a different light by mandating, at Article 4.21, common guidelines for the interpretation, application and administration of provisions under Chapters III and IV, particularly as they apply to rules of origin for products to be provided with free or favorable tariff treatment. Where regulations and tariffs are not absolutely eliminated, they are subject to mandates to create uniform common regulations and guidelines for all parties to the Convention.

Similarly, under Chapter V dealing with customs administration and trade facilitation, Article 5.5 again mandates cooperation between the parties. While under this article the parties are not required to create uniform customs and trade regulations, they are required to give advance notice to other parties of any significant modifications in their administrative policies or similar developments related to their laws and regulations governing importations where those are likely to substantially affect the operation of the Convention. They are often required to cooperate in achieving compliance with their respective national laws and regulations. Due to the detailed requirements of the latter clause, it will be necessary for the parties to closely coordinate and unify, as much as possible, their respective domestic regulations in order to adequately enforce those of the other parties for the efficient continuation of trade.

There are a number of articles in various chapters of CAFTA mandating equal treatment by each party of the citizens of other parties in all aspects of trade and investment. For instance, in Chapter X on investment,

Article 10.3 requires each party to accord to investors of another party treatment no less favorable than that it accords to its own investors. In Chapter XI concerning trade and services, Article 11.9 requires the parties to provide mutual recognition of all licenses and certifications, including recognition of the education or experience obtained by citizens of another party on the same basis as that recognized for the residents of that party. In Chapter XII relating to financial services, Article 12.2 again mandates that each party shall accord to investors of another party treatment no less favorable than that accorded to domestic investors in the establishment of various types of financial services.

D. Dispute Resolution Mechanisms

One of the most important aspects of establishing the Rule of Law for the governance of any state or grouping of states is the creation of adequate and impartial dispute resolution mechanisms. CAFTA contains extensive provisions for the inter-party and private (individual) resolution of disputes arising out of the free trade regime that has been created.

Under Chapter I, Article 1.2(f) provides as a basic objective that the parties are to “create effective procedures for the implementation and application of this agreement, for its joint administration, and for the resolution of disputes.” Thereafter, Chapter XX in its entirety governs “dispute settlement.” Section A, Articles 20.1 through 20.19 contains extremely detailed provisions and procedures to follow for any disputes regarding the interpretation or application of CAFTA, where a party state considers that an actual or proposed measure of another party state is inconsistent with CAFTA, where a party state has failed to carry out its obligations under CAFTA, or where the action of another party state would cause nullification or impairment of CAFTA. Section A of Chapter XX requires consultation and mediation. Failing this, there are detailed rules for the implementation of an arbitration procedure and limited exceptions to the requirement for arbitration.

Section B of Chapter XX pertains to domestic proceedings and private commercial dispute settlement. Ar-

ticles 20.20 through 20.22 provide for referral of matters to judicial or administrative proceedings and alternative dispute resolution.

Other chapters of CAFTA set out dispute resolution mechanisms pertaining to specific aspects of the Convention. Chapter V (Customs Administration and Trade Facilitation) provides for administrative and judicial review under Article 5.8. Chapter X (Investment), at Section B, contains the most detailed and specialized investor-state dispute settlement system. This provides detailed rules mandating submission of a claim to arbitration with certain conditions and limitations. Importantly, Article 10.21 contains a detailed transparency requirement for the arbitral proceedings.

Under Chapter XII governing financial services Articles 12.18 and 12.19 provide another dispute settlement mechanism governing this aspect of the new trade regime.

With the extensive dispute resolution mechanisms set up to govern interpretation of CAFTA as a whole and to govern private disputes arising under the CAFTA regime, as well as incorporation of other international trade agreements, the state parties and their citizens should find adequate tools to enforce the terms and conditions of the new regime. This is perhaps the most important aspect of CAFTA in promoting the establishment of the Rule of Law over this free trade area.

E. Labor and Environment

Two issues that garnered the largest amount of protest outside of business and government circles during the course of the CAFTA negotiations were labor and environment. These grabbed the attention of populist protesters and also appear to be the subject of much of the anti-CAFTA writings, both in the popular press and in academic circles.²³

While CAFTA is attacked for not adequately protecting the interests of labor or satisfactorily addressing environmental concerns, it should be noted that nothing in CAFTA reduces protections in these categories, and in fact the CAFTA regime as a whole would tend to encourage promotion of protective measures. Admittedly, the general purpose of a free trade agreement such as CAFTA is not

proper mandates and oversight of party states these goals can be addressed.

The Preamble specifies that the parties are resolved to “protect, enhance, and enforce basic workers’ rights and strengthen their cooperation on labor matters...create new employment opportunities and improve working conditions and living standards in their respective territories,” and therefore the state parties will “build on their respective international commitments on labor matters.” Also, the parties resolve to “implement this agreement in a manner consistent with environmental protection and conservation, promote sustainable development, and strengthen their cooperation on environmental matters,” and “protect and preserve the environment and enhance the means for doing so, including through the conservation of natural resources in their respective territories.” Other sections of the Preamble resolve to “create new opportunities for economic and social development in the region” and to “safeguard the public welfare.”

While these protective goals are the most extensively addressed terms in the Preamble to CAFTA, CAFTA also contains a full chapter devoted to labor protection, and another full chapter devoted to the environment. Chapter XVI – Labor first requires, at Article 16.2, that parties must enforce their existing labor laws. This goes beyond what some writers have deemed to be the inadequate labor protections existing in the laws of many of the Central American countries. Article 16.1 reaffirms the obligations of all members of CAFTA as members of the International Labor Organization (ILO) and their commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its follow-up (ILO Declaration).²⁴

Prior to the conclusion of the CAFTA negotiations, surveys were performed within the various party states and it was determined generally that the party states have sufficient labor laws on the books, although in some cases there are problems with enforcement or the ability to enforce those laws.²⁵ For this, Articles 16.5

continued, next page

RULE OF LAW*from preceding page*

and 16.6 and Annex 16.5 provide for cooperation among the parties and a capacity-building mechanism whereby assistance can be obtained to help with full enforcement of existing labor laws and to bring any deficiencies up to standard. With the assistance not only of the United States but of the more prosperous Central American parties, those states which are deemed to be unable to fully enforce their existing labor laws or to implement enforcement systems acceptable to the ILO will now have the opportunity to share in both technical resources and obtain financial and informational assistance.

Chapter XVII – Environment is structured in a similar manner to the labor chapter. It also sets goals and mandates enforcement of existing laws, and furthermore provides for shared information and assistance in developing adequate enforcement mechanisms and collaborative assistance. The chapter references other multi-lateral environmental agreements to which the state parties are members and requires continued efforts to enhance the mutual support of multi-lateral environmental agreements within their jurisdiction. While certain aspects of this chapter are generalized or set in aspirational terms, such as Annex 17.9 pertaining to environmental cooperation, this will allow the parties with more advanced environmental laws and technical enforcement to readily assist others to improve their environmental regulations. The strong interest shown by many non-governmental groups during the course of the CAFTA negotiations would also indicate that pressure from these groups after the enactment of CAFTA will encourage the parties to continue to develop environmental enforcement more thoroughly than before they became parties to CAFTA. Again, CAFTA has served to spread the interest in regulation of labor and environmental matters more directly to countries which would not have benefited from these concepts without joining CAFTA.

Conclusion

The approved text of CAFTA, including its Annexes, and the goals set for implementation by the countries which have ratified the Convention provides a great opportunity to establish a relatively uniform legal system governing commerce in Central America. This uniform system will produce certainty to businesses and investors in the region, promoting the growth of commerce and free enterprise. The unification of most aspects of the legal system governing trade will also help, both directly and indirectly, to reduce abuses caused by the uncertain enforcement of varying laws and *ad hoc* enforcement of regulations. In the global economy, only this certainty will encourage the development of trade.

There is legitimacy in the concerns expressed by some about the effects of opening smaller and less developed economies to competition from large industries and agriculture based in an economic superpower.²⁶ CAFTA takes account of this in multiple special provisions and exceptions contained in Annexes and reservations as to each member country. The concerns are also noted in the set of goals enumerated in the first chapter of the Convention. There is no question that some amount of dislocation and economic stress may result from the initial implementation of the open market. However, the benefits foreseen from the application of a uniform and open legal system for the benefit of trade may extend much further than even the supporters of CAFTA can now anticipate. The free trade systems which have benefited other nations and regions, if handled properly and monitored closely, may bring tremendous benefits to Central America and the Caribbean first dreamed of by statesmen in these countries some two hundred years ago.

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issues in the region and individual countries are provided in: Storrs, *supra*.

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Un Tratado, una Ley y un Acuerdo, www.aba.org/noticia.php?id=20161 (Sept. 2003). The same has been expressed with regard to the sensitive textile industry, which has been extensively addressed in the Convention and its Annexes. See: Carlos Felipe Jaramillo, *Que Sabemos de los Efectos del CAFTA?* *Revista Centroamerica en la Economia Mundial del Siglo XXI* (World Bank, 2004). The business community and governments, generally, seem to be supportive. *Discurso Sr. Elias Antonio Saca Presidente de la Republica Anuncio de la Entrada en Vigor del Tratado de Libre Comercio*, www.minec.gob.sv/default.asp?id=13mnv=1 (27 Feb. 2006); Miguel E. Lacayo, *Las Oportunidades del Libre Comercio y las Mipymes en El Salvador*, www.causa.sicca.org.gt; *El TLC como tema de Campana Electoral en El Salvador*, hunnaphublogcindano.com.

