State Bar of Michigan

Michigan International Lawyer

International Law Section

Volume 26 No. II, Summer 2014

In This Issue

Dear Members,

Reed Newland

Please mark September 11 on your calendar and plan on attending our Annual Meeting and Program. Please be alert for messages on our list.serv as we confirm location, time and Program details. David Guenther, Chair-Elect, of Conlin, McKenney & Philbrick, is busy preparing a great program on The International Data Cloud, a topic dynamic enough its content may be changing up to the date of the Program. (Earlier this week, the *Wall Street Journal's "Most E-Mailed"* article was titled, "Forget the 'Cloud'; the 'Fog' is Tech's Future"). We hope to make some sense of efforts to date at regulating the 'Cloud' (or the 'Fog'), and give our Program its customary "international law" twist.

Our International Law Section's *raison d'etre* is to provide educational and interesting programs for our members. This is our first and primary goal this year. I write this on the eve of two Section events that will take place before you read this. I hope they are *educational and interesting* and as well received by our members and targeted non-members as the energy that has gone into their planning. I can additionally report on one such Program that took place in March.

We held our Immigration-focused meeting and program on Wednesday, March 19, at Butzel Long's downtown Detroit offices. Aptly titled, "Policy, Practicality, and Reality: The 3 Facets of Immigration", we had three speakers address:

- Immigration Reform – Fact or Fiction?
- NAFTA Operations – Employment and Admissibility; and
- Employer Compliance – ICE, DOL, and USCIS

We had hoped when the Immigration program was scheduled that it could address current domestic proposals for comprehensive and possibly even enacted Immigration reform. However, as our Program date arrived, no immigration reform had been enacted and none is fairly expected, at least until after the fall midterm elections. ILS Council Member Debra Auerbach Clephane opened the Program and provided a general overview of both Immigration Law as both a practice area and a political issue, on both domestic and international levels. Among other things, we learned that despite a compelling environment for reform in the United States, immigration reform can become clouded quickly by difficult details in implementation, or mired in unintended consequences and political posturing, and that's before mentioning limited resources.

Michigan International Lawyer Submission Guidelines

The *Michigan International Lawyer,* which is published three times per year by the International Law Section of the State Bar of Michigan, is Michigan's leading international law journal. Our mission is to enhance and contribute to the public's knowledge of world law and trade by publishing articles on contemporary international law topics and issues of general interest.

The Michigan International Lawyer invites unsolicited manuscripts in all areas of international interest. An author is encouraged to submit a brief bio and a photograph for publication. An article, including footnotes, should contain between 1000 and 3000 words.

Articles can be submitted for consideration in hard copy or electronic format. Manuscripts and photographs cannot be returned unless accompanied by a $5 check or money order made payable to Wayne State University Law School for shipping and handling.

The Michigan International Lawyer will consider articles by law-school students and may publish student articles as part of a regular column. A student should submit the article either through a law-school faculty member or with a law-school faculty member's recommendation.

Submissions should be forwarded to:
Professor Fox, Faculty Editor
Michigan International Lawyer
Wayne State University Law School
471 W. Palmer
Detroit, Michigan 48202
Telephone: (313) 577-0110
E-Mail: gfox@wayne.edu

Michigan International Lawyer

Publication Deadline Dates

Fall Issue
Articles due August 15

Winter Issue
Articles due January 15

Summer Issue
Articles due April 1

The *Michigan International Lawyer* is published three times per year by the International Law Section, State Bar of Michigan, 306 Townsend Street, Lansing, Michigan 48933-2083.

Former NAFTA Customs Border and Protection Officer Scott Clifford was our always informative "non-lawyer" speaker. The US and Canada share the largest bilateral trade relationship in the world (over $500 billion in 2010), and the Detroit-Windsor corridor is the busiest trade corridor on the US-Canadian border supporting that trade relationship. Officer Clifford refreshed our respect for those entrusted with guarding our borders, as is often the case with our public sector civil servants, and reminded us of how much they accomplish with limited resources and little or no recognition.

Betina Schlossberg, Schlossberg Legal, PLLC completed the Program and provided an overview of the employer's perspective of what to do when the "government" shows up in your lobby and wants to conduct LCA audits and site visits, maintaining up to date I-9 files and complying with the "alphabet soup" of US government regulations under the aegises of the Departments of Labor and Homeland Security (ICE and USCIS-Immigration and Customs Enforcement and Customs and Immigration Service).

I always come away from immigration law presentations appreciating the expertise immigration lawyers bring to the "human" side of international law that we see in Michigan.

Thank you to all our speakers, and especially to Linda Armstrong & Butzel Long, for hosting the event.

As I write this, *force majeure* events swirl around me: one at work and two of our three speakers have had to bow out of our Wednesday, May 21, 2014, Program. Our speakers line-up may change, but I hope not our topic. As advertised, our Wednesday, May 21, 2014, Program will address the "Nuts and Bolts of Investment Treaty Arbitration: What Every Deal Maker Should Know About Protecting Cross-Border Investments". Troy Harris, FCIArb, and Interim Dean and Associate Professor of Law at the University of Detroit Mercy Law School, will be our featured speaker. Troy is also a very active ILS Council member and he and UDM will host the event.

****

- Increase Membership and Diversity of Membership
- Increasing Engagement and Activity of Council Members and Committees

In furtherance of Goals 2 and Goal 3 for the Section for this year, Section officers and Council members targeted hosting informal "Meet & Greet" events at each of Michigan's law schools. The simple idea is for three (or more) of us to buy law students a meal and discuss what it is we do as international law practitioners in Michigan. We hosted these events at both Wayne State and UDM since my last letter, and previously at MSU. We will have to wait until next year to host "Meet & Greet" events at the UofM and Cooley.

Young Lawyers Section Summit

The ILS agreed to put together a "Session" or panel discussion at the Young Lawyers' Section annual Summit, which was held Saturday, May 31, in Lansing, to provide some perspectives on "international" law as practiced in Michigan. After our "Meet & Greet" events designed to attract law students to join our Section, we "targeted" the Young Lawyers' Section, the State Bar's single largest section, I believe, to attract more young members to our Section. ILS Council member Aaron Ogletree was instrumental in connecting our Section with the YLS to explore ways our Sections might collaborate. Our Session's topic was "Perspectives on International Legal Practice from In-House and Outside Counsel." I provided the In-House perspective, longstanding ILS member and former Chair Bruce Thelen of Dickinson Wright provided the Outside Counsel perspective, and Aaron Ogletree was the moderator. Thank you to Bruce Thelen and Aaron Ogletree for agreeing to represent our Section at the YLS Summit.

****

- Increase Engagement and Activity of Council Members and Committees

Bringing More International Dispute Resolution to Michigan, or 'Making Michigan the Delaware of ADR'

In a great opportunity to work on our third goal of engaging members, I reported in my last letter on the opportunity given our Section to participate in an effort to make Michigan the choice more often of decision-makers electing where to resolve international commercial disputes.

Ad Hoc Committee/Task Force

In addition to Carl E. Ver Beek, of Varnum LLP in Grand Rapids, who invited our Section to participate (and who I believe coined the 'Making Michigan the Delaware of ADR' catch-phrase), past, present and future Chairs are participating in our Committee: Jeff Paulsen, immediate past Chair, myself and David Guenther, our Chair Elect this year. To provide ourselves some expertise and academic *gravitas*, Professor Troy Harris has agreed to lead the effort from our Section's perspective, and Professor Julian Mortenson of The University of Michigan Law School has agreed to join our exploration of the topic.

What exactly does 'Making Michigan the Delaware of ADR' mean? More practically, what can we as the International Law Section do about it; what is our appropriate role if we decide it's an idea worth promoting? We have continued our lively discussions of this topic since our January meeting and in subsequent Council meetings and conference calls of both the Ad Hoc Committee/Task Force and Council. We harbor no illusions that we will displace New York, Paris or London as a desirable location to resolve commercial disputes. We concluded we need a "hook" to cause more alternative dispute forum selectors to choose Michigan. We have initially concluded that Michigan's manufacturing expertise may be the "hook." We intend next to solicit input from our targeted audience of stakeholders: economic development organizations; lawyers and judges; and international business owners and operators.

More specific goals remain to be defined, but might include a broader, State Bar-based task force and/or enactment of model legislation in Michigan. It remains true that this effort is in its early stages, and might take some years. But that's an opportunity to provide a modest legacy, if we come up with something. That's something to be proud of!