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IMMIGRATION REFORM BILL

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taxes, undergo rigorous security and background checks, and pay hefty fines for entering the country illegally. This earned legalization is not an “amnesty” program when the government penalizes immigrants with hefty fines for their illegal entry.

Tougher and More Effective Enforcement

Failure to pass the comprehensive immigration reform bill means that enforcement measures will not be adequately funded until after the presidential elections. In the meantime, the country continues to fear terrorism and to desire a reduction in illegal immigration. However, the solution to the illegal immigration problem is not to build a wall along the southern border with Mexico. Illegal immigration may be curtailed along the northern and southern borders by increasing the number of border patrol and electronic surveillance. Congress must appropriate the funds to fully staff Border Patrol and border security technology. Already Congress has committed to a variety of

technology-based security measures such as lighting, sensors, and night vision devices that would enhance the capability of Border Patrol officers to detect, locate and apprehend illegal entrants.

Conclusion

Perhaps the United States is far less divided on immigration than the current debate suggests. According to another recent Gallup Poll, generally U.S. citizens have a positive view of immigration in the abstract. “Three in four have consistently said it has been good for the United States in the past, and a majority says it is good for the nation today.”⁵ A comprehensive immigration reform bill would channel this general sentiment into a bill that increases employment-based visas, creates tougher and more effective enforcement, and provides a road to legalization for undocumented immigrants already in the country. In order to successfully overhaul our current immigration systems, these three elements must be addressed and implemented simultaneously.

The goal should be to replace the current illegal flow of immigration with a lawful influx since it is arguably good for the economy and necessary for our national security.

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RIGHT TO WATER*from page 4*

their natural resources. Nor can we. Moreover, in terms of the pure pursuit of ever more markets, growth and consumption, free markets are inefficient - even for economic life. Markets devalue extra-market values - on which capitalism relies for its continued viability. Quite simply put, continued expansion, consumption and growth are unsustainable at their present rates and in their present form, and unguided and unbounded economic globalization erodes and negates human rights and the environment. Consequently, we are faced with pressing and alarming issues of growing distributive justice that arise from this economic landscape that we presently inhabit.

A comprehensive report on economic health has now been compiled in the Millennium Ecosystem Assessment (MEA) which was released in March 2005. This is a scientific effort of immense proportions which adopts a century long view - 50 years in the past and 50 years in the future- to offer a new way of assessing and valuing ecosystems. It addresses the immense value of "nature's services," which we are presently bankrupting. "Unless we acknowledge the [environmental] debt and prevent it from growing, we place in jeopardy the dreams of citizens everywhere to rid the world of hunger, extreme poverty, and avoidable disease—as well as increasing the risk of sudden changes to the planet's life-support systems from which even the wealthiest may not be shielded."²¹

The MEA's authors categorize what they refer to as nature's services in four groups:

- 1) Provisioning services including fresh water and food, fiber and fuel;
- 2) Regulating services, including biophysical processes that control climate, air and water quality, flooding, diseases, pollination and erosion;
- 3) Cultural services including locations offering recreational, spiritual and aesthetic values;
- 4) Supporting services, which are

the underlying processes including soil formation, nutrient cycling and photosynthesis.

The MEA Report authors provide the following sobering facts:

Nearly two thirds of the services provided by nature to humankind are found to be in decline worldwide. In effect, the benefits reaped from our engineering of the planet have been achieved by running down natural capital assets.

In many cases, it is literally a matter of living on borrowed time. By using up supplies of fresh groundwater faster than they can be recharged, for example, we are depleting assets at the expense of our children. The cost is already being felt, but often by people far away from those enjoying the benefits of natural services. Shrimp on the dinner plates of Europeans may well have started life in a South Asian pond built in place of mangrove swamps— weakening a natural barrier to the sea and making coastal communities more vulnerable.²²

Not everybody has contributed to the depletion of natural resources to the same extent. Ecosystem stewardship can be cast as an equity or justice issue. The per capita rates of consumption of those living in industrialized countries have been 10 to 20 times higher than those of the poor.²³ 20% of the world's population consumes as much as 80% of the world's resources.²⁴ Though accounting for only 5 percent of the world's population, Americans consume 26 percent of the world's energy.²⁵

Adding to this troubling brew are China and India, which, in the course of transforming their economies, are vastly increasing their energy consumption and carbon dioxide output. These changes are rapidly accelerating and compounding the effects of global warming, which, in turn, are impacting water resources by virtue of the resulting changed climate conditions.

Between 1990 and 2004, energy consumption rose by 37% in India and 53% in China.²⁶ China is building

coal-fired power plants at the startling rate of one every week. While the most technologically advanced coal plants operate at almost 45% efficiency, China's coal plants operate at no more than 33% efficiency.²⁷ Additionally, China, like the United States, refuses to cap carbon emissions. This is in stark contrast to the proposal tabled recently by Germany for the recent G8 summit held in June 2007. This proposal would require that world leaders agree to prevent global temperatures from rising by more than 2 degrees Celsius and would require stringent emission cuts.²⁸

America's per capita emission of carbon dioxide continues to be the largest by far, however, at approximately 21.75 tons compared with 4.03 tons in China and 1.12 tons in India.²⁹ At the present rate of growth in China, at 10% per year, which is not expected to lessen, it is expected that China will overtake the U.S. in its total greenhouse emissions before 2010.³⁰

II. Recipe for Disaster: Water Shortages, Water Wars and Flashpoints

The world's population is growing rapidly - today it stands at approximately 6.6 billion and at the present rate, it is projected to grow by The Department of Economic and Social Affairs of the United Nations Secretariat to 8.9 billion in 2050, showing an increase of 47 per cent.³¹ The rapidly increasing population, combined with the transformation of economies in South East Asia, will put an increasing strain on ecosystem services. Rising demand along with shrinking supply will lead inexorably to more vulnerability and conflicts in a world where there is already a stark division between the "haves" and "have-nots." One billion people living in the developed world have 80% of the world's gross domestic product while five billion people in developing countries share the remaining 20%.³²

There is a correlation between the regions that are facing the largest development challenges and also

the largest problems arising from stressed ecosystems.³³ This further correlates with the regions which have been identified as being the site of flashpoints of future conflicts. These regions comprise Central Asia, parts of South and Southeast Asia, Latin America and the area south of the Sahara in Africa.

“The Atlas of International Freshwater Agreements” was a study that was published to mark World Water Day on March 22, 2003. It was launched by the United Nations Environment Program (UNEP) in conjunction with the Food and Agricultural Organization of the United Nations (FAO) and Oregon State University, which found that cooperation concerning these river basins was either non-existent or patchy. The world’s river basins have been the subject of rising tensions and hostilities over water for drinking supplies, irrigation, fisheries and hydropower, and aggravated by rising populations, and social, political and environmental upheavals.

The Atlas identifies 263 rivers that either cross or mark international political boundaries. These international basins are situated over 145 countries, containing 50 percent of the Earth’s land surface, 60 percent of its freshwater and are home to 40 percent of the global population.³⁴ Sixty-nine of the rivers are in Europe, fifty-seven in Asia, fifty-nine in Africa, forty in North and Central America and thirty-eight in South America.³⁵

A. Origins of the Darfur Conflict and Other Troubled Regions

According to the UN Secretary-General Ban Ki-moon, the four-year conflict in Darfur that has killed at least 200,000 people and forced more than two million from their homes has its roots in water and food shortage caused by climate change. In an editorial piece in the Washington Post, published on June 16, 2007, he wrote: “Almost invariably, we discuss Darfur in a convenient military and political shorthand -- an ethnic conflict pitting Arab militias against black rebels and farmers. Look to its roots, though, and you discover a more complex dynamic. Amid the diverse social and political causes, the Darfur conflict began as an ecological crisis, arising at least in part from

climate change.”³⁶ Since the 1980s, according to U.N. statistics, the average rainfall in the region has declined by 40 percent.³⁷

The UN Secretary General explains that “...once the rains stopped, farmers fenced their land for fear it would be ruined by the passing herds. For the first time in memory, there was no longer enough food and water for all. Fighting broke out. By 2003, it evolved into the full-fledged tragedy we witness today.”³⁸ The U.N. Chief calls for solutions that address the root of the conflict and spoke of the need for new irrigation and water storage techniques, infrastructure for roads and sanitation and social, health and education reconstruction programs. He also identifies other conflicts having similar roots stemming from food and water insecurity, for instance, in Somalia, the Ivory Coast and Burkina Faso.

We are today facing down our destiny, and now, more than at any other time, we need to change course and find new ways. We must respond strongly and resoundingly if we are to survive. Continuing down our present path will lead inexorably to our destruction. There are encouraging signs that a shift in thinking and in practice is occurring. These signs are coming from some business leaders, NGO’s, international organizations, and, in the U.S, from state and local governments.

For example, Mayor Greg Nickels of Seattle led what has now become a nationwide movement to tackle global warming after becoming outraged at the U.S. Senate for failing to ratify the Kyoto Treaty global-warming accords and the continuing refusal by the Bush administration to implement mandatory caps on carbon emissions: “As of [March, 2007], 431 mayors representing more than 61 million Americans had signed on, imposing higher parking taxes, buying hybrid vehicles for the municipal fleet, helping local businesses audit their energy use and even converting traffic lights from incandescents to LEDs, which are 90% more efficient. Says Nickels: ‘I think this sends a message that there is intelligent life in America.’”³⁹

III. Conclusion

Rather than focus on the question of how we reached this lamentable

that we urgently and collectively chart a map for the future that changes our course which is presently set for destruction. In order to do so, we will need to confront the status quo and the “business as usual” mentality that we have fallen into due to complacency. Implementing a right to water will provide us with a moral compass and ethical guidelines in our journey into the future. It is not overstating the case by concluding that the future of humanity hinges on our changing course and on our willingness to implement a right to water, and in so doing, to confront and transform the status quo.

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RIGHT TO WATER

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she obtained both a J.D. and a LL.M. in Comparative Law.

Endnotes:

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- 2 Humanitarian News and Analysis, UN Office for the Coordination of Humanitarian Affairs, available at <http://www.irinnews.org/InDepthMain.aspx?InDepthId=13&ReportId=61155>.
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- 4 UN Committee on ESC Rights, General Comment No. 15: The Right to Water, UN Doc. E/C.12/2002/11 (20 January 2003).
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- 7 World Health Organization, 2003, 'Right to Water' available at http://www.who.int/water_sanitation_health/rightwater/en/.
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- 9 Available at http://www.watertreaty.org/docs/en/news_april_1/PRESSRELEASEC-SD2104.pdf. <http://www.globalgreen.org/programs/water/day.html>.
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- 11 Committee on Economic, Social and Cultural Rights, General Comment 15, The right to water (Twenty-ninth session, 2003), U.N. Doc. E/C.12/2002/11 (2002), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at

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- 14 GA res. 44/25, annex, 44 UN GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989)
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- 35 *Id.*
- 36 "A Climate Culprit in Darfur", *Ban Ki Moon* Washington Post, Saturday, June 16, 2007; p. A15, at <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/15/AR2007061501857.html>.
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- 38 *Id.*
- 39 Time, Special Double Issue, *Global Warming Survival Guide*, p. 60.

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will be handling the representation at the oral hearing itself. If an arbitral institution administers the arbitration and if the advocate is not familiar with the procedures of that particular institution, it is important for the advocate to review the rules and to ask the administrator about the usual procedural events.

F. Scheduling Disclosures and Discovery. In international arbitrations, a party should rely upon independent investigation rather than discovery to obtain necessary evidence. Discovery may not be possible in some types of arbitrations and U.S. style discovery is generally discouraged in all international arbitrations. If discovery is going to be

allowed, specific scheduling will help move the process along. A party can propose to the panel that dates be set for each phase of the discovery process, as well as a final deadline to raise any discovery issues. Nevertheless, differing cultural and legal attitudes toward privacy, confidentiality, and disclosure can raise legitimate issues and cause delay. Intellectual property-related disputes will further complicate such issues. Invariably, there will be confidentiality and trade secret concerns. Wise counsel will offer a proposed confidentiality agreement to opposing counsel at the onset of the arbitration.

G. Use of Cut-Off Dates. It is also important to set a date after which

claims and counterclaims cannot be amended. Because this is a double-edged sword, you must consider whether that date is firm or whether claims and counterclaims can be amended based upon newly discovered evidence. Either way, it is important to have a cut-off date that will prevent an assertion that additional discovery will be necessary as a result of a new claim or counterclaim and that such discovery would necessarily require postponement of the oral hearing. If there is a three-person arbitration panel, a party can request at the beginning of the proceedings that either the chair or one of the panelists have authority to rule on discovery issues and procedural issues that may

arise. Eliminating the need for the entire panel to meet and confer will make it easier to present those issues and have them ruled upon.

H. Delays in the Hearing Process.

The hearing process can be streamlined without affecting fairness to the parties.

1. To the extent possible, exhibits should be submitted as agreed exhibits in a joint submission to the panel. To the extent there are exhibits to which the other party expects to object, those can be placed in supplemental exhibit binders submitted by either party. Obviously, there should not be duplicative exhibits in the separate supplemental submissions.
2. Using a clock and limiting each side to an agreed amount of time for examining or cross-examining witnesses and presenting other evidence can streamline proceedings. Similarly, a clock can be used to limit opening and closing statements.
3. It is very common in international arbitrations to use written witness statements. A decision must be made as to whether the witness is nevertheless to appear and be cross-examined or whether witness statements can be presented without the witness having to appear. Even for live witnesses, background information can be presented in writing and, thus, the parties can avoid using valuable hearing time presenting such information orally. Use of a time clock will reduce cumulative testimony. Even so, there is no reason to refrain from objecting to cumulative witnesses and cumulative testimony.
4. Once a hearing date has been set, an advocate can confirm with the panel at the time of setting the hearing date that the hearing date will not be continued except in the case of a substantial emergency. Sometimes in international arbitrations, hearings do not take place on consecutive days, but take place through a series of hearings in one or more locations. If problems arise with respect to the availability of a witness, the witnesses can be taken out of order on a different

hearing date. If a witness is not available for the hearing dates, then the use of a written statement should be explored. If that is not a satisfactory solution, then surely the witness could be deposed outside the hearing and the deposition presented at the hearing. If credibility is an issue with the witness, the deposition can be videotaped.

5. It is the responsibility of counsel to keep track of witnesses and how to obtain testimony for presentation of the party's case. Inability to locate a witness or unavailability of a witness is not normally a strong basis for postponement of a hearing. Of course, arbitration always involves a balance between providing each party a fair opportunity to present its case and moving proceedings along expeditiously. Therefore, if a key witness is unavailable and the amount of delay requested is not unreasonable, it is better to make sure that a party has a fair hearing with a short delay. If a party has a credible basis for later moving to vacate the award or deny enforcement based upon the denial of a request for delay, the post-award proceedings will cause greater delay than would a slightly extended hearing.

IV. Sanctions.

A. Limitations on Arbitrator Authority. Arbitrators do not generally have the same authority as judges to impose sanctions. An arbitrator may not normally impose a fine or "terms" against a party or that party's counsel. The way to effect the monetary equivalent of such sanctions is sometimes available through the authority of the arbitrator to allocate fees and expenses as part of the award. This is not always an available option if the arbitration clause includes a specific requirement as to allocation of fees and costs.

B. Evidentiary-Related Sanctions. There are other sanctions, however, that can be imposed, particularly when dealing with potential concealment of documents or evidence by one side. These can include the following:

1. The arbitrator can make a nega-

tive inference as to facts that could be revealed by the production of documents or other evidence.

2. The arbitrator can make a determination that certain facts are admitted.
3. Certain claims, defenses, or arguments can be precluded. Depending upon the authority of the arbitrators in a particular proceeding, they may have the ability to award the expenses a party has incurred in proving matters if those expenses resulted from the other party's failure to cooperate with ordered discovery. Typical acts of noncompliance meriting evidentiary sanctions include failure to allow inspection of tangible objects or physical locations (site visits), failure to allow access to non-confidential documents or other material, or failure to meet scheduling deadlines. Another appropriate sanction is to refuse to allow presentation of evidence on a matter on which the party exhibited obstructive behavior or engaged in actions that interfered with the expeditious process of the arbitration.

C. Protecting the Arbitration Process and Fundamental Fairness.

As discussed earlier, arbitrators have to balance the goal of an efficient, expeditious, and low-cost proceeding with the need to avoid an attack on the award based upon allegations of bias or failure to allow presentation of evidence.

1. **Partiality or Bias.** If an arbitrator is neutral, avoids the appearance of bias, and avoids ex parte communications, a motion to vacate based upon partiality or bias is not likely to be successful. One common exception is when there has been a failure of the arbitrator to disclose potential conflicts of interest or other information that could give the appearance of bias. In the U.S., there are numerous cases addressing the materiality of a failure to disclose. Good examples of these can be found in relatively recent Ninth Circuit cases.¹⁵ There are also a number of cases denying challenges to an award based upon

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claimed evident partiality from statements of the arbitrator during the proceedings.¹⁶

2. **Refusing to Allow Delay.** Cases have also upheld the ability of an arbitrator to move proceedings along even if it meant some evidence was not allowed. In one case, the respondent stated on the last day of a hearing that a rebuttal witness who had not previously been identified was needed to testify on rebuttal and was not available. The arbitrators did not postpone or continue the hearing, but closed it at the end of the day, denying the respondent an opportunity to present the rebuttal witness's testimony. Nevertheless, a request to vacate the award was denied.¹⁷ Similar results have occurred in other unsuccessful challenges to awards based upon arbitrators' having taken steps to insure that the arbitration process moved along in an expeditious manner.¹⁸
3. **Refusing Oral Testimony or Other Evidence.** There are also cases in which an arbitrator has issued a summary award based upon documentary evidence. In one, the arbitrator refused to conduct any oral hearings despite a party's repeated request to do so. Nevertheless, the award was upheld.¹⁹ Similar results and similar language can be found in other cases.²⁰

V. Conclusion

An international arbitration presents special challenges to providing expeditious, cost-efficient proceedings while simultaneously administering the arbitration in a fair and unbiased manner. Arbitrators must be flexible in addressing the perspectives of parties who differ from the arbitrators by culture or legal system. A panel that includes nationals of varied cultures and legal systems will help maintain the appearance of fairness, dispel distrust, and have an easier time control-

ling delay attempts without creating the appearance of bias. The complex issues of allowable disclosure and discovery are made even more complex by the presence of intellectual property assets and disputes.