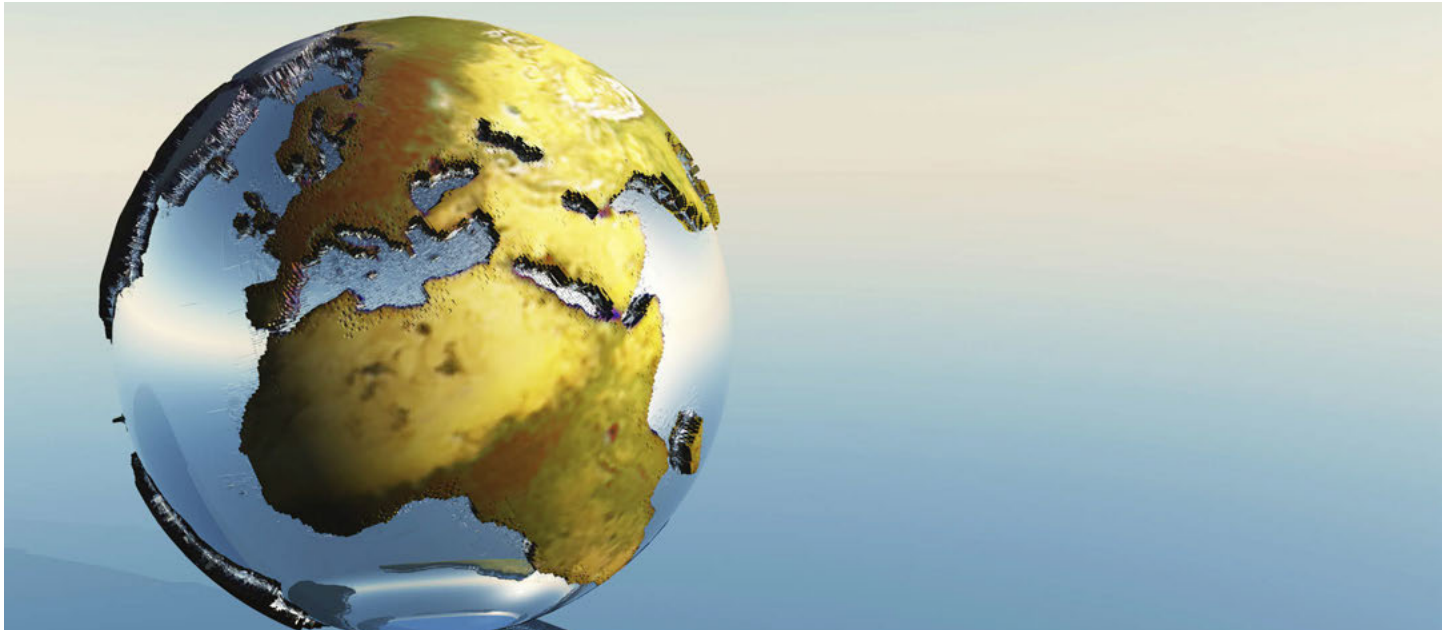
****

Please enjoy this issue of the *Michigan International Lawyer*. I hope to see you at a future ILS Council Meeting or our September 10 Annual Meeting and Program on The International Data Cloud (or maybe The International Data 'Fog'). Help us achieve our goals by recruiting more members. Look for further information on our Section's Meetings and Programs via the ILS listserv announcements, the ILS LinkedIn website and on our Section's page of the State Bar of Michigan's website in the coming weeks and months.

Please contact me [(734) 354-7142 or *rnewland@plastipak.com*] if you want to discuss any of the issues and activities of our Section. Have a great summer!

Sincerely,

A. Reed Newland
Chairperson 2013-2014
International Law Section
State Bar of Michigan



Global Tax Transparency – Could the Road to Hell be Paved with Good Intentions?

By Alex Martin – Principal, Clayton & McKervey, PC Southfield, Michigan

Apple, Google, Amazon, Starbucks – all high profile companies publicly shamed for their global tax practices, and the world has taken notice. While these four household names have drawn attention to worldwide concerns over multinational tax strategies, the resulting drive for so-called "global tax transparency" will likely create problems for both companies and tax authorities alike.

> *"Apple wasn't satisfied with shifting its profits to a low-tax offshore tax haven. Apple successfully sought the holy grail of tax avoidance."*
>
> -Senator Carl Levin, (D-MI), May 20, 2013

International tax issues have taken center stage as companies are questioned about whether they shift taxable income offshore unfairly. In particular, intercompany transfer prices of goods, services and royalties across borders drive how much corporate income tax is paid in each country where they operate. Every multinational has a transfer pricing issue because all of these companies have intercompany transactions across borders.

Complicated tax strategies as the "Double-Irish" and the "Dutch Sandwich" leave the distinct impression that companies with the right resources can manipulate tax systems at the expense of everyone else. Multinationals and consultants alike need to be aware that new strategies for tax transparency can lead to attacks on the business structure in every country where they operate.

Tax Authorities React to Aggressive Tax Strategies but Where Will it Lead?

The Organization for Economic Cooperation and Development ("OECD") notes in its "Addressing Base Erosion and Profit Shifting" Strategy Whitepaper:[2]

> *"[T]here is increased segregation between the location where actual business activities and investment take place and the location where profits are reported for tax purposes."*[3]

The OECD's position is particularly relevant in that most countries rely on the OECD's *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* ("OECD Guidelines") as the underlying principles for transfer pricing regulations.

Alex Martin

Companies have a fiduciary duty to the shareholders to minimize their tax bills, but calls for tax transparency from multinationals are understandable under the circumstances. Existing transfer pricing enforcement and documentation rules, including punitive penalties, have failed to resolve concerns that businesses are not paying their fair share of taxes.

> *"You [Google] are a company that says you 'do no evil'. And I think that you do evil in that you use smoke and mirrors to avoid paying tax."*
>
> -UK Member of Parliament Margaret Hodge, November 12, 2012

New disclosure requirements are geared toward companies that pay relatively little or no tax where they operate. However, policymakers and companies need to be cognizant that the proposed increases in disclosure requirements will likely lead to an exponential growth in tax disputes. Even companies with conservative transfer pricing approaches will undoubtedly face scrutiny similar to the more aggressive multinationals.

Global Developments

While outrage over corporate tax issues tends to burst onto the news cycle for a short time, recent developments on the global stage have generated the momentum for a once-in-a-generation shift in how governments tackle business tax issues. Global tax transparency has become far more than a catchphrase for governments, multinational organizations and companies of all sizes. Most notably, both developed and developing countries are all now driving a fundamental change in how multinationals report and pay taxes to governments.

The United Nations, World Bank, and other multilateral organizations all have some role in the transfer pricing and tax transparency initiative, but the OECD is the central forum for driving this shift in strategy. The G20 finance ministers called on the OECD to develop a plan to combat perceived transfer pricing abuses in 2012. The OECD unveiled the Base Erosion and Profit Shifting ("BEPS") strategy to address these concerns in February 2013.

Under recent deliverables from the OECD's BEPS plan, all tax authorities will have far greater access to information

regarding how much, and where, a company pays income taxes on a global basis.

> *"It is clear multinational companies have developed an unprecedented know-how for minimizing their worldwide tax pressure. These situations are literally impossible to explain to our fellow citizens."*[4]
>
> -Pierre Moscovici, French Finance Minister
> July 12 2013

What Will Be Disclosed to Tax Authorities?

In what may be a surprise to many multinationals and their accounting, tax and legal advisors, the proposed Country-by-Country ("CbC") template would disclose the following items to every tax authority where a company does business:

- Revenues by country
- Earnings before Interest and Tax by country
- Income tax paid by country
- Income tax accrued by country
- Employees by country
- Capital and Retained Earnings
- Tangible Assets

The CbC template will provide tax administrations with unprecedented visibility on how companies allocate their taxable income, income taxes payable and business activities on a global basis. This template is expected to be finalized during 2014, and many tax authorities are expected to adopt this template shortly thereafter. [5]

Multinational companies without a convincing explanation of their intercompany pricing results, including transfer pricing documentation, are at greater risk that tax authorities will develop their own theory of whether pricing is arm's-length. In the author's experience, transfer pricing documentation is a company's first and best opportunity to avoid a transfer pricing audit.[6] Documentation should ideally have the same analysis for tax authorities on both sides of intercompany transactions under review.

Moving to a More Transparent System or a Global Tax Grab?

While transfer pricing is a resource intensive and fact-driven area of tax law, tax authorities already know that audits are a high return-on-investment activity. Transfer pricing has long been considered the most contentious tax issue by multinationals.[7] In fact, many public listed companies regularly disclose transfer pricing issues as material financial statement items.[8]

Simply stated, tax authorities will be better placed to focus on maximizing their share of corporate income tax, rather than assessing whether a company's transactions across borders are correctly priced or not.[9] Human nature would imply that one of the first tax auditor questions will be why the company is paying more corporate income tax elsewhere rather than locally. Tax authorities auditing a subsidiary in India, for example, will now know how much tax is paid by a company in China or other locations.

Beyond the day-to-day audit revenue collections, collecting more tax from foreign-owned companies is a politically popular strategy for collecting money in an era of tight budget deficits.

> *"Why does Starbucks manipulate its accounts to avoid tax?"*
>
> -UK MP Margaret Hodge to Starbucks Chief Financial Officer Troy Alsted, UK Parliament Public Accounts Committee
> November 12, 2012

Deadlocks between Governments?