For the advocate seeking to prevent undue delay and expense, the starting point is the applicable rules for the arbitral proceeding. Procedures can be simplified and prehearing tasks moved along efficiently by using the measures available in the rules and by taking advantage of potential assistance from case administrators. Counsel have an obligation, both under arbitral rules and most ethical rules, to support the goals of the arbitration process. If an advocate or a party does not cooperate with the efficient operation of proceedings, the arbitrators have the power to use evidentiary and cost allocation sanctions while still allowing an adequate opportunity to present evidence in a fundamentally fair proceeding.

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He has served as an adjunct professor and is listed in Who's Who in American Law.

Endnotes:

- 1 The actual name is The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, available at <http://www.jus.uio.no/lm/un.arbitration.recognition.and.enforcement.convention.new.york.1958/doc.html>.
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- 17 *Maiocco v. Greenway Capital Corp.*, No. CIV. A.97-MC-0053, 1998 WL 48557 (E.D. Pa. Feb. 2, 1998).
- 18 *Skinner v. Donaldson, Lufkin & Jenrette Sec. Corp.* (In re Arbitration Between Skinner & Donaldson, Lufkin & Jenrette Sec. Corp.), No. C 03-2625 VRW, 2003 WL 23174478 (N.D. Cal. Dec. 29, 2003); *Bisnoff v. King*, 154 F. Supp. 2d 630 (S.D.N.Y. 2001); *Sisti v. Merrill Lynch, Pierce, Fenner & Smith*, No. 91-00102-R, 1991 WL 575874 (E.D. Va. Apr. 22, 1991); *Berlacher v. PaineWebber, Inc.*, 759 F. Supp. 21 (D.D.C. 1991); *Hunt v. Mobil Oil Corp.*, 654 F. Supp. 1487 (S.D.N.Y. 1987).
- 19 *Intercarbon Berm., Ltd. v. Cal-Tex Trading & Transp. Corp.* (In re Arbitration Between Intercarbon Berm., Ltd. & Cal-Tex Trading & Transp. Corp.), 146 F.R.D. 64 (S.D.N.Y. 1993).
- 20 *Lewis v. Sup. Ct. of San Bernardino County*, 970 P.2d 872 (Cal. 1999); *Schlessinger v. Rosenfeld, Meyer & Susman*, 47 Cal. Rptr. 2d 650 (Ct. App. 1995).

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on September 28, 2006.¹⁷ Truly, “Hope Springs Eternal” – even within the corridors of Luxembourg.

Factual Setting

During 1994 and 1995, the government of The Kingdom of the Netherlands undertook the partial privatization of that nation’s postal and telecommunications company, Netherlands PTT. The company statutes, however, were amended to introduce a special share, called a “golden share,” for The Kingdom of the Netherlands. In 1998, the PTT was divided into two separate limited liability companies, namely, Koninklijke KPN NV (KPN) for telecommunications services and the TNT Post Groep NV, which subsequently became TPG NV (TPG), for postal services. The state was reserved one “special share” within each new company. This special share granted to the Netherlands the right of prior approval of certain decisions (as outlined within the companies’ statutes), including those pertaining to the following issues:

- issuance of shares and distribution of dividends in shares;
- withdrawal of the special shares;
- merger, demerger, or dissolution;
- major investments; and
- amendments of company statutes.

It must be added that the Netherlands entered into a formal agreement with both companies whereby the authorities agreed only to use such special rights if 1) its majority interest so required; or 2) for the protection of the general interest in the guarantee of universal postal service. Nonetheless, between 1998 and April of 2003, The Kingdom of the Netherlands reduced its ordinary shareholdings to around twenty percent in KPN and thirty-five percent in TPG.¹⁸

Arguments of the Parties

In its actions for failure to fulfill obligations (filed pursuant to Article 226 of the EC Treaty), the Commission argued that this special rights regime had erected impermissible obstacles to the free movement of

capital and to the freedom of establishment and that such special rights, even where intended to protect the general interest, were in any case illegal as disproportionate to the results being sought. Eager not to relinquish its special rights in the two concerned companies, The Kingdom of the Netherlands replied with a multifaceted approach. First of all, the Netherlands government argued, in a general sense, that the special rights regime did not create any obstacles to these fundamental freedoms. And, more specifically, The Kingdom of the Netherlands argued that 1) the measures taken were not “state measures” within the scope of Article 56(1); 2) there was no impact upon the acquisition of shares within the companies, only upon the management of such; 3) thus, these measures were not likely to deter investors and had not, in fact, done so; and 4) any link between such special rights and the decision to invest, if such link existed, was too uncertain and indirect to constitute an obstacle to the free movement of capital. Finally, the government of the Netherlands argued, in the alternative, that the TPG special share was justified by overriding reasons of the general interest, namely, the guarantee of the universal postal service.¹⁹

The Court’s Findings or “Back to the Future” Still Playing in Luxembourg

For reasons that will be made clear hereinafter, the ECJ first turned to an analysis and disposition of the Article 56(1) claims.

“Measures likely to deter investors from other Member States”

The court reminded the parties that, in the absence of explicit definitions within the EC Treaty of “movements of capital” for the purposes of an Article 56(1) analysis, the ECJ recognized in past decisions that both portfolio and direct investments are included within the fundamental freedom of movement of capital protections. And, more directly, the court

found that the special shares at issue constitute restrictions on the free movement of capital provided for in Article 56(1). In its reasoning, the ECJ opined that The Kingdom of the Netherlands’s actions added up to “state measures falling within the scope of Article 56(1)” and that such special rights were “likely to deter investors from other Member States from investing in KPN and TPG.”²⁰ The court then described the negative effects upon potential direct and portfolio investors in the Dutch companies posed by this special rights regime in the following terms:

By virtue of these special shares, a series of very important management decisions of the organs of KPN and TPG, concerning both the activities of those two companies and their very structure (in particular questions of merger, demerger and dissolution), depend on prior approval by the Netherlands State. Thus, . . . those special shares confer on the Netherlands State an influence over the management of KPN and TPG which is not justified by the size of its investment and is significantly greater than that which ordinary shareholding in those companies would normally allow it to obtain. Moreover, those shares limit the influence of other shareholders in relation to the size of their holding in KPN and TPG. (T)he existence of those shares may have a negative influence on direct investments. Similarly, the special shares at issue may have a deterrent effect on portfolio investments in KPN and TPG. A possible refusal by the Netherlands State to approve an important decision, proposed by the organs of the company concerned as being in the company’s interests, would be capable of depressing the (stock market) value of the shares of that company and thus reduce the attractiveness of an investment in such shares.²¹

Possible “Justifications” – Application of the Proportionality Test

Having found that the special
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rights at issue did in fact constitute obstacles to the free movement of capital as described above, the ECJ then reminded the parties that, in the absence of Community harmonizing measures, the free movement of capital may be restricted by national measures justified on the grounds set out in Article 58 or by overriding reasons in the general interest. Furthermore, as reiterated by the court, Member States are free to decide on the degree and methods of protection of such general interest as long as those protections do not go beyond the limits set by the EC Treaty and, in particular, as long as such protections observe the principle of proportionality. As stated by the court, this principle of proportionality requires that “the measures adopted be appropriate to secure the attainment of the objective which they pursue and not go beyond what is necessary in order to attain it”²² The court found, with regard to the special share held in KPN, that The Kingdom of the Netherlands did not adduce any objective in the general interest and, as a result, the claimed infringement of Article 56(1) in Case C-282/04 must be upheld.²³

The court then turned to the Netherlands government’s claim that the special share held in TPG was necessary to protect the general interest, namely, the guarantee of universal postal service and, more particularly, to protect the solvency and continuity of TPG, which was the only undertaking capable in the Netherlands of providing that universal service at the level required by statute. While acknowledging that the guarantee of a universal postal service may constitute an overriding reason in the general interest capable of justifying an obstacle to the free movement of capital, the court found that “[t]he special share at issue goes beyond what is necessary in order to safeguard the solvency and continuity of the provider of the universal postal service.”²⁴ Applying the criteria of the proportionality test to the golden shares held by the Netherlands government in TPG, the court stated as follows:

[I]t should be noted, first, that the special rights of the Netherlands State in TPG are not limited to that company’s activities as provider of a universal postal service. Moreover, the exercise of those special rights is not based on any precise criterion and does not have to be backed by any statement of reasons, which makes any effective judicial review impossible. [H]aving regard to the whole of the above, the first complaint in Case C-283/04 must be upheld.²⁵

The court went on to find that there was no need for a separate examination of the alleged Article 43 freedom of establishment claim in light of the infringement ruling concerning Article 56(1), considering that the obstacles to the freedom of establishment are “inextricably linked” to the obstacles described above to the free movement of capital.²⁶ Thus, in conclusion, the ECJ ruled as follows:

By maintaining in the statutes of KPN NV and TPG NV certain provisions, providing that the capital of those companies is to include a special share held by the Netherlands State, which confers on the latter special rights to approve certain management decisions of the organs of those companies, which are not limited to cases where the intervention of that State is necessary for overriding reasons in the general interest recognized by the Court and, in the case of TPG NV in particular for ensuring the maintenance of universal postal service, the Kingdom of the Netherlands has failed to fulfill its obligations under Article 56(1) EC.²⁷

Conclusions and Implications for the Volkswagen Law Case

On March 4, 2005, the EU Commission brought an action against the Federal Republic of Germany, claiming that the so-called Volkswagen Law is an infringement of the free movement of capital and freedom of establishment as protected by the EC Treaty.²⁸ This Volkswagen Law, which was originally adopted in 1960, grants to German authorities the following special rights:

The right of the Federal Government--notwithstanding that it has

Land of Lower Saxony, as long as they are shareholders, to each appoint two members of the supervisory board of the company;

The limitation of voting rights to 20% of the share capital where any shareholder exceeds that percentage; and

The increase to more than 80% of the share capital represented for the adoption of resolutions of the general shareholders’ meeting.²⁹

These special rights must be considered in light of the fact that the Land of Lower Saxony currently holds approximately 20.8% of the corporation’s shares--thus enjoying a “blocking minority” for important shareholder decisions.³⁰

Although the ECJ is yet to rule in this case, one may examine these special rights provided the German government(s) in light of the series of case decisions discussed above. And, even though this special rights regime is not discriminatory in its application (it applies to all other current and potential shareholders, German or foreign), it is clear that such non-discriminatory measures constitute a restriction on the free movement of capital and freedom of establishment in that they may discourage investment in the concerned company by both direct and portfolio investors. Direct investors, for instance, may well withhold investing in a multinational corporation wherein the voting rights are restricted to a maximum of twenty-percent regardless of shareholdings and where, when coupled with the rule that certain important decisions must obtain more than an eighty-percent affirmative vote, even major investors are legally barred from exercising proportionate control. As for portfolio investors, share prices of such a company may well be depressed due to the blocking minority enjoyed by the state and the threat posed by such, especially when concerning decisions involving issues considered strategic or sensitive to the German authorities (*i.e.*, possible foreign control, social/labor, and political issues). As put forth by the Commission in a recent report concerning special rights regimes within the EU, “[s]pecial rights, whether they limit the acquisition of capital or provide

for a veto of major strategic decisions on the future of the enterprises, represent a restriction to these freedoms because they are liable to dissuade investors from other Member States from investing in the capital of the privatized enterprises.³¹

As made clear in this line of golden shares cases, however, such non-discriminatory measures may be permitted as long as these special rights are linked to a clearly established general public interest and qualified by stable, objective criteria. Accordingly, the German government has argued (in addition to the claim that the Volkswagen Law does not constitute a “state measure” as considered in Article 56(1)) that these measures are in fact well grounded in reasons of the general interest – in particular, the protection of important industrial, economic, and regional political concerns. In his “Conclusions” submitted to the ECJ on February 13, 2007, the EU’s Advocate-General has requested that the court reject this claimed justification of general interest as being too sweeping in scope and too far removed from a realistic assessment of legitimate governmental interest in protecting the public.³² And, perhaps more ominously for the Federal Republic of Germany, one must keep in mind that the ECJ has consistently held that “economic grounds” alone are insufficient to justify restrictive measures that constitute obstacles to the free movement of capital and freedom of establishment.³³

In conclusion, one can imagine the ECJ judges comparing the “clear” general interest concerns as established in the *Distrigaz* case to the claim of necessary protection of the public interest put forth by the German government in support of the Volkswagen Law. A state’s concern for protecting vital national natural gas supplies is pitted against the interest of the state in protecting its largest automobile manufacturer. It now seems quite clear that non-vital industries (*i.e.*, those not concerning networks supplying essential goods or services such as gas, electricity, water, or healthcare) will prove very difficult to protect from the vagaries of globalization under current interpretations of EU law. So goes it, most likely, even for the People’s Car!

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Endnotes:

1 Concerning the French government’s hastily arranged merger of government-controlled Gaz de France (GDF) and privately-held Suez in opposition to a rumored hostile bid for GDF by the Italian company Enel, see Commission Press Release IP/06/1558 (November 14, 2006) – Mergers: Commission Approves Merger of Gaz de France and Suez Subject to Conditions. Regarding the Spanish government’s attempted blockage of the takeover of the Spanish privatized company Endesa by the German energy company E.ON, see Commission Press Release IP/07/116 (January 31, 2007) – Mergers: Infringement Procedure Against Spain for Not Lifting Unlawful Conditions Imposed on E.ON’s Bid for Endesa. Concerning the successful blockage by the Italian government of the takeover of the domestic highway company Autostrade by the Spanish company Abertis, see Commission Press Release IP/06/148 (October 18, 2006) – Mergers: Commission Sends Preliminary Assessment to Italy on Measures to Block Abertis-Autostrade Merger. European Commission press releases are available on the EU’s official website located at <http://europa.eu>.

2 Concerning the call to modify the 2005 legislation, see Commission Press Release IP/06/1353 (October 12, 2006) – Free Movement of Capital: Commission Calls on France to Modify Its Legislation Establishing an Authorization Procedure for Foreign Investments in Certain Sectors of Activity, which is available at <http://europa.eu>.

3 See *Comm’n of the European Cmty. v. F.R.G.*, Case No. C-112/05, 2005 O.J. (C 143) (March 4, 2005), available at <http://europa.eu>.

4 These fundamental principles were clarified by the Commission in the following terms:

The movement of a firm from the public to the private sector is an economic policy choice which, in itself, falls within the exclusive competence of Member States (based in Treaty neutrality vis-à-vis Member States’ systems of ownership, Art 295 EC). The Commission has clarified that when a Member State is privatizing a company, and when that Member State acts in its capacity as a controlling shareholder, it may apply certain conditions concerning the sale as long as such con-

ditions: (i) are based on specific public policy objective clearly defined beforehand; (ii) are applied without discrimination; (iii) are limited to the time necessary to achieve the specific objectives; and, (iv) leave no margin for interpretation by the authorities . . . However, once the sale of a company has taken place the authorities must desist from intervening further in the privatized company.

See Commission Staff Working Document: Special Rights in Privatized Companies in the Enlarged Union – A Decade Full of Developments, at 7 (July 22, 2005), available at <http://europa.eu> [hereinafter Commission Staff Working Document].

5 In particular, Article 56(1) provides that “all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.” Treaty Establishing the European Community, Dec. 24, 2002, pt. 3, tit. III, art. 56(1), available at <http://europa.eu>. It should be noted that this principle was elevated to the status of a basic freedom under EU law with the coming into force of the Treaty on European Union on January 1, 1994, which amended the Treaty of Rome (1957) by renaming it the Treaty Establishing the European Community (hereinafter the EC Treaty). Full versions of these treaties are available at <http://europa.eu>.

Article 43(1) provides that “restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited . . .” *Id.* pt. 3, tit. III, art. 43(1). Importantly, for the purpose of our analysis, Article 43(2) provides that the freedom of establishment includes the right to “set up and manage undertakings, in particular companies and firms . . . under the conditions laid down for its own nationals by the laws of the country where such establishment is effected . . .” *Id.* pt. 3, tit. III, art. 43(2).

6 Communication of the Commission on Certain Legal Aspects Concerning Intra-EU Investment, 1997 O.J. (C 220).

7 As interpreted by the Commission in the following terms: “Member States may take measures which are justified by public policy or public security (Article 58), public health (Article 46) and defence (Article 296). Other exceptions to the freedom of capital movements concern third countries (Article 57), . . . taxation and prudential supervision of financial institutions (Article 58), safeguard measures . . . (concerning the operation of the European Monetary Union (EMU, Article 59) and the imposition of financial sanctions on third countries (Article 60).” Commission Staff Working Document, *supra* note 4, at 27; see also *Ass’n Eglise de Scientologie de Paris*, Case No. C-54/99, 2000 ECR I-1335 (wherein the court ruled that such exemptions must be narrowly construed (*i.e.*, only where there is a direct and serious threat to the protection of the general interest)).

8 *Comm’n v. Italy*, Case No. C-58/99, 2000, ECR I-3811, available at <http://europa.eu>.

9 *Comm’n v. Port.*, Case No. C-367/98, 2000 ECR I-4731, available at <http://europa.eu>.

10 *Comm’n v. Fr.*, Case No. C-483/99, 2002 ECR I-4781, available at <http://europa.eu>.

11 *Comm’n v. Belg.*, Case No. C-503/99, 2002 ECR I-4809, available at <http://europa.eu>.

12 *Comm’n v. Spain*, Case No. C-463/00, 2003

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- ECR I-4581, available at <http://europa.eu>.
 13 *Comm'n v. U.K.*, Case No. C-98/01, 2003 ECR I-4641, available at <http://europa.eu>.
 14 *Comm'n v. Italy*, Case No. C-174/04, 2005 ECR I-4933, available at <http://europa.eu>.
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 16 *Belg.*, *supra* note 11, at ¶¶ 45–55.
 17 *Comm'n v. Neth.*, Case Nos. C-282/04 and C-283/04, 2006 ECR I-0914, available at <http://europa.eu>.
 18 *Id.* ¶¶ 5–11.
 19 *Id.* ¶¶ 15–17.
 20 *Id.* ¶¶ 19–23.

- 21 *Id.* ¶¶ 24–27. <http://www.jdsupra.com/post/document/html.aspx?v=556141-wolkswagen-golden-shares-140005ab9ac51>
 22 *Id.* ¶¶ 32–33 (citing the *Distrigaz* case).
 23 *Id.* ¶¶ 35–36.
 24 *Id.* ¶¶ 38–39.
 25 *Id.* ¶¶ 40–41.
 26 *Id.* ¶ 43.
 27 *Id.* ¶ 45.
 28 *F.R.G.*, *supra* note 3.
 29 ECJ Press Release No 14/07 (February 13, 2007) – Advocate General’s Opinion in Case C-112/05, *Commission v. Federal Republic of Germany: Advocate General Ruiz-Jarabo Takes the View That the Volkswagen Law Restricts the Free Movement of Capital*, at 1, available at <http://europa.eu> [hereinafter *Advocate-General’s Opinion*].
 30 *Germany Set to Lose Volkswagen Golden Shares*, EurActiv.com (February 13, 2007), available at <http://www.euractiv.com/en/com->

[petition/germany/set-to-lose-volkswagen-golden-shares](http://www.jdsupra.com/post/document/html.aspx?v=556141-wolkswagen-golden-shares-140005ab9ac51).

- 31 Commission Staff Working Document, *supra* note 4, at 10.
 32 Advocate-General’s Opinion, *supra* note 29, at 2.
 33 *See generally* Commission Staff Working Document, *supra* note 4, at 29 (wherein the Commission stated: “Purely economic reasons, on the other hand, can never serve as a justification for imposing restrictions. Considerations identified by the ECJ as such purely economic reasons include e.g. choosing a strategic partner, strengthening the competitive structure of the market concerned or modernising and increasing the efficiency of the means of production” (citing *Port.*, *supra* note 9)).

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- (10) Any claims for compensation have been satisfied by peace treaties and international agreements reached between Japan, the Allied Powers, and other Asian countries after World War II.⁵⁰
- (11) Since Japan has already been tried for crimes based on their involvement in World War II, the Tribunal could not try them again, or it would constitute double jeopardy.
- (12) The comfort women system was non-coercive because the women were voluntary prostitutes, the women were not forcibly recruited, they were paid for services rendered and were free to go home at the end of their contracts.⁵¹

VI. Counter-Arguments

The Tribunal addressed these arguments in its Final Judgment. The Women’s Tribunal found it had jurisdiction even though it is neither a state nor an internationally mandated tribunal because crimes against humanity are subject to universal jurisdiction under customary international law.⁵² Moreover, the Women’s Tribunal found that when states fail to exercise their obligations to ensure justice, a civil society can step in its place.⁵³ Because sovereignty resides in the people of each state and territory, the people of the region gave the Women’s Tribunal the jurisdiction to prosecute the crimes.⁵⁴

The Women’s Tribunal reasoned that because it was a People’s Tribunal and the accused will not incur any legal detriment, it does not have to provide due process guarantees, which is an obligation of the state or organizations with legal authority.⁵⁵

In evaluating the evidence, the Women’s Tribunal observed the principle of *nullum crimen sine lege* by only applying laws that existed at the time of the acts’ occurrence.⁵⁶ The Women’s Tribunal found that acts constituting crimes against humanity in the Nuremberg and Tokyo Charters were indisputably crimes during WWII.⁵⁷ Thus, the term “crimes against humanity” did not create new crimes but re-categorized conduct that was already criminal.⁵⁸

Fifth, because of the gravity of the crimes, the Women’s Tribunal found that the head of state or officials were not entitled to immunity. The Treaty of Versailles of 1919 recognized that immunity given to heads of states was not absolute. Both the Nuremberg Tribunal and the IMTFE allowed for the prosecution of those acting in an official capacity.⁵⁹ In addition, crimes against humanity are *ultra vires*, which means that these are crimes that go beyond the scope of any official actions that can be considered legitimate.⁶⁰ A head of state cannot use sovereign immunity to shield himself from liability.

The Women’s Tribunal concluded that the evidence established that Emperor Hirohito and others clearly had knowledge of crimes that might

be committed against civilians but did nothing to prevent those crimes. With regards to Emperor Hirohito, the evidence showed he was not simply a figurehead because he exercised decision making authority and was cognizant of the atrocities his troops committed.⁶¹ Moreover, both soldier-witnesses testified that their superiors encouraged sexual violence towards the comfort women.⁶² Because of their positions as high-level superiors and the ubiquity of the comfort women system, the superiors were charged with knowledge of the crimes against the comfort women.

The Tribunal found that, because it is a reopening of the IMTFE, it functions as if it were taking place in 1946 and there is no statute of limitations issue with regards to crimes against humanity.⁶³ Moreover, the Women’s Tribunal rejected the argument that the Peace Treaties barred the claims. The Women’s Tribunal reasoned that crimes against humanity are *erga omnes*, which are duties owed to everyone. Thus, it is legally impossible for a state to waive the interests of other states through agreements.⁶⁴ Finally, the double jeopardy defense fails since the Allied powers failed to try the accused for sexual violence crimes during the IMTFE and other related military tribunals.⁶⁵

VII. The Findings

Factually, the Judges determined that the Japanese military took women into the comfort women system by any means available including force,

threats, purchase, and deception.⁶⁶ The evidence overwhelmingly showed that the system was not a voluntary system, as even former prostitutes endured slave-like conditions and could not leave.⁶⁷

The Tribunal found Japanese Emperor Hirohito and all of the other high officials individually guilty of crimes against humanity.⁶⁸ Additionally, the Tribunal found the high-ranking officials liable under the command responsibility theory because they knew or had reason to know that their subordinates were involved in criminal activity and failed to take sufficient measures to prevent them from doing so.⁶⁹ The Tribunal also found that the officials “consciously approved or negligently permitted” concealment of sexual slavery by continuing the comfort women system.⁷⁰ With regards to Emperor Hirohito, the Tribunal found him guilty because of his position as Supreme Commander of the Japanese Army and Navy, which carried the responsibility and authority to ensure his subordinates followed international law.⁷¹ It is important to note that the Tribunal did not see Emperor Hirohito as a “mere puppet” but rather as the “ultimate decision-making authority.”⁷² The Tribunal also relied on his awareness of the atrocities and his failure to prevent the continuation of the comfort women system to find him criminally responsible.⁷³

The Tribunal found the State of Japan incurred liability for its failure to actively prevent, protect, and punish international wrongs of rape and sexual slavery committed by its officials during World War II.⁷⁴ The Tribunal concluded that Japan violated a number of treaties and norms of customary international law. States are responsible not only for wrongful acts or omissions within its territory but also for wrongful acts or omissions by its organs, agencies, officials, and employees acting outside the State’s territory.⁷⁵ The Tribunal held that since the military and government of Japan are organs of the State and were criminally liable, Japan was responsible too.⁷⁶

Specifically, the Tribunal found that Japan failed to prosecute the wrongdoers, neglected to provide reparations, and did not take measures to protect the well-being and dignity of human beings.⁷⁷ Evidence

to the Tribunal showed that Japan took measures to destroy and conceal wartime documents to protect the Emperor and high-ranking state officials.⁷⁸ Thus, the Tribunal found Japan responsible for the crimes and liable for reparations including: (1) a “full and frank apology;” (2) acceptance of legal responsibility for the comfort women system; (3) payment of monetary compensation to victims and survivors; (4) establishment of an investigation mechanism for sexual slavery; (5) disclosure of all documents regarding the comfort women system; and (6) punishment of all perpetrators involved in the system.⁷⁹

VIII. Looking Forward

After the Tribunal’s December 2000 judgment, Japanese Prime Minister Junichiro Koizumi issued an apology in which he said that Japan is “painfully aware of its moral responsibilities” and that it “must not evade the weight of the past” nor its responsibilities for the future.⁸⁰ He also stated that Japan should accurately convey its history to future generations.⁸¹ Thus, it appeared that the government of Japan had unequivocally accepted its moral obligations.

However, in 2007, Japan appeared to recant their apologies when the US House of Representatives debated whether to issue a non-binding resolution asking Japan to “formally acknowledge, apologize, and accept historical responsibility.” In response to these hearings, Japanese Prime Minister Shinzo Abe said that Japan will not issue another apology to the comfort women. He continues to stand by Japan’s 1993 apology in which it acknowledged that the military set up and ran brothels for troops during World War II. However, Mr. Abe said that the testimony at the Tribunal revealed “no evidence to prove there was coercion.”⁸²

With this new stance, Japan appears to be trying to invalidate the Women’s Tribunal’s efforts towards acknowledgement and a meaningful apology. It has also alienated itself politically, as many Koreans, Chinese, and Southeast Asians are very upset over this lack of remorse. In the face of international outrage, Mr. Abe met with President Bush and expressed his apologies for the circumstances that the comfort women endured.⁸³

With Japan now claiming that there is no evidence of coercion despite voluminous testimony to the contrary, a journalist investigating Japan’s war crimes during World War II claims to have found new documents showing coercion.⁸⁴ The documents were located in Dutch archives and include the testimony of a Dutch woman who was forced to become a comfort woman.⁸⁵ The Japanese Foreign Ministry has declined to comment on the documents, claiming it has not yet seen them.⁸⁶

The Japanese government knows that it would be extremely difficult to get an internationally mandated tribunal with legal authority to try it for crimes against comfort women during World War II. If Japan accepts legal responsibility with regards to the comfort women, it could provide the impetus for the emergence of more claims by other types of war victims. Moreover, the acceptance of legal responsibility would go against Japan’s own domestic courts, which have so far opined that either their courts have no jurisdiction, no remedy is available, or the statute of limitations has passed.

IX. Conclusion

The Women’s Tribunal had three primary effects: it provided the comfort women with acknowledgment of their suffering; it provided gratification to members of civil society who had worked to bring the plight of the comfort women to an international forum; and it provided a symbolic tribunal to achieve a sense of empowerment.