An increase in government tax audits, transfer pricing adjustments and penalties are not the only increasingly conten-

Since intercompany transactions across borders involve two (or more) tax authorities, there is a natural tension over how a multinational company's taxable income should be divided globally. If a company charges a sister company too high an intercompany price for goods, services, or royalties, the purchasing country tax authority is shortchanged. The opposite situation occurs where a company charges too low a price. Every multinational company faces this dilemma.

One additional complication of a transfer pricing audit is that a transfer pricing adjustment can create double tax on the same income for a multinational company. The tax authority on the other side of an intercompany transaction does not automatically refund taxes that have been overpaid in the other country after a transfer pricing adjustment. Taxpayers do have the opportunity to apply for double tax relief through the "competent authority" process specified in many international tax treaties. In competent authority, opposing tax authorities attempt to reach agreement on a taxable income adjustment to prevent double taxation of the same income. However, this competent authority process can add several additional years to the audit process and is no guarantee of double tax relief[1].

The IRS has historically been the trendsetter in this area, but over 70 countries now enforce transfer pricing regulations.

tious tax issue facing the world economy. Governments will also find themselves in a more complicated negotiating environment with their tax authority counterparts.

Since taxpayers must request double taxation relief through international tax treaties, tax authorities will be called upon to negotiate with their counterparts in other countries on an even more regular basis.[10] Perhaps most troubling is the time required to resolve these double tax issues. For example, double tax negotiations for the U.S. government averaged 790 days during 2012. In other words, relief from double tax requires government-to-government negotiations lasting well over two years. Why? Transfer pricing is essentially a "zero-sum" game: if one tax authority collects additional taxable income from a transfer pricing adjustment, the other tax authority must agree that some portion of the adjustment is reasonable before issuing any refunds.

This 790 day timeline does not start until after a tax authority conducts an audit and issues a transfer pricing adjustment. Therefore, resolution of transfer pricing audit disputes can require a decade or more of management time and resources. The length of this process can certainly be expected to increase as tax authorities are burdened with more requests for negotiated double tax relief, likely without increased staffs or resources to cope sufficiently with the ramp up in demand.

There is already a history of major impasses between governments over transfer pricing issues. For example, given numerous stalemates between the IRS and Canada Revenue Authority to resolve double tax issues in the Mutual Agreement Process, the most recent US-Canada tax treaty includes a mandatory arbitration mechanism. In February 2013, the IRS competent authority refused to negotiate Advance Pricing Agreements with his Indian counterpart due to an enormous backlog of disputes over transfer pricing issues.[11] These stalemates leave multinational companies in an unfair double tax situation, regardless as to whether the audit adjustment is reasonable or not.

A Preview of What's to Come?

"Companies need to wake up and smell the coffee, because the customers who buy from them have had enough,"

-David Cameron, UK Prime Minister,
Davos World Economic Forum- January 24, 2013

The OECD BEPS plan is still in the public consultation phase, but the IRS has already perceived a noticeable shift in attitude from certain foreign governments. IRS Deputy commissioner Michael Danilack, speaking at an American Bar Association Section of Taxation's May meeting in Washington D.C., noted that some foreign tax authorities are already taking the BEPS project "as a blanket indictment of U.S. multinationals," and the aggressive positions adopted by BEPS create "a very difficult situation and disturbing in certain respects."[12] In response to such allegations, Danilack noted that the IRS would plan on shifting more resources to audits of more inbound, foreign-owned subsidiaries.[13]

Bottom line, the battle has begun.

Just 20 years ago, the US introduced transfer pricing penalties for multinationals that failed to comply with the "arm's-length standard." In a remarkably short period of time, over 70 countries –and growing – have followed with transfer pricing regulations in one form or another. In the author's experience working with companies facing adjustments either in the U.S. or internationally, many tax auditors have very fixed views on what are considered a "reasonable" profit margins. What was already the most contentious tax issue for multinationals may become a global free-for-all after every tax authority can see what everyone else receives in global tax.

The new tools granted in pursuit of global tax transparency may have established a pattern of disputes where multinationals, tax authorities and advisors find that the road to hell is paved with good intentions.

The Author is grateful for comments from William Elwood and the MIL staff for this article. Any errors are the responsibility of the author alone.

About the Author

***Alex Martin** is a Transfer Pricing Principal with Clayton & McKervey, PC and leader of the PKF accounting firm network's North America group. Over his 17-year career, Alex has worked with companies of all sizes in managing transfer pricing issues on a U.S. and global basis. Alex was an economist and a director at a Big-4 accounting firm for over 12-years, working both in the U.S. and overseas. Alex has also assisted the World Bank in building transfer pricing expertise in developing countries.*

Endnotes

1 Note that the recent U.S.-Canadian international tax treaty now allows for an arbitration process to settle competent authority disputes between the two competent authorities.

2 The OECD is a multilateral organization of 34 developed and developing countries that focuses on promoting policies to support global development in a number of areas, including tax issues. In transfer pricing, the OECD has developed principles and guidelines that most countries, both OECD and non-OECD members, rely upon when enforcing transfer pricing.

3 OECD (2013), *Addressing Base Erosion and Profit Shifting*, OECD Publishing. *http://dx.doi.org/10.1787/9789264192744-en*.

4 Simon Bowers & Patrick Wintour, *Amazon told: time is up for tax avoidance* (2013), *available at* http://www.theguardian.com/business/2013/jul/19/oecd-tax-reform-proposals-amazon

5 The original schedule proposed by the OECD may be found on page 15 of the OECD's "Discussion Draft on Transfer Pricing Documentation and CbC (Country-by-Country) Reporting released on January 30, 2014. Information regarding specific intercompany transactions has been removed in later iterations of this schedule. Please see http://www.oecd.org/tax/transfer-pricing/public-consultation-transfer-pricing-documentation.htm

6 See Treas. Reg. §1.6662-6(d) and chapter V of the OECD *Transfer Pricing Guidelines* for a summary documentation. From a high level, transfer pricing documentation includes an explanation of how the business operates in each country under review; an overview of how business is affected by industry conditions; an assessment of the pricing or profitability of intercompany transactions under review; and selection and application of the "Best Method" or "Most Appropriate Method" for benchmarking intercompany transactions. In the U.S., transfer pricing documentation is not required, but in the event of a large transfer pricing adjustment, the IRS can issue 20% or 40% nondeductible penalty on the additional tax due. If a company does have documentation in place by the filing of the corporate tax return, penalties are not assessed. Other countries do require that transfer pricing documentation is prepared. Documentation reports of over a hundred pages are not uncommon.

7 Ernst & Young Global Transfer Pricing Surveys, *2013 Global Transfer Pricing Survey* (2013), http://www.ey.com/Publication/vwLUAssets/Tax_Alert_2013_No_36/$FILE/TaxAlert2013No36.pdf

8 In March 2013 alone, over 30 SEC listed companies disclosed new transfer pricing developments or disputes in public filings. These issues ranged from Yahoo! regarding a 2005 issue to a company with $28 million in annual revenue.

9 I.e. on an "arm's-length" basis as specified under Treas. Reg. §1.482 and the OECD Transfer Pricing Guidelines.

10 As an example, if a tax authority in Country B issues a transfer pricing adjustment raising taxable income, the company may not automatically reduce taxable income in Country A and request a refund for overpaying tax in Country A. The "Mutual Agreement Process" ("MAP") specified in international tax authorities requires that governments negotiate over the amount of a transfer pricing adjustment before any tax refunds are granted – in this example, Country A. In other words, the MAP procedure is the only way to alleviate double taxation after a transfer pricing adjustment.

11 "United States: Danilack Says "No" to Indian APAs, Citing Backlog of 140 MAP Cases," 21 Tax Mgmt.

Trans. Pricing Rep. 962, 7 February 2013.

12 Bloomberg BNA Tax Management Transfer Pricing Report "Danilack: BEPS Forcing U.S. to Focus on Inbound Activity, Protecting Tax Base" May 9, 2014 http://news.bna.com/trln/TMTRWB/split_display.adp?fedfid=46440433&vname=tmtrnot&fn=46440433&jd=46440433

13 ibid

Section Member Profile: Frederick A. Acomb

Frederick A. Acomb, FCIArb, is the International Dispute Resolution Section Chair at Miller Canfield. For more than twenty years, Acomb has devoted his practice to prosecuting and defending international arbitration and litigation matters for clients from all over the world. His work regularly takes him around the globe, and he has appeared before arbitration tribunals in multiple continents including Asia, Europe, and North America.

Another area of focus for Fred is the defense of sales commission disputes; he has defended over 70 of them as of this writing. As former general counsel to the firm, he has a unique perspective on client service that he endeavors to bring to every engagement.

Q. How do you define "international law"?
The body of law that governs the legal relations between parties from different nations.


Frederick A. Acomb

Q. Why did you choose to work in international law (or a related field)?
I'd never been anywhere, and I wanted to see the world. Also, dealing with multiple legal systems and cultures is challenging, and keeps me interested in my job.

Q. Where did you go to law school?
The University of California, Hastings College of the Law.

Q. What would you want people who know you professionally to know about you personally?
I have a terrific wife and five children, and they are the cornerstone of my life. I grew up well below the poverty level, and this informs my view of the world and my place in it.

Immigration Reform, Fact or Fiction? Proposed Changes Affecting Business Immigration

By Betina Schlossberg

Although we have been hearing about the importance of immigration and the need for reform for about a decade, we have seen little change. In 2013 the Senate passed a bill, S. 744,[1] which did not move in the House. Meanwhile, the House has been working on immigration reform alternatives and various House Committees have reported a number of proposals.

In agreement with this issue of MIL dedicated to Corporate law, we are going to give an overview of the "would-be" changes as they would affect the employment aspect of the immigration system.

Temporary, High Skilled Workers

These workers are those with a minimum of a Bachelor's degree or equivalent. They are eligible for the H-1B, L-1, or O-1 categories.

The most common of the above is the H-1B category, which covers professionals in a variety of specialties. Currently, H-1B holders are authorized to be present and work in the United States for 2 consecutive 3-year periods and can "adjust their status" i.e., get a "green card" in the United States. The H-1B category is versatile and convenient because its main requirements are that the position commonly require a Bachelor's degree and that the Beneficiary hold it; the Petitioner must also pay the employee at the prevailing wage level or above as determined by the Department of Labor. However, the H-1B category brings difficulties both for the worker and for the employer, who has to overcome the "cap" (the black cloud of H-1Bs). The "cap" is a quota that limits the number of new H-1B admissions each year to 65,000, plus an additional 20,000 for Beneficiaries who hold Master's degrees from U.S. institutions of higher education.

When the economy is in a negative turn, those 65,000 openings may be enough to cover all the petitions. However, when the economy is flourishing –or even less- and employers need skilled workers, then the cap is too low. As an example, for the 2015 fiscal year about 175,000 petitions were filed. As a result of more petitions than visas, the United States Citizenship and Immigrations Services (USCIS) draws a lottery to decide which of those Petitions are going to be processed and returns the excess to the petitioning employers. The uncertainty is enormous, employers do not know how many employees they can count on and employees do not know if they will have a job in 6 months' time or in what country they will be living. Corporations have been asking for a lift of the cap for a while; they argue that the market should rule over the number of foreign workers they can hire and that the number should not be fixed. The government does not agree. If a cap-free system is not possible, employers request that the cap be raised. In a compromise, S.744 includes a flexible cap of 115-180 thousand visas, which would fluctuate according to the health of the job market. In addition, the bill includes another 25,000 visas for STEM[2] [3] graduates. As a perk to employees, the Senate bill allows for spouses of H-1Bs to obtain Employment Authorization. Although the House's reported proposal is similar to the Senate bill in that spouses would be authorized to work and the cap would be raised, H.2131[4] cap proposal stretches to a fixed 155,000 which includes 40,000 visas for STEM graduates. Considering the number of Petitions recently filed for fiscal year 2015, the cap proposed by the House may not be enough from the start.

Betina Schlossberg

The other major category for high skilled temporary workers is the L-1. This brings in employees transferred from companies abroad. Executives, managers, and specialized employees of a company can be transferred to another company of the same group in the United States for 6 or 7 years. This category requires that employees transferring to the United States have worked for the foreign employer for at least one year out of the last three and that the U.S. company be the parent, subsidiary, branch, or affiliate of the foreign employer. With regard to this category, the Senate bill mostly adds verification and compliance changes, while the House proposes that employers satisfy labor market conditions, probably similar to the Labor Condition Application currently required for H-1B petitions and not necessary for L-1 petitions today.

Foreign workers of extraordinary ability and workers of motion pictures/ TV productions and accompanying personnel can apply for O-1 status/visa. There does not appear to be many changes in sight for this group, except for some air to film and TV workers, who would need to comply with less stringent requirements.

Professional workers from certain countries may have more options. Trade agreements provide for the easy movement of people and come with certain non-immigrant categories of their own. Today, citizens of Mexico and Canada can obtain TN status, Australians can get E-3, and citizens of a

number of countries can get either E-1 (Treaty Trader) or E-2 (Treaty Investor); there is even an H-1B1 for natives of Chile and Singapore. These categories do not have immigrant intent, which means that the foreign workers in these categories will not be able to obtain a green card while in the United States, but they can live and work in the U.S. as long as they have a job or a business operation here. Changes coming out of S.744 for these categories include adding other Trade Agreement countries to Mexico, Canada, and Australia for TN and E-3, and also expanding the list countries for E-1 and E-2 purposes. The House proposal includes adding a $500 Fraud Detection and Prevention fee and making E-1 and E-2 dual intent categories.

Temporary, Low Skilled Workers

The Low Skilled workers category was revised to include considerable changes. In the agricultural workers' category, the Senate bill eliminates the category and creates new ones which will not require certification from the Department of Labor, will not need to be seasonal, and will give the workers the possibility of being at-will employees, as well as a path to permanent residence. The House report creates a new sub-category within the existing type and similarly allows for at-will employment and a pathway to permanent residence. For non-agricultural workers, the Senate bill lifts the current 66,000 cap, extends the workers' allowed periods of stay, and lifts the Department of Labor certification requirement.

Enforcement

Worksite enforcement is an important change both the Senate and House want to restructure. Today, employers cannot verify the prospective employees' ability to work in the U.S. until after hired. In addition, participation in the federal verification tool, E-Verify, is not mandatory. In rare agreement, the Senate bill and reported projects from the House propose the creation of a new e-verification tool , as well as making employer registration mandatory. In addition, the new tool, as described by the Senate bill, would include photo matching. Both the Senate and the House include increased penalties for non-complying employers, while the House intends that the verification of workers be done prior to hiring.

Students and Scholars

Today, there are almost one million foreign students in the United States. This category is important for corporations, because many of these students start working in the U.S. under the CPT (Curricular Optional Training) or OPT (Optional Practical Training) programs and then stay on under H-1Bs employment.

A student can work on OPT for 12 months after graduation. However, those who graduated and work in the STEM fields can request an extension of an additional 17 months. This is particularly handy considering the H-1B cap; the STEM extension allows for an employer to keep the employee for two H-1B filing cycles, in case the employee does not make the cap in the first filing.

Both the Senate and the House have changes in mind for this category, mainly to grant dual intent (viz. the possibility of becoming Permanent Residents) to F-1 visa holders. Other than that, there is not too much agreement; the House states that dual intent should be granted only to students within the STEM fields, for the Senate it should be granted to all. In the case of cultural exchange visitors on J-1 visas, which include scholars, trainees and interns, and au pairs, the reform emphasis seems to be placed on increasing fraud penalties, and adding fees on sponsors according to the Senate bill, or changing to stricter accreditation requirements as suggested by the House report.

Permanent

After 6 or 7 years or after the one long-term project when a worker's status is over, many employers are satisfied with the employee's performance and many employees do not want to leave. Employers can petition for their foreign employees to get "green cards". As is, the system has multiple backlogs due to the number of immigrant visa allocation possibilities both per category and per country. As a consequence, some workers have been waiting for their green cards for over ten years.

Major changes emerge from the Senate bill and the House Committee's reports regarding employment-based Permanent Residence. The Senate wants to see no limit for the first employment based category (EB-1), which includes: Managers and Executives, Outstanding Researchers and Professors, and Aliens of Extraordinary Ability, and would be extended to cover PhDs, STEM graduates, and physicians. This broadening of the EB-1 category would alleviate some of the backlog in the second employment based category (EB-2) that currently covers most PhDs, STEM graduates, and physicians. With a slightly different perspective, the House proposals include adding a fixed number of immigrant visas for STEM graduates and graduates of the medical professions, and for advanced degree holders from U.S. universities. The Senate bill also describes the creation of new immigrant categories to alleviate the visa backlogs.

In the case of Permanent Residence for Investors (EB-5), both the Senate and the House would like to see the amount set for the investment (currently, at $1 million) to be adjusted by CPI. Other requirements, such as the creation of ten jobs, remain untouched.

Michigan

Of late, our state has been trying to become an attraction center for immigrants, seeing them as powerful job creators who can help push Michigan forward. With that aim in mind,

the Office for New Americans was recently created. Some of its scope is to coordinate the state's efforts to welcome immigrants and their entrepreneurship and to ensure that the much needed agricultural and tourism workers come to our state. The office will also help coordinate existing services to immigrants and facilitate partnerships with non-profits, foundations, and the private sector in the areas of licensing, workforce training, education, housing, healthcare, and quality of life.

Thanks to a swift move from USCIS, Michigan recently became one of only two states in the nation with a state run EB-5 Regional Center. The EB-5 preference visa program allows investors and their families to obtain permanent residency by investing in an enterprise that creates at least 10 direct or indirect jobs in a certain area. Investments can range from $500,000 to $1,000,000, depending on whether the qualifying project is in a distressed area considered a targeted employment zone (TEA) or not. An area is considered a TEA if unemployment in the area is at or above the 150% level of the national unemployment rate. There are currently 433 eligible areas in Michigan.

Since the writing of this article, Department of Homeland Security has published two proposed rules, which are up for comments until July 11, 2014. In the first place, according to one of the proposals, high-skilled specialty occupation professionals from Chile and Singapore (H-1B1) and from Australia (E-3) will be able to file for extensions of stay and change of status in the U.S., as available to other nonimmigrant classifications. The second proposed rule involves the capacity of H-4 (dependent spouses of H-1B non-immigrants) to obtain employment authorization, if the principal immigrant is in the process of seeking Permanent Residence through employment.

About the Author

Betina Schlossberg *practices immigration law, with a focus on business immigration. Her clients include universities, manufacturing and IT companies, and hospitals, as well as individuals throughout the nation. Ms. Schlossberg is a qualified Civil Mediator, taught Legal Spanish and English for Legal Studies at the University of Michigan, holds a foreign Law Degree, and has had considerable work experience in South America and Europe. She is a member of the State Bar of Michigan International Law Section, American Bar Association International Law Section, the American Immigration Lawyers Association, the Washtenaw County Bar Association, the Italian American Bar Association of Michigan, and Women's Lawyers Association of Michigan.*

Endnotes

1 S. 744 refers to the Senate passed Border Security, Economic Opportunity, and Immigration Modernization Act

2 STEM refers to the fields of Science, Technology, Engineering, and Mathematics

3 For a list of STEM-designated degree programs go to http://www.ice.gov/doclib/sevis/pdf/stem-list.pdf

4 H.R. 2131 refers to the Supplying Knowledge-based Immigrants and Lifting Levels of Stem Visas (SKILLS Visa) Act, reported by the House of Representatives 6/27/2013.

New State Bar of Michigan Member Directory Mobile App

Do you need to locate information about a State Bar member and all you have handy is your smartphone?

Download the new SBM Directory App and you'll have everything you need at your fingertips. Our new mobile directory includes direct access to the SBM online member directory, a directory of Michigan and U.S. legislators, and links to the latest digital issues of the *Michigan Bar Journal*, *e-Journal*, and SBMBlog. The app also has a text alert feature allowing members to sign up for member alerts, dues notice information, special event news, and e-Journal alerts (get the holding and a link to the full text of major court decisions within hours of the decision).

Download the new app for your iPhone or Android device by searching in iTunes or GooglePlay for State Bar of Michigan. The app is also available for the iPad.

Download the mobile directory today!

Doing Business in Eurasia? Beware of the "Black Holes"

By Brian T. Gill

The Russian annexation of Crimea continues a trend toward geopolitical and legal uncertainty. In "wider Europe"[1] alone, prior to the seizure of Ukrainian land, an estimated three million people lived in territories over which recognized countries asserted, but could not enforce, jurisdiction. Six areas, seldom indicated on maps and likewise generally omitted from business planning, according to their self-declared names are: the "Republic of Abkhazia," the "Republic of South Ossetia (RSO)," the "Pridnestrovian Moldavian Republic" (PMR, also known as Transnistria), the "Nagorno Karabakh Republic" (NKR), the "Turkish Republic of Northern Cyprus," and the "Republic of Kosova" (Kosovo). These "black holes," as they are sometimes labeled, "function as criminal havens where massive contraband enriches a few corrupt leaders, . . . where basic human rights are disregarded . . . and where arms smuggling, human and drug trafficking, and kidnapping are considered 'business as usual.'"[2] Also referred to as frozen conflicts, they may at any time become flashpoints for wider armed confrontations, as occurred in in August of 2008 when Georgia's recapture of South Ossetia escalated into a war with Russia.

Consequently, breakaway republics pose challenges for diplomats and public international lawyers, the professional classes that typically engage with them. Less understood is their relevance to commercial attorneys. On a fundamental level, international norms require that "Transnational corporations and other business enterprises shall recognize and respect . . . national law and regulations . . . of the countries in which the enterprises operate."[3] In the case of Kosovo, though, which set of laws governs, those of Serbia (the "cosmopolitan" state maintaining a territorial claim), or the "Republic of Kosova"? Can the competing legal systems somehow be reconciled, and what are the ramifications to foreign companies if they cannot? Other examples of vexing questions include:

1. What liability attaches to imports from Moldova Steel Works (in Russian, MMZ), a large Transnistrian producer?
2. May a certificate of origin from the "Turkish Republic of Northern Cyprus" be accepted?
3. Will an entrepreneur with interests in Serbia be barred entry if he has visited Kosovo?
4. Might a company entering Abkhazia from the Russian Federation face criminal sanctions in Georgia?

There are few easy answers, in large part due to a vacuum in the law.[4] Accordingly, this article is neither intended to be comprehensive nor to substitute for qualified legal counsel. More modestly, it strives to raise awareness as to the existence of outlier areas and the broader associated risks, as well as to provide a general framework for addressing corresponding legal and ethical issues. Due to the fluidity of Eurasian geopolitics, readers are advised to verify information contained herein prior to taking any specific action.

Background: Proliferation of the "Cyprus Problem" and of hot conflicts?

In terms of risk assessment, the eastward expansion of the EU and the North Atlantic Treaty Organization (NATO) both draws the West closer to Eurasia's black holes and raises the likelihood of counter-reactions. Prior to 1974, there were only two prototypes for partially recognized countries, neither being adjacent to Europe. Israel gained representation in the United Nations (UN) on May 11, 1949, and despite an Arab boycott, has established full diplomatic relations with 159 countries.[5] The Republic of China (Taiwan) followed a different vector: after General Assembly Resolution 2758 (1971) transferred UN membership to the People's Republic of China, the number of countries maintaining formal bilateral ties shrank to 22.[6]

The phenomenon of wholly and partially recognized nations drew closer to the European mainland in 1974, when Turkey forcibly established a client state in the Mediterranean. Nine years later Ankara unilaterally recognized "The Turkish Republic of Northern Cyprus" as an independent country. In 2004, the fourth wave of European Community (EC) enlargement brought the "Cyprus problem" within the EU. A decade after its admission, the island remains divided, with the *acquis communautaire*, the sum total of European Union laws and norms, suspended in the Turkish-controlled north.[7]

Also in 2004, the admission of Bulgaria and Romania to NATO stretched the alliance to right-bank Moldova, close to the PMR, and to the Black Sea, on which Crimea and the "Republic of Abkhazia" lie farther to the east. Each nation joined the EC in 2007. All three Balkan candidate countries, Macedonia, Montenegro, and Serbia (which asserts an administrative rather than international boundary), share borders with Kosovo. Via the European Neighborhood Policy (ENP) the EU engages the nations that surround or claim as their land the four breakaway republics in the former USSR: Moldova, Ukraine, Georgia, Armenia, and Azerbaijan. The first two of these countries recently signed association agreements with the EU, and Georgia might follow in 2014.

Kosovo's declaration of independence in 2008 and the subsequent 2010 advisory opinion of the International Court of Justice[8] might spur further splintering within Europe. Bosnian Serbs have declared that "the ICJ decision can serve as guidance for our continuing fight over our status . . . ."[9] The case has likewise heartened secessionist drives in the Spanish Basque region and Catalonia, as well as in Scotland, which will hold a referendum on independence this September.

Overview of the "Black Holes"

Common threads run among the six self-declared states. In particular, they coordinate their drives for recognition through the Unrepresented Nations and Peoples Organization (UNPO).[10] They also tend to exhibit a high degree of militarization and corruption. The following section provides a brief overview.

The "Turkish Republic of Northern Cyprus"

According to the website of the "Turkish Republic of Northern Cyprus Public Information Office," the population is 265,000. The TRNC comprises 3,355 square kilometers, making it the tiniest of the breakaway republics by land size. Many residents are believed to have resettled from Turkey.

Concerning the respective assertions of sovereignty by the black holes, UN policy is most clear with respect to the TRNC. Security Council Resolutions 541 (1983)[11] and 550 (1984)[12] both prohibit recognition, the latter referring to the self-declared state as "legally invalid." The EU follows a similar track, linking Turkey's application for membership to final resolution of the "Cyprus problem." Consistent with this approach, the EU rejects certain certificates issued by the TRNC.

The only flights to the TRNC originate in Turkey. Since 2003 land crossings between the north and south have been possible, although some restrictions remain on driving automobiles across the Green Line (and supplemental insurance policies may be required) as well as on the conveyance of goods. Travel websites advise that a TRNC "visa" may be stamped either in a passport or on a separate sheet of paper.[13]

The "Republic of Abkhazia"

Among the areas covered in this article, Abkhazia likely has the greatest economic potential, but the frailest claim to statehood on ethnic grounds. In the Soviet era this autonomous republic of the Georgian SSR was considered the "jewel of the Black Sea." After Kosovo, Abkhazia is the largest of the breakaway republics by size, with about 8,600 square kilometres. Following the war of August 2008, 210 kilometers of coastline are under separatist control. Even before this open conflict with Georgia, the Russian Federation announced plans to involve Abkhaz companies in the modernizations planned for the 2014 Winter Olympics in nearby Sochi.

According to the UNPO, the breakaway republic has 216,000 residents. However, the local "government" scrupulously conceals demographic information. According to some analyses, ethnic Abkhaz are outnumbered both by Armenians and Georgians, most of whom live in the Gali district adjacent to areas controlled by Tbilisi.

Entry into Abkhazia through Georgian controlled territory is theoretically possible, but difficult. Therefore access is most feasible via Russia, which has developed a virtual monopoly over commercial activity.[14] Consequently EU citizens would need a double-entry Russian visa, as well as an Abkhaz "visa." The case study given in section 3 describes the legal consequences of failure to obtain Georgian consent for this logistical arrangement.

The "Republic of South Ossetia"

Of the six breakaway republics, the RSO is the least economically viable. This area, claimed by Georgia as the "Tskhinvali region" or "Samachablo," covers the second smallest territory (3,900 square kilometers). The website of the "President of the Republic of South Ossetia" asserts 72,000 residents.[15] Although the former Organization for Security and Co-operation in Europe (OSCE) Mission to Georgia had estimated the actual number at half this level *before* the expulsion of ethnic Georgians in 2008, making the RSO the most sparsely populated of the self-declared states.

Among the six breakaway republics the RSO is, after Nagorno Karabakh, the most geographically isolated. Unlike Abkhazia, it is landlocked, situated to the south of the Greater Caucasus, through which the only land connection to the Russian Federation is via the Roki Tunnel. Since the war of August 2008 Russian troops have guarded the line of contact (LOC), asserted by the separatists to be an international border, which is heavily mined. Separatist leaders have openly expressed the aim of unification with Russia.

The "Pridnestrovian Moldavian Republic"

After Kosovo, Transdniestria has the largest population, estimated at 537,000 residents.[16] The PMR holds the greatest overall industrial potential, with production in steel, car parts, alcohol and other sectors. In recent history it was the least inflammatory of the breakaway republics, with right-bank Moldova pursuing exclusively non-violent means of reintegration. The PMR is the only self-declared state to launch its own currency, the "Transdniestrian Rouble," which elsewhere is inconvertible. To this point the declaration of independence has not been followed with a single recognition. However, Russia could annex this territory, as an exclave, if diplomatic relations with the West further deteriorate.

The PMR is isolated, surrounded by anti-secessionist Ukraine and right-bank Moldova. This unique geo-political situation has enabled formation of an EU Border Assistance

Mission to Moldova and Ukraine (EUBAM),[17] which in effect encircles Transnistria. While EUBAM lacks enforcement authority, its agents assist Moldovan and Ukrainian customs authorities to interdict contraband. Consequently, major Transnistrian companies are forced to legalize their operations in Chisinau.[18] Pursuant to a bilateral agreement between the two adjacent metropolitan countries, exports from the PMR are routed through right-bank Moldova, which issues valid certificates of origin.

The "Nagorno Karabakh Republic"

An estimated 145,000 persons live in Nagorno-Karabakh, and the territory comprises 4,457 square kilometers.[19] The NKR is the most geographically isolated of the breakaway areas, and at present, is the most volatile. It was an enclave within Azerbaijan until the capture of Lachin opened a land corridor to Armenia, itself a landlocked country. Travel is possible along this route, with the "Consular Section of the NKR Permanent Representation in Armenia" issuing "visas." Visitors are cautioned that the Law of the Republic of Azerbaijan "On exiting country, entrance to country and passports" envisions denial of entry, as well as administrative and criminal sanctions, for persons bearing an NKR entry stamp in their passports. Together with the PMR, the NKR is in the category of wholly unrecognized countries, with Armenia thus far refraining from taking this step.

The "Republic of Kosova"

Of the six covered disputed areas, the "Republic of Kosova" features the largest territory (10,908 square kilometers), population (estimated at 1.805 million by the UNPO), and number of UN-member recognitions (now over 100).[20] Kosovo also has by far the biggest diplomatic and international community. Numerous bilateral embassies have joined the organizations that operate under the umbrella of UN Resolution 1244 (1999).

Serbia's pending EU membership, coupled with the impracticality of reversing so many recognitions, offer hope for a negotiated settlement; contrarily, Serbia may use its upcoming 2015 OSCE chairmanship to press for invalidation of Kosovar independence. In the meantime, movement between the two sides remains difficult but manageable. Serbia permits travel directly from Kosovo, provided that a Serbian entry stamp was earlier received; otherwise border agents consider entry into the country (i.e. via Kosovo) illegal and may bar admission. Kosovo is the only breakaway republic to adopt the Euro. Article 1(3) of the constitution prohibits unification with Albania.

Legal, Operational, and Ethical Challenges

By definition, conducting business not only in, but adjacent to the "black holes" creates additional layers of complexity. Dueling sovereignties, logistical complications, and moral dilemmas are among the issues confronting companies affected – sometimes without their knowledge. Again, this section is intended merely to frame a strategic approach.

Legal

Persons intending to transact business within any of the covered areas should, among other requirements, understand the reach of long-arm statutes and international treaties that criminalize the offense of corruption. The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,[21] Article 1(4)(a) defines "foreign public official" as "any person holding a legislative, administrative or judicial office of a foreign country," a formulation that could be argued to exclude unrecognized/partially recognized states. However, Article 1(4)(b) in effect renders moot the distinction between ***de facto*** and ***de jure*** status, specifying that "foreign country" refers to "all levels and subdivisions of government, from national to local" (i.e. anti-corruption provisions in Kosovo, regardless of whether the territory if sovereign or a part of Serbia).

In the interest of brevity, this article focuses on Georgia to highlight additional compliance issues that arise when engaging a black hole. Following the Russian invasion of August 2008, the government adopted the Law of Georgia "On Occupied Territories,[22] which proscribes both "entrepreneurial" (commercial) and "non-entrepreneurial" (not-for profit) activity in Abkhazia and South Ossetia. Subsequently promulgated "Modalities for Conducting Activities in the Occupied Territories of Georgia" elaborate on these requirements.[23] Article 4(1)(1) of the Law permits travel to Abkhazia only through the Zugdidi municipality, on the Georgian side of the LOC. Paragraph 2 treats non-compliance as a criminal offense. Likewise, pursuant to Article 3(6) and (7) of the Order of the Minister of Finance No. 233 dated 20 March 2007, registration is compulsory for conducting activity within Georgia, defined as including the two separatist-controlled areas. Under Article 192(1) of the Criminal Code,[24] violation carries "a fine or deprivation of liberty from 1 to 3 years."

Operational

The black holes and surrounding areas typically present heightened risks of ***force majeure*** and other dangers such as ceasefire breaches[25] and violent infighting.[26] Consequently, a thorough review is highly advised before placing employees in harm's way. Media outlets, the websites of proximate embassies, diplomatic organizations and humanitarian groups, and military and security sources (such as Stratfor) should be monitored to assess the likelihood of a "frozen conflict" becoming hot.

With the possible exception of Kosovo, insurance is of limited value for risk transfer. Policies, even when nominally

"global," frequently contain exclusions for conflict zones. Entities considering a visit to a breakaway republic or establishment of an office may need to renegotiate the scope of coverage or to take out supplemental protection for health, accident, or disability. Furthermore, medical evacuation (medevac) underwriters typically do not offer insurance in this case, or at a minimum will not guarantee an adequate response time.[27]

Similarly the capacity of the diplomatic community to intervene is restricted. In relation to Azerbaijan, the US Department of State bluntly warns to "avoid travel to the region of Nagorno-Karabakh and the surrounding occupied areas, as well as regions along the line of contact between Azerbaijani and Armenian positions. Because of the existing state of hostilities, we cannot offer consular services to Americans in Nagorno-Karabakh."[28]

Ethical

Commercial entanglements with disputed areas may arise in unexpected ways. Suppose, for example, that a US supplier concluded a distribution agreement with a Russian partner, covering the entire national territory. What are the ethical implications of onward sales to Crimea (i.e. land that the US government considers to belong to Ukraine)? What are the practical implications of the Russian Federation now collecting the value added tax (VAT) and other surcharges on these transactions; is that not tantamount to financing an occupation? In some cases the law will set clear prohibitions; in others, businesspersons might find themselves operating in shades of gray.

When moral guidance is needed, mission and vision statements may inform decision-making. Corporate Social Responsibility (CSR), which appears to be transitioning from an aspirational norm into binding law, may provide another useful reference. In his report of 22 April 2009, John Ruggie, the UN Special Representative, articulated a duty to conduct due diligence "in its broader sense: a comprehensive, proactive attempt to uncover human rights risk, actual and potential, over the entire life cycle of a project or business activity, with the aim of avoiding and mitigating those risks."[29]

Among other sources, supplemental guidance comes from the Business & Human Rights Resource Centre, which has identified nine hazards that may be associated with self-declared states:[30]

1. Expelling people from their communities
2. Forcing people to work
3. Handling questionable assets
4. Making illicit payments
5. Engaging abusive security forces
6. Trading goods in violation of international sanctions
7. Providing the means to kill
8. Allowing use of company assets for abuses
9. Financing international crimes

These "red flags" expose foreign entities to the risk of complicity, defined as being "closely linked to the concept of 'aiding and abetting'" violations by other actors.[31] Concerning sourcing, "The Corporate Responsibility to Respect Human Rights in Supply Chains,"[32] may be consulted.

Conclusion

In summary, the Westphalian system, predicated on the nation-state and clearly defined borders, seems to be under assault. The coming decades could witness not only additional "velvet divorces," as occurred between the Czech and Slovak Republics, but further "Cyprus problems" involving murkier boundaries. In view of these prospects, contingency planning on the part of companies doing business in Eurasia would seem to be warranted.

About the Author

Brian T. Gill *is a Michigan attorney who served with the Organization for Security and Co-operation in Europe (OSCE). As the Legal Adviser to the OSCE Mission to Georgia he counseled on engaging the self-proclaimed governments of Abkhazia and South Ossetia. He has visited each region, along with Transnistria and Kosovo, and the Turkish-controlled north of Cyprus. Brian holds an LL.M. from the University of Vienna, and currently teaches international courses at the Thomas M. Cooley Law School. He may be reached at btg@briantgill.com.*

Endnotes

1 *See* "Wider Europe – Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours," Brussels, 11 March 2003, COM (2003) 104 final, available at http://eeas.europa.eu/enp/pdf/pdf/com03_104_en.pdf.

2 Chisinau Declaration of the Presidents of Georgia and the Republic of Moldova: Against the 'Black Holes" in Europe, available at http://www.osce.org/secretariat/41930. This article uses the term "black holes" broadly, with the acknowledgment that it does not fit all of the areas to the same degree.

3 "Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights," UN Economic and Social Council, E/CN.4/Sub.2/2003/12/Rev.2, 26 August 2003, available at http://www1.umn.edu/humanrts/links/norms-Aug2003.htmlavAAug2003.htmlhttp://www1.umn.edu/humanrts/links/norms-Aug2003.

4 "There are states, and there is little else." Dov Lynch, "Engaging Eurasia's Separatist States: Unresolved Conflicts and de Facto States" (US Institute of Peace Press, 2004), p. xi.

5 See www.mfa.gov.il.

6 See www.mofa.gov.tw.

7 Protocol No. 10 on Cyprus, Article 1(1) provides that "The application of the acquis shall be suspended in those areas of the Republic of Cyprus in which the Government of the Republic of Cyprus does not exercise effective control."

8 International Court of Justice, "Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo," advisory opinion of 22 July 2010.

9 Richard Caplan, "The ICJ's Advisory Opinion on Kosovo," United States Institute of Peace Brief 55 (17 September 2010), available at www.usip.org.

10 www.unpo.org

11 http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/534(1983).

12 http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/550(1984).

13 See e.g., www.cyprusholidayadvisor.com/border-crossings.htm.

14 The International Crisis Group estimates that 99% of foreign investment comes from the Russian Federation. See "Abkhazia: Deepening Dependence," p. 6.

15 www.presidentrso.ru

16 This figure, for 2007, is taken from www.nr2.ru.

17 www.eubam.org/.

18 The website www.moldova.org reports that 62 left-bank companies exported goods through this mechanism in 2008.

19 This figure is from 2002, according to www.nkrusa.org.

20 *See* www.kosovothanksyou.com. The .com top-level domain results from the lack of consensus as to Kosovo's legal status, which in turn prevents issuance of the .kv or a similar ending.

21 http://www.oecd.org/corruption/oecdantibriberyconvention.htm. The US is a member of the Organization for Economic Cooperation and Development (OECD).

22 23 October 2008, No. 431-IIs, available at http://www.smr.gov.ge/docs/doc216.pdf.

23 Approved by Regulation of the Government of Georgia N 320 of 15 October 2010.

24 Criminal Code of Georgia (28.04.2006, #2937).

25 For the first quarter of 2011 Armenia alleged 2,300 violations by Azerbaijan, which resulted in fatalities. See, for example, www.armtown.com/news/en/a1p/20110411/201104113.

26 In Abkhazia, for example, numerous bombs have detonated following "independence." For general information, *see* "Russia accuses Georgia of pandering to terrorists," 20 April 2011, available at www.easternpartnership.org.

27 The OSCE has confronted this issue with its various worldwide insurance contracts.

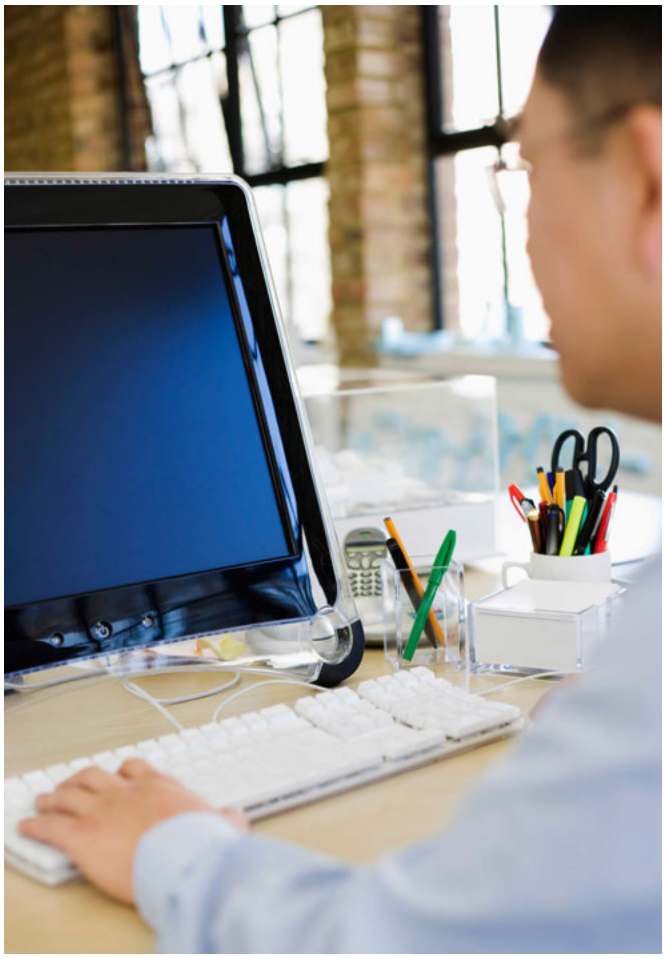
28 See the "Country Specific Information" available at www.travel.state.gov.

29 "Business and human rights: Towards operationalizing the 'protect, respect and remedy' framework," Report of the Special Representative of the Secretary-General on the issues of human rights and transnational corporations and other business enterprises, 22 April 2009, A/HRC/11/13, ¶ 71.

30 This 2008 initiative of the International Alert and Fafo Institute for Applied International Studies is available at http://www.business-humanrights.org/ConflictPeacePortal/Specialinitiatives/RedFlags.

31 See "Corporate Complicity & Legal Responsibility, Vol 1: Facing the Facts and Charting a Legal Path," Report of the International Commission of Jurists, available at www.icj.org.

32 10th OECD Roundtable on Corporate Social Responsibility Discussion Paper of 30 June 2010.



Call for Papers

The *Michigan International Lawyer* is looking for papers from corporate attorneys or those who work in the corporate arena for the next issue. Please see page 2 for submission guidelines.

Treasurer's Report

For the seven months ending April 30, 2014

	Current Activity April 2014	Year-to-date April 2014	Year-to-date April 2013
Revenue:			
International Law Section Dues		14,210.00	12,900.00
International Stud/Affil Dues		40.00	105.00
Total Revenue		14,250.00	13,005.00
Expenses:			
ListServ	50.00	175.00	150.00
Meetings	74.00	1,681.01	2,166.84
Annual Meeting Expenses		(250.00)	
Telephone	35.58	136.64	133.25
Newsletter		2,156.55	1,962.95
Postage	5.32	55.39	10.90
Miscellaneous	72.08	72.08	96.92
Total Expenses	236.98	4,026.67	4,520.86
Net Income	(236.98)	10,223.33	8,484.14
Beginning Fund Balance:		14,068.30	18,051.59
Total Beginning Fund Balance		14,068.30	18,051.59
Ending Fund Balance		24,291.63	25,752.99

Treasurer's Report

For the eight months ending May 31, 2014

	Current Activity May 2014	Year-to-date May 2014	Year-to-date May 2013
Revenue:			
International Law Section Dues	70.00	14,280.00	12,900.00
International Stud/Affil Dues		40.00	115.00
Total Revenue	70.00	14,320.00	13,015.00
Expenses:			
ListServ		175.00	175.00
Meetings	665.57	2,346.58	4,005.02
Seminars	155.00	155.00	
Annual Meeting Expenses		(250.00)	
Telephone	20.47	157.11	153.37
Newsletter		2,156.55	2,113.86
Postage		55.39	10.90
Miscellaneous		72.08	96.92
Total Expenses	841.04	4,867.71	6,555.07
Net Income	(771.04)	9,452.29	6,459.93
Beginning Fund Balance:		14,068.30	17,268.85
Total Beginning Fund Balance		14,068.30	17,268.85
Ending Fund Balance		23,520.59	23,728.78

Minutes of the Council of the International Law Section of the State Bar of Michigan

A meeting of the Council ("**Council**") of the International Law Section ("**Section**") of the State Bar of Michigan ("**State Bar**" or "**SBM**") was held on March 19, 2014 at the Detroit office of Butzel Long located at 150 West Jefferson, Suite 100, Detroit, MI 48226.

The following officers of the Council were present in person: A. Reed Newland, Chairperson; David B. Guenther, Chair-Elect; Daphne A. Short, Secretary; and, Lara Fetsco Phillip; Treasurer. A quorum of voting members of the Council were present in person. Names of each of the attendees will be filed with these meeting minutes.

Call to Order

A. Reed Newland, Chairperson of the Section, called the meeting to order at approximately 4:45 p.m.

Approval of Agenda

The Chairperson circulated an agenda for the meeting, which was approved as presented.

Notice and Quorum

Daphne A. Short, Secretary of the Section, presented a written notice of the meeting that was mailed or delivered to all members of the Council and to Members of the Section in accordance with the Section's Bylaws. The Secretary said that the notice will be filed with the minutes of the meeting.

Approval of Meeting Minutes

The Secretary circulated a draft of the minutes of the Council meeting held on January 15, 2014. Upon motion made and supported, the Council approved of the minutes without correction. The Secretary reported that approved minutes of the Section Council meetings are regularly posted on the Section website at *www.michbar.org* and that the approved minutes would also be posted to the Section website.

Treasurer's Report

Lara Fetsco Phillip, Treasurer of the Section, presented the unaudited financial statement of the Section for the five months ending February 28, 2014 and the related detailed trial balance for the same period, prepared by the Finance & Administration Division of the State Bar. As of the five months ending February 28, 2014, the revenues of the Section were $14,215.00, and expenses for the same time period were $2,647.42, resulting in Net Income of $11,567.58. The Section's ending fund balance as of February 28, 2014 was $25,635.88. The Chairperson noted that the Section's financial statements are generally reprinted in the *Michigan International Lawyer.*

Chairperson's Report

The Chairperson began his report by discussing the Michigan Supreme Court Task Force on the Mandatory State Bar. Recently, a bill was introduced to disband the mandatory state bar in favor of making it a voluntary organization. The SBM invited it's sections to make comments to the proposed legislation. The SBM itself is unable to take general political positions on matters such as these. But, sections of the SBM are able to take positions and lobby on matters such as these because section membership is optional.

Peggy Costello, the Section's SBM liaison, shared comments about the matter. Peggy stated that this matter has a long history over many years and after the SBM took a position on the disclosure of judicial campaign funding, a member re-introduced the bill. About 60% of bar associations in the U.S. are mandatory. If the SBM was disbanded, some membership fees would remain and the disciplinary responsibilities would continue as well.

The Chairperson informed the Section of the benefits that the SBM provides, for instance, the Listerv service and the facilitation of administration matters such as collection of dues, payment of expenses, and membership records. Without the SBM, the sections would be forced to do these tasks independently. There is a concern that these costs would be too high without the infrastructure of the SBM. The Section relies on low administration costs in order to facilitate programs and other benefits to its members. If operating costs rise, dues would also need to increase proportionately in order to provide the same benefit to members.

The Chairperson opened the discussion to the floor for comments. Section members expressed concerns that disbanding the SBM may affect membership because firms and companies may not sponsor participation. Reduced membership would lead to decreased funding for the Section.

Upon motion made and supported, the Section will draft comments in opposition of the bill. The Chairperson also encouraged Section members to draft individual comments on the proposal.

ILS Law School Luncheon Events/ Membership Activities

The Section is sponsoring luncheons at area law schools in order to educate students on careers in International Law as well as promote membership for the Section.

No new luncheons have been planned in anticipation of the exam schedules at the area schools. The Council will revisit the topic in the fall and plan additional luncheons accordingly.

2014 Annual Meeting Update

The Chairperson introduced David Guenther, section co-chair to present on the topic of the 2014 annual meeting. The tentative date for the meeting is September 11, 2014 with a location of SE Michigan. A broad IT based topic was discussed for the meeting, to include data security, data collection, and privacy. There was also some discussion about overlapping the meeting with that of the IT section, if these topics were chosen. Possible topics still being discussed are choice of law issues; trends in international corporate social responsibility; international law issues in development of the north/south pole; international terrorism/cybercrime; bank secrecy and know your customer requirements; NSA concerns; taxation of non-US citizens; and MI as the Delaware of international ADR. Ideas for the meeting are still being accepted and should be directed to David Guenther.

Committee Chair Goals and Reports

The Chairperson invited the Section's Committee chairs to report on their activities. No committees reported during the meeting.

Law Student Reports

There were no law student reports.

New Business

There was no new business

Adjournment

There being no further business to come before the Council, the Chairperson adjourned the meeting at approximately 5:40 p.m.

Dinner and Program

The featured topic was Policy, Practicality, and Reality: The Three Facets of Immigration and the features speakers were Betina Schlossberg, Schlossberg Legal, PLLC; Scott Clifford, NAFTA Customs and Border Protection Officer; and Linda J. Armstrong, Butzel Long.

The program was very well attended.

Respectfully submitted,

Daphne A. Short, Secretary 2013-14
International Law Section
State Bar of Michigan

Calendar of Events

Thursday, September 11, 2014: ILS Annual Meeting
Regulating the International Data Cloud: New Proposals and Initiatives
Tentatively scheduled for the Detroit Opera House, 1526 Broadway St., Detroit, MI 48226

Wednesday, November 12, 2014: ILS Quarterly Meeting
Topic: TBA Location: TBA

Wednesday, January 21, 2015: ILS Quarterly Meeting
Topic: TBA Location: TBA

Wednesday, March 18, 2015: ILS Quarterly Meeting
Topic: TBA Location: TBA

Wednesday, May 20, 2015: ILS Quarterly Meeting
Topic: TBA Location: TBA

50th session of the International Law Seminar, 7-25 July 2014, Palais des Nations, Geneva, Switzerland

Cambridge Summer Campus (EPLO) Summer 2014, 19 July – 3 August 2014, Wolfson College, Cambridge, UK – addressed to lawyers, diplomats, advisors, and public policy makers interested in International Law and EU affairs.

23rd edition of the Summer Course on International Protection of Human Rights Resolution of Conflict, 1-10 September 2014, Poznan, Poland

International Bar Association Conferences 2nd Annual International Bar Association and International Law Students Association Conference; 5-6 September 2014 at The University of Law, London, Bloomsbury. For more information: *http://www.int-bar.org/conferences/conf593/binary/London,%202nd%20Student%20Conference%20programme.pdf*

Michigan International Lawyer
State Bar of Michigan
Michael Franck Building
306 Townsend Street
Lansing, MI 48933-2083

NONPROFIT
U.S. POSTAGE
PAID
LANSING, MI
PERMIT NO. 191

2013-2014 Roster, State Bar of Michigan, International Law Section

Officers
Chair: A. Reed Newland
Chair-Elect: David Guenther
Secretary: Daphne Short
Treasurer: Lara Phillip
Immediate Past Chair: Jeffrey Paulsen

Committee Chairs
Business and Tax: Colleen Freeburg
International Trade: Aaron Ogletree & Christina Howard
Emerging Nations: Richard Goetz & Timothy Kaufman
Employ and Immigration: Debra Auerbach Clephane & Linda Armstrong
Human Rights: Andrew Moore
International Dispute Resolution: Troy Harris
Mentor-Mentee: Gregory Fox and Jillian Berndt

Diversity Coordinator: Aaron Ogletree

Commissioner Liaison: Margaret Costello

Council Members
Linda Armstrong (2014)
Sonia Salah (2014)
Douglas Duchek (2014)
Timothy Attalla (2015)
Debra Auerbach Clephane (2015)
Neil Woelke (2015)
Troy Harris (2016)
Timothy Kaufmann (2016)

Law Students Representatives
WSU- Shahar Ben-Josef, J.D./M.A. candidate 2015

Michigan International Lawyer
Professor Gregory Fox
Shahar Ben-Josef, Senior Editor
Carly Colombo, Student Editor
Corey Neil, Student Editor