The Women’s Tribunal also raised awareness about a previously unknown cause. These victims do not only want monetary damage and an apology- they want the world to know how they suffered at the hands of the Japanese government. Through the Women’s Tribunal, they achieved this goal. In addition, the Women’s Tribunal showed the power people have to create a tribunal and achieve justice, even if it is not a “legal” resolution. The Women’s Tribunal clearly demonstrated the crucial role people play in compelling states to abide by international law.

To gain a deeper understanding of current Japanese sentiments by the

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younger generation, we interviewed twenty-four year old Emi Mitsuyasu. We asked her if it was commonplace to learn about the comfort women in school, but she was not sure.⁸⁷ However, she said that one of her teachers felt that it was necessary for them to have a “moral education” and learn of the “terrible things Japan did.”⁸⁸ Interestingly, Ms. Mitsuyasu added, “We were all controlled by the Emperor.”⁸⁹ We inquired about the prevailing attitudes of the people of her generation regarding World War II to which she responded: “We know Japan did such terrible things, but it was a long time ago, so we don’t really care. The Emperor was a really bad guy, that’s why.”⁹⁰ This attitude by the younger generation is exactly the type of attitude that the comfort women hope to change through the judgment of the Women’s Tribunal.

“It is good to wash one’s hands, but to prevent blood from being spilled on them would be better.”

– Victor Hugo⁹¹

Ms. Mariz is a recent graduate and Ms. Satish is a December 2007 J.D. candidate from the Stetson University College of Law.

Endnotes:

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- 35 *Id.* at ¶ 79.
- 36 *Id.* at ¶ 82.
- 37 *Id.*
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ETERNAL ADJUSTMENT

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L, before leaving the United States.¹¹

20) Does it make a difference if the alien departs the United States with a valid advance parole, that advance parole expires, and a new advance parole is issued when the alien is abroad?

Although the regulatory language (8 C.F.R. 245.2 (a)(4)(ii)(B)) is not completely clear, there is a good argument under the regulations that as long as the alien left the country after one advance parole had been approved, he should be able to return to the country with a second advance parole document. However, the instructions to Form I-131 (which are in many respects outdated) state that the application is deemed abandoned by the alien's departure. As a practical matter, this issue has rarely arisen at ports of entry.

21) How will USCIS treat absences for adjustment applicants who departed the United States on or after July 2, 2007, upon learning that the USCIS was going to reject adjustment filings?

As of the date of this article, the answer is unknown.

22) When is the I-485 deemed filed – the date it was received, or the date on the USCIS received notice?

The date it was physically received by USCIS.¹²

23) What can be done to protect the children of the principal adjustment applicant from aging out if they are abroad and will visa process?

File an I-824 with the adjustment application. This will constitute the child's application for the visa.¹³

24) Can an adjustment applicant change to consular processing?

Yes, but both cannot be pending at the same time. The I-824 is treated as a request to withdraw the I-485.¹⁴

25) What is the procedure for doing this?

File form I-824. Some posts will create an immigrant visa application with a copy of the receipt notice for Form I-824; however, they will not adjudicate the visa application until they receive the petition from NVC. A DOS cable encourages posts to process cases utilizing the I-797 approval notice of an I-140, a copy of the I-140, a receipt for the I-824 and evidence that the applicant was last resident in the consular post.¹⁵

26) Can an adjustment applicant port if the adjustment applicant decides to consular process?

Yes. As long as the visa petition is approved and the adjustment application was pending for 180 days.¹⁶

27) Will concurrent filing of the adjustment application and visa petition freeze a child's age?

If the principal files an I-140 and I-485 concurrently and the beneficiary "child" is in the United States and wishes to adjust with the principal, the filing of an I-485 by the child contemporaneous with the parent's concurrent filing should protect the child. The child's I-485 will be pending when the parent's I-140 is approved; and, assuming the priority date is current, the child's age will be frozen at the time the I-140 is filed. However, if the priority date is not current when the I-140 is approved, the Child Status Protection Act, which did not anticipate concurrent filing, is rather ambiguous. We believe that the better argument is that the child's age is protected on the date of filing of the concurrent I-485 irrespective of subsequent quota retrogression.¹⁷

28) What if the child was 21 when the adjustment was filed for the principal, is the child eligible to adjust?

Assuming the priority date is current, the child may still be eligible to adjust. Deduct the period of time the I-140 that was filed on behalf of the principal was pending, and subtract this period of time from the child's age to determine the child's filing age.

The child must still seek to procure residence within one year of the approval of the parent's I-140.¹⁸

29) Does the child have an argument that he is protected by the CSPA if he failed to file for adjustment when his priority date became current, and subsequently the priority date retrogressed for more than a year?

The CSPA itself does not take into account the possibility that a priority date might be current for a one month period and then subsequently retrogress for over a year. The statute contemplates giving the child a one year period to make an application for the visa or adjustment. Thus, one could argue that the period of time that the child could not apply because the priority date retrogressed tolls the year by the period of time that the priority date was unavailable. One would argue that there was impossibility of performance within the one year filing deadline.

30) What happens if an adjustment applicant works without an EAD and without valid nonimmigrant status after the filing of the adjustment application?

The USCIS position, as evidenced in its training materials, is that unauthorized employment after the filing of the adjustment application can bar adjustment. CIS will accumulate any unauthorized employment prior to the filing of the adjustment and unauthorized employment after the filing of the adjustment and, if the total exceeds 180 days since the last entry, the applicant will be considered ineligible to adjust and not protected by INA section 245(k).

31) What if the adjustment applicant fails to maintain any nonimmigrant status after the filing of the adjustment, but does not work without authorization?

The USCIS position is that, as long as any violation of status was less than 180 days after last entry and before the filing of the adjustment application, INA section 245(k) protects

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the alien's eligibility for adjustment of status.

32) Can an alien have more than one adjustment of status application pending at the same time? For example, what if two spouses have approved I-140s and both spouses file I-485s with their approved I-140s and separate I-485s as derivatives of their spouse's I-140 adjustments?

Although USCIS discourages such duplicate filings, they are not

violative of any law or regulation. However, as a practical matter, multiple adjustment filings may result in confusion regarding multiple biometrics, multiple security clearances, multiple RFEs and possible Service withdrawal or denial of one of the two adjustment applications.

Tammy Fox-Isicoff (tfox@rifkinfox.com) of Rifkin & Fox-Isicoff, P.A. is a former Trial Attorney for the United States Immigration and Naturalization Service and Special Assistant United States Attorney. She is a Past President of the South Florida Chapter of the American Immigration Lawyers Association and currently serves on the Board of Governors of AILA

Media, Congressional and Bar Association Committees. She has served as AILA's representative to the American Bar Association's Immigration Coordinating Committee. Tammy is on the Board of Directors of Catholic Charities Legal Services and has been the recipient of three AILA Presidential Awards for advocacy on behalf of immigrants. Tammy is a member of The Florida Bar International Law Section and Chairs their Immigration Labor Liaison function.

H. Ronald Klasko [Ron] (rklasko@klaskolaw.com) is the Managing Partner of Klasko, Rulon, Stock & Seltzer, LLP, with offices in Philadelphia and New York. Ron and his firm were chosen by clients and peers as one of the top six immigration firms in the country (Chambers Global, The World's Leading Lawyers 2007). Ron is a former National President of the American Immigration Lawyers Association (AILA) and served for three years as that association's General Counsel. He is a past Chair of AILA's Business Immigration Committee, Department of Labor National Liaison Committee and its Task Force on H and L Visas. Ron has been selected for inclusion in Best Lawyers in America since 1991. He was selected as the "most highly-regarded" immigration lawyer in the world by The International Who's Who of Corporate Immigration Lawyers 2007. Ron is the recipient of the AILA Founders Award, bestowed upon the individual who has had the most positive impact on immigration law.

Endnotes:

- 1 8 C.F.R. 245.2 (a)(4)(ii)(B).
- 2 8 C.F.R. 245.2 (a)(4)(ii)(C).
- 3 USCIS Memorandum, Michael D. Cronin, Acting Associate Commissioner Office of Programs, HQADJ 70/ 2.8.6, 2.8.12, 10.18, "AFM Update: Revision of March 14, 2000 Dual Intent Memorandum" (May 25, 2000).
- 4 *Id.*
- 5 *Id.*
- 6 INS Memorandum, Michael Aytes, Acting Director of Domestic Operations, December 27, 2005, HQPRD, 70/6.2.8-P, "Interim guidance for processing I-140 employment-based immigrant petitions and I-485 and H-1B petitions affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21)(Public Law 106-313)." See also Frequently Asked Questions issued by USCIS on July 23, 2007.
- 7 *Id.*
- 8 *Matter of Hosseinpour*, 15 I&N Dec. 191(BIA 1975), aff'd on other grounds, *Hosseinpour v. INS*, 520 F.2d 941 (5th Cir. 1975).
- 9 Cronin, *supra*, at note 3.

UNCITRAL Designates Inter-American Bar Association as Official Observer

The United Nations Commission on International Trade Law (UNCITRAL) has designated the Inter-American Bar Association as an observer to its Working Group II (Arbitration). This designation was obtained as a result of the efforts of **John Rooney**, of Miami, Florida, Chair of Committee XVIII (International Arbitration Law), who will represent the IABA at working group sessions. The first session of the Working Group in which the IABA is eligible to participate will take place in Vienna, Austria, from Sept. 10 - 14, 2007.

UNCITRAL, a commission of the United Nations, is responsible for suggesting and coordinating the drafting of model texts, such as the UNCITRAL Model International Commercial Arbitration Law and the Vienna Convention of Contracts for the International Sale of Goods, and in order to accomplish its mission, convokes diplomats and other public officials, academic and practitioners named by its constituent countries and observers to prepare texts and discuss trends.

UNCITRAL's designation of the Inter-American Bar Association is a recognition of the IABA's work of excellence in the field of law since its foundation in 1940, as well as for the IABA championing of the Rule of Law in the Western Hemisphere as the foundation of a just and free society. The IABA, headquartered in Washington, D. C., is comprised of bar associations of the Americas and Spain, individual members, law school and universities. For additional information on the IABA, please visit its web page at: www.iaba.org.

10 Matter of [name deleted], (AAO January 12, 2005), USCIS Adopted Decision, AILA InfoNet Doc. No. 05102761.
 11 8 C.F.R. 245.2 (a)(4)(ii)(B).
 12 USCIS Update (August 3, 2007).
 13 See "DOS Issues Revised Cable on Child Status Protection Act," AILA InfoNet at Doc. No.03020550.

14 See INS Memorandum, Michael Cowdin, August 8, 2000, "Prohibition on Concurrent Pursuit of Adjustment of Status and Consular Processing," HQ 70.23.IP, AILA InfoNet doc. No. 00101803.
 15 See DOS Cable, 00 State 180792 (Sept. 2000), AILA InfoNet Doc. 0009273.
 16 See AILA – Visa Office Liaison Min-

utes (March 22, 2001), AILA InfoNet Doc. No. 01041804.
 17 See Tammy Fox-Isioff & H. Ronald Klasko, "The Child Status Protection Act - Is Your Child Protected?" 80 Interpreter Releases 973 (July 21, 2003).
 18 *Id.*

2007 International Law Section Statement of Operations

Revenue	2006 - 2007	Year End	2007 - 2008				
	Approved	June 2007	Approved				
	Budget	Actuals	Budget				
Admin Fee Adjustment	-15,385	0	-15,380	Officers Travel Exp.	1,000	36	1,000
Section Dues	40,000	34,925	40,000	Meeting Travel Exp.	1,000	3,090	1,500
Affiliate Dues	980	415	950	Out-of-State Travel	1,000	2,500	2,500
Admin Fee to TFB	-18,000	-15,650	-18,100	CLE Speaker Exp.	4,000	773	4,000
Total Dues	7,595	19,690	7,470	Committee Expenses	2,500	1,543	2,500
On-Line Seminars	0	1,072	0	General Meeting	1,000	0	1,000
Sct Share Online CLE	0	162	400	Board or Council Mtg.	1,500	16	1,500
CLE Courses	52,500	39,707	25,860	Bar Annual Meeting	8,000	6,026	8,000
Audio Tapes	0	2,400	0	Midyear Meeting	5,000	3,999	5,000
Section Differential	0	4,258	0	Section Service Program	5,000	7,739	5,000
Book Sales	50	0	50	Retreat	5,000	3,999	5,000
Newsletter Subscription	0	150	0	Foreign Program Exp.	10,000	10,622	10,000
Sponsorships	30,000	25,030	30,000	Sec. Membership Dir.	500	0	500
Member Service Program	1,500	17,595	1,500	Awards	3,000	2,552	3,000
Foreign Program Rev.	10,000	0	10,000	Website	2,500	2,431	2,500
Newsletter Advertising	2,000	0	2,000	Legislation/Lobbying	8,000	0	8,000
Advertising Revenue	2,500	0	2,500	Int. Arb Pre-Comp	20,000	20,900	20,000
Investment Allocation	6,677	14,957	11,297	Vause Memorial	2,000	0	2,000
Miscellaneous	2,500	0	2,500	Case Law Digest	4,000	0	4,000
Other Revenue	107,727	105,331	70,727	Council of Sections	300	0	300
Total Revenues	115,322	125,021	78,197	Special Projects/ 25th Anniversary	2,500	0	10,000
Credit Card Fees	100	469	0	Operating Reserve	10,307	0	11,357
Employee Travel	3,631	3,671	4,354	Miscellaneous	1,000	0	1,000
Telephone/Direct	0	517	1,500	Course Credit Fee	150	0	150
Express Mail	0	35	0	A/V Ctr Dup/Prod	0	154	0
Postage	2,500	1,543	1,750	Total Operating Expenses	110,288	73,579	121,361
Printing	1,500	604	1,000	Meetings Administration	197	1,418	205
Newsletter	350	165	350	Graphics & Art	2,987	3,311	3,364
Membership	2,000	0	2,000	Registrars	0	210	0
Supplies	250	0	250	Total TFB Support Services	3,184	4,939	3,569
Photocopying	700	195	350	Total Expenses	113,472	78,518	124,930
				Net Operations	1,850	46,503	-46,733
				Beginning Fund Balance	95,384	146,792	161,385
				Current Fund Balance	97,234	193,295	114,652

CHAIR'S MESSAGE

from page 2

geographic location as a north/south and east/west crossroads. As well the international nature of its people, including the polyglot population, our welcoming cities and our ability to transact legal business in Spanish, Portuguese, Russian, Italian, French, Creole, Dutch and so many other languages, has placed Florida on the verge of emerging as one of the premier centers of international law. As evidence of this, Florida lawyers serve in the leadership of other international bars such as the International Bar Association, the Inter-American Bar Association and as major leaders and officers of the International Center for Dispute Resolution of the AAA, the international arbitration arm of the International Chamber of Commerce and of the London Court of International Arbitration. Florida is now a seat of preference for international arbitrations. Hundreds of millions of dollars of international transactions are negotiated, drafted and closed by Florida lawyers each year. Moreover, Florida's law schools have emerged as leading centers of international legal thought and are turning out law graduates who already see the world of law as an international matrix within which Florida is a major player. Teams from Florida law schools have now become feared competitors in major international legal competitions including Stetson Law's major victory in 2005 as the victor in the Vis International Arbitration Mock in Vienna, Austria against 153 law schools from 47 countries. Since then the teams from Florida law schools have become perennial challengers for the crown in Vienna in the past two years and we hope to help a Florida law school to recapture the crown in 2008.

Honoring our Past

This has not happened by accident. It is due to the leadership of visionaries that have foreseen Florida as a major player in the global legal world and the ILS as one of the principal engines of this development. This year the ILS is focusing on honor-

ing its founders, its past leaders and those who have nurtured it throughout the years as well as those who have planted the seeds for the growth of the practice of international law in Florida. We will honor pioneers and visionaries like Marshall Langer, John (Jack) Bierley, Bob Hendry, Owen Freed, Burton Landy, Richard Jacobson, Maureen O'Brien, Raul Valdes-Fauli, Eugene Rostov, Jana Sigars, Bill Newton, George (Rocky) Harper, Steve Zack, my own partner Jose Astigarraga, and so many more that I hesitate to mention any for fear of the certain knowledge that I'm overlooking so many others. To honor our history, the ILS has commissioned a living history project which will involve video interviews all of its former chairs and as many of those that led its predecessor committee as we can. That will be made into a movie to be shown at a gala to be held in January 2008 in conjunction with The Florida Bar's Midyear Meeting at the Biltmore to celebrate our Silver Anniversary as a Section.

Our Focus on the Future

This year is an ambitious year for the ILS on other fronts as well. Our agenda for the ILS this year is to focus first, on branding the ILS and the Florida Bar as one of the foremost organizations in the international legal world and, second, on building and measuring accountability for ILS voluntary leaders and members to set and meet the goals of the section. The ILS will organize and host conferences in Rio de Janeiro in September and in Argentina in November of this year. In October, we will host a world class (as recognized by others) international tax and estate planning seminar in Miami. We will host a major international arbitration conference next April featuring a mock international commercial arbitration. We also desire to plan and host a major international transactions conference in 2008 as the first major project of our nascent International Business Transactions Committee. Our goal is to sign new cooperative agreements with at least six more bar associations from around the world, including Genoa, Italy; Rio de Janeiro, Brazil; Buenos Aires, Argentina; Singapore and Guatemala. Our

legislative committee is undertaking an enormous agenda including the adoption of the UNCITRAL model law for international arbitration to update the Florida International Arbitration Act. As described above, we will once again host in Orlando in February, 2008 a regional "tune up" competition for all the Florida law schools that are sending a team to Vienna, Austria for the Vis Competition.

The ILS Needs You and Wants You

What does this mean to you? Well, if you're already a member of the ILS and are not involved with section activities, this is the year to get involved. As we look back to celebrate our roots, we are also solidifying a platform to insure that Florida will remain a major center of international legal expertise. If you are not a member of the ILS and either have a practice that has international aspects or want to practice more in the international world, then come to one of our events and become a member. While our past is being documented, our future still remains to be written and we want you to be a part of our future. We particularly want those who were involved in the past, including our former chairs and council members, to get active again. We need your vision, your ideas, your leadership, your wisdom and your support. We are an open, welcoming and vibrant section that is looking to accomplish great things, but we need you, our members and soon to be members, to become an active participant in the ILS membership, leadership and programs.

Our next event is our general meeting in Tampa on September 7. Come and join us. To take a look at the rest of our upcoming programs, committees and other interesting information go to our website at www.internationallawsection.org. If you want to become more active, and make no mistake that we want you to get involved, give me a call or send me an e-mail. My contact information is below.

